LawTalk

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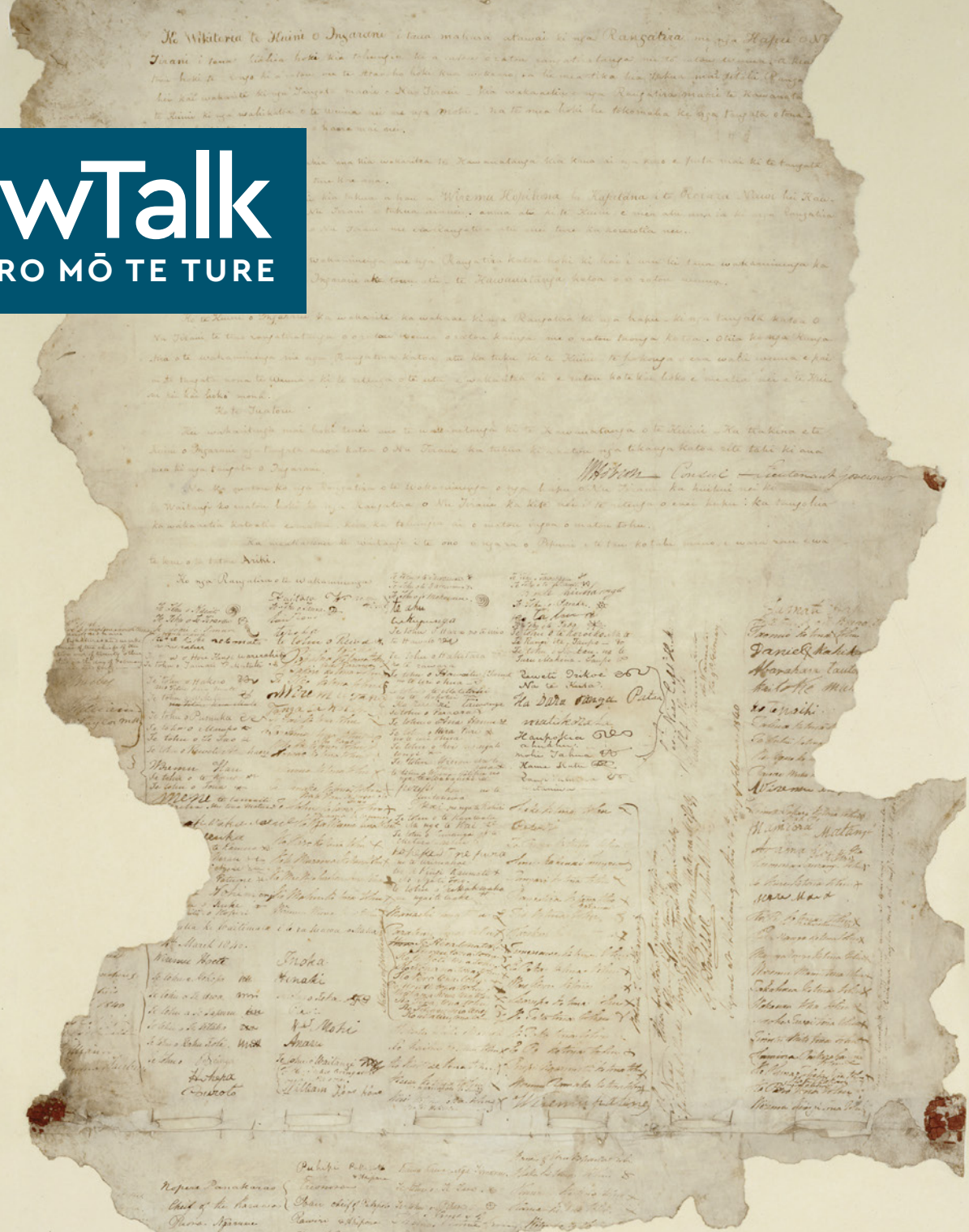

Perspectives on Aotearoa New Zealand's Legal Milestones

New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Contents

Cover Image:
The Waitangi Sheet of the Treaty of Waitangi, signed between the British Crown and various Māori chiefs in 1840.

ABOUT LAWTALK

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CONTACT DETAILS

publications@lawsociety.org.nz

PO Box 5041, Wellington 6140, New Zealand
DX SP 20202

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FROM THE VICE PRESIDENT

A nod to the past; a look to the future

BY **CAROLINE SILK**

"Occasions for defining moments do not arise every day. When they do, we must seize the opportunities they present for improving everyone's life." — Richard Pound

Nothing could be truer for the legal profession than that. The law never stands still, and neither does the framework which we live under. Right from when Te Tiriti o Waitangi was signed in February 1840, New Zealand has led the world in shaping a unique environment which embraces our diversity as a nation. There is also still much work to be done to ensuring we embrace future challenges and take the opportunities they present.

LawTalk September 2022 is all about key legal milestones in Aotearoa New Zealand. Throughout this edition you will read many accounts and points of view on our legal and constitutional development – moments which have made Aotearoa New Zealand unique, and which have shaped the country we live in today.

We are grateful to the many contributors who have provided insights and thoughts on some of those key milestones, as well as stories and lessons about what the future might hold. As you will see, New Zealand punches well above its weight when it comes to seizing opportunities when they arise.

Sir Geoffrey Palmer accounts for the nature in which our legal and constitutional framework has developed and where it might go. As a former Prime Minister, Attorney-General and Minister of Justice, he has a unique insight into the substantive changes to significant pieces of legislation which were made in the late 80s. He also proffers some ideas on where we might go next, how we might get there and what future change in New Zealand might lead to.

Equally as interesting are some of the insights from leading academics, practitioners, former Ministers and judges on key legal milestones in their or Aotearoa New Zealand's legal development. There is plenty to digest and think about. One thing that strikes me is the variation of moments and ideas that have come forward from each of our panellists – testament to the many events we as a country have experienced and by which we have been shaped.

The current Minister of Justice, Hon Kiritapu Allan, provides her view on our development and what might be coming down the pipeline. Recent changes to the New Zealand Bill of Rights Act 1990 to allow the courts to declare inconsistencies with the Bill of Rights, and require the House of Representatives to essentially confirm the inconsistency in law or make amendments is one of those significant moments in our history which will change the way in which both parliament and the courts interpret and apply the Bill of Rights.

There are also other contributions from outside the legal and political world which showcase important developments. An article on the National Duty Solicitors Scheme and its origins highlights some of the inbuilt, structural inequities that existed at the time. The statistics provided in the article show just how far we have come in terms of providing better access to justice, but also how far we still have to go.

The Law Society itself is undergoing substantial change, and many would say not without time.

The Independent Review consultation that has just closed for submissions is one of those times in our history where we must seize the opportunity. Thank you to the individuals and groups who contributed to the 1,835 survey responses and 157 written submissions, and to the 375 people who attended an online event or in person event. The Independent Review Panel extended the time for submissions past the original closing date, and this provided even more opportunity for the profession to engage.

The result of this Independent Review will change the way we interact with each other, and with New Zealanders. It will fundamentally shift our guiding legislation and rules and create a system which is more dynamic and focussed on supporting lawyers and the broader community. The final report is due later this year with recommendations set to be delivered to the Minister of Justice in the first half of 2023.

It is important that New Zealanders have trust and confidence in the Law Society as the regulator of the profession as well as an advocate for the legal profession. The Independent Review is just one part of that work

It is important that New Zealanders have trust and confidence in the Law Society as the regulator of the profession as well as an advocate for the legal profession. The Independent Review is just one part of that work, and the Law Society remains focussed on ensuring we are both a fit-for-now and a fit-for-the-future regulator.

It would be remiss of me to not mention some recent operational changes. It was with sadness that the Board of the New Zealand Law Society Te Kāhui Ture o Aotearoa received the resignation of CEO Joanna Simon. Ms Simon tendered her resignation in early June and finished at the end of August.

During her tenure, Ms Simon has been responsible for leading an ambitious transformation programme within the organisation, as well as influencing reform throughout the legal profession. She oversaw major projects including managing the Independent Review of the law profession and facilitating an organisation-wide strategy which includes a representative strategy and a regulatory strategy.

I want to take this opportunity to thank Jo for the energy and enthusiasm she has brought to her role at the Law Society during her tenure. She leaves the organisation in far better shape as a result.

This edition of *LawTalk* is all about defining moments in our history. Many of the opportunities have been seized and we have all benefited. As we look to the next decade, and the period post-pandemic, our job as a profession is to recognise and seize the opportunities to improve access to justice and shape our future to improve everyone's lives too. ■

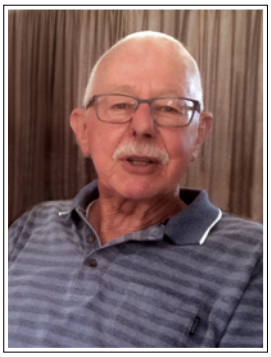
KEY LEGAL MILESTONES

‘Not Guilty, Your Honour’

Forging a national duty solicitor scheme: a memoir

BY **OLIVER SUTHERLAND**

Fifty years after the first ‘home-made’ duty solicitor scheme was established in 1972 in Nelson, I want to recall the traumatic beginnings of what became the National Duty Solicitor Scheme.



At the end of 1969, after four years study overseas including a tumultuous year at the Berkeley campus of the University of California, I took up a position as entomologist with the Department of Scientific and Industrial Research. In no time I was invited by a whānaunga of mine – trade unionist and activist John Hippolite – to become the secretary of the Nelson Māori Committee of which John was chairman.

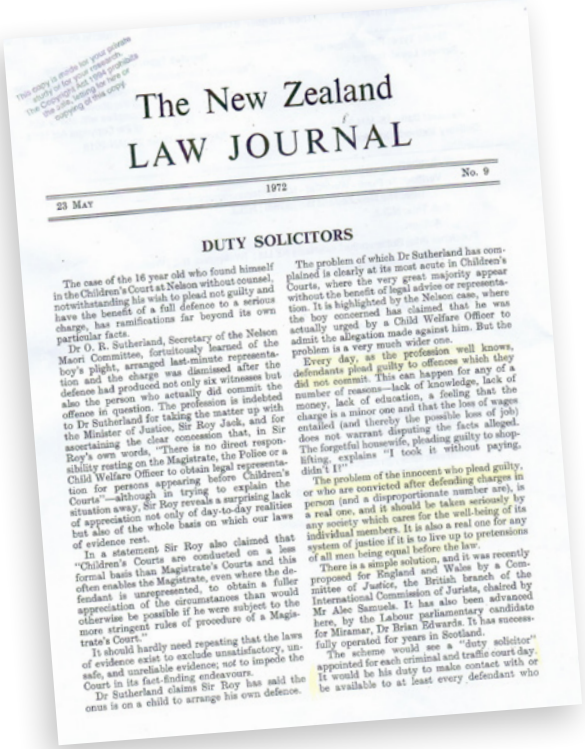
From time to time the committee assisted Māori – young Māori mostly – who were in trouble with the Police or the Children’s Court. We soon saw the many disadvantages children faced in their dealings with the whole judicial system and decided to analyse Children’s Court data from national justice statistics of that time to see what happened to these children. The picture that emerged, particularly for Māori children, really shocked us. We found that in every year, between 10,000 and 11,000 New Zealand children from the age of seven were being processed by the courts – 40 to 50 per cent of them were Māori. Since there was no duty solicitor scheme of any sort, the vast majority of these children were not represented by counsel.

Young children faced a range of criminal charges, with seven, eight and nine year olds charged with burglary, offences against the person and conversion. The figures included 10 and 11 year olds charged with ‘vagrancy’ (idle and disorderly) and, more seriously, with assault. In most cases these children were questioned, often alone, by police without any lawyer present. Most pleaded guilty as the Police and/or social welfare officers told them to. Parents were often not present, particularly because many of the children were state wards and had been removed from their parents’ guardianship.

The outcomes of the Children’s Court hearings were particularly disastrous for Māori children. They were twice as likely as non-Māori children to be sentenced to a detention centre, borstal or prison while the non-Māori children were more likely to be fined or admonished and discharged.

Our conclusion was that the Children’s Court was discriminating against Māori children and we wrote to the Minister of Justice, Roy Jack, and later Dr Martyn Finlay, saying so. The government’s own statistics proved that the system was a racist system. Roy Jack replied that in New Zealand we had the ‘best of British justice for all’; Dr Martyn Finlay, as Minister of Justice in the Kirk Labour Government, agreed that the record of the Children’s Court “was a dismal one.”

With no one there to argue for bail, magistrates might remand children to social welfare homes or if they were



The New Zealand
LAW JOURNAL

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DUTY SOLICITORS

The case of the 16 year old who found himself in the Children's Court at Nelson without counsel, notwithstanding his wish to plead not guilty and have the benefit of a full defence to a serious charge, has ramifications far beyond its own particular facts.

Dr O. R. Sutherland, Secretary of the Nelson Maori Committee, fortuitously learned of the boy's plight, arranged last-minute representation and the charge was dismissed after the defence had produced not only six witnesses but also the person who actually did commit the offence in question. The profession is indebted to Dr Sutherland for taking the matter up with the Minister of Justice, Sir Roy Jack, and for ascertaining the clear concession that, in Sir Roy's own words, "There is no direct responsibility resting on the Magistrate, the Police or a Child Welfare Officer to obtain legal representation for persons appearing before Children's Courts"—although in trying to explain the situation away, Sir Roy reveals a surprising lack of appreciation not only of day-to-day realities but also of the whole basis on which our laws of evidence rest.

In a statement Sir Roy also claimed that "Children's Courts are conducted on a less formal basis than Magistrate's Courts and this often enables the Magistrate, even where the defendant is unrepresented, to obtain a fuller appreciation of the circumstances than would otherwise be possible if he were subject to the more stringent rules of procedure of a Magistrate's Court."

It should hardly need repeating that the laws of evidence exist to exclude unsatisfactory, unsafe, and unreliable evidence; not to impede the Court in its fact-finding endeavours.

Dr Sutherland claims Sir Roy has said the onus is on a child to arrange his own defence.

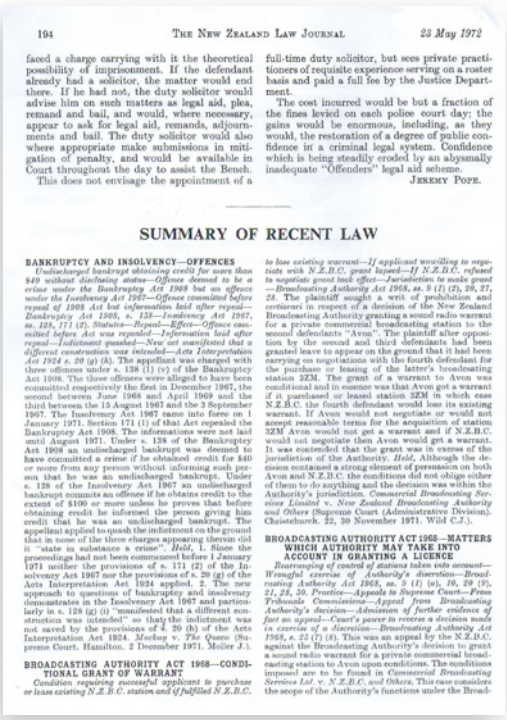
The problem of which Dr Sutherland has complained is clearly at its most acute in Children's Courts, where the very great majority appear without the benefit of legal advice or representation. It is highlighted by the Nelson case, where the boy concerned has claimed that he was actually urged by a Child Welfare Officer to admit the allegation made against him. But the problem is a very much wider one.

Every day, as the profession well knows, defendants plead guilty to offences which they did not commit. This can happen for any of a number of reasons—lack of knowledge, lack of money, lack of education, a feeling that the charge is a minor one and that the loss of wages entailed (and thereby the possible loss of job) does not warrant disputing the facts alleged. The forgetful housewife, pleading guilty to shoplifting, explains "I took it without paying, didn't I?"

The problem of the innocent who plead guilty, or who are convicted after defending charges in person (and a disproportionate number are), is a real one, and it should be taken seriously by any society which cares for the well-being of its individual members. It is also a real one for any system of justice if it is to live up to pretensions of all men being equal before the law.

There is a simple solution, and it was recently proposed for England and Wales by a Committee of Justice, the British branch of the International Commission of Jurists, chaired by Mr Alec Samuels. It has also been advanced here, by the Labour parliamentary candidate for Miramar, Dr Brian Edwards. It has successfully operated for years in Scotland.

The scheme would see a "duty solicitor" appointed for each criminal and traffic court day. It would be his duty to make contact with or be available to at least every defendant who



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faced a charge carrying with it the theoretical possibility of imprisonment. If the defendant already had a solicitor, the matter would end there. If he had not, the duty solicitor would advise him on such matters as legal aid, plea, remand and bail, and would, where necessary, appear to ask for legal aid, remands, adjournments and bail. The duty solicitor would also where appropriate make submissions in mitigation of penalty, and would be available in Court throughout the day to assist the Bench.

This does not envisage the appointment of a full-time duty solicitor, but sees private practitioners of requisite experience serving on a roster basis and paid a full fee by the Justice Department.

The cost incurred would be but a fraction of the fines levied on each police court day; the gains would be enormous, including, as they would, the restoration of a degree of public confidence in a criminal legal system. Confidence which is being steadily eroded by an abysmally inadequate "Offenders" legal aid scheme.

JEREMY POPE.

SUMMARY OF RECENT LAW

BANKRUPTCY AND INSOLVENCY—OFFENCES

Undischarged bankrupt obtaining credit for more than $40 without disclosing status—Offence deemed to be a crime under the Bankruptcy Act 1908 but an offence under the Insolvency Act 1967—Offence committed before repeal of 1908 Act but information laid after repeal—Bankruptcy Act 1908, s. 138—Insolvency Act 1967, ss. 128, 171 (2). Statute—Repeal—Effect—Offence committed before Act was repealed—Information laid after repeal—Indictment quashed—New act manifested that a different construction was intended—Acts Interpretation Act 1924 s. 20 (g) (h). The appellant was charged with three offences under s. 138 (1) (v) of the Bankruptcy Act 1908. The three offences were alleged to have been committed respectively the first in December 1967, the second between June 1968 and April 1969 and the third between the 15 August 1967 and the 3 September 1967. The Insolvency Act 1967 came into force on 1 January 1971. Section 171 (1) of that Act repealed the Bankruptcy Act 1908. The informations were not laid until August 1971. Under s. 138 of the Bankruptcy Act 1908 an undischarged bankrupt was deemed to have committed a crime if he obtained credit for $40 or more from any person without informing such person that he was an undischarged bankrupt. Under s. 128 of the Insolvency Act 1967 an undischarged bankrupt commits an offence if he obtains credit to the extent of $100 or more unless he proves that before obtaining credit he informed the person giving him credit that he was an undischarged bankrupt. The appellant applied to quash the indictment on the ground that in none of the three charges appearing thereon did it "state in substance a crime". *Held*, 1. Since the proceedings had not been commenced before 1 January 1971 neither the provisions of s. 171 (2) of the Insolvency Act 1967 nor the provisions of s. 20 (g) of the Acts Interpretation Act 1924 applied. 2. The new approach to questions of bankruptcy and insolvency demonstrates in the Insolvency Act 1967 and particularly in s. 128 (g) (i) "manifested that a different construction was intended" so that the indictment was not saved by the provisions of s. 20 (h) of the Acts Interpretation Act 1924. *Mackay v. The Queen* (Supreme Court, Hamilton, 2 December 1971, Möller J.).

BROADCASTING AUTHORITY ACT 1968—CONDITIONAL GRANT OF WARRANT

Condition requiring successful applicant to purchase or lease existing N.Z.B.C. station and if fulfilled N.Z.B.C. to lose existing warrant—If applicant unwilling to negotiate with N.Z.B.C. grant lapsed—If N.Z.B.C. refused to negotiate grant took effect—Jurisdiction to make grant—Broadcasting Authority Act 1968, ss. 9 (1) (2), 20, 27, 28. The plaintiff sought a writ of prohibition and certiorari in respect of a decision of the New Zealand Broadcasting Authority granting a sound radio warrant for a private commercial broadcasting station to the second defendants "Avon". The plaintiff after opposition by the second and third defendants had been granted leave to appear on the ground that it had been carrying on negotiations with the fourth defendant for the purchase or leasing of the latter's broadcasting station 3ZM. The grant of a warrant to Avon was conditional and in essence was that Avon got a warrant if it purchased or leased station 3ZM in which case N.Z.B.C. the fourth defendant would lose its existing warrant. If Avon would not negotiate or would not accept reasonable terms for the acquisition of station 3ZM Avon would not get a warrant and if N.Z.B.C. would not negotiate then Avon would get a warrant. It was contended that the grant was in excess of the jurisdiction of the Authority. *Held*, Although the decision contained a strong element of persuasion on both Avon and N.Z.B.C. the conditions did not oblige either of them to do anything and the decision was within the Authority's jurisdiction. *Commercial Broadcasting Services Limited v. New Zealand Broadcasting Authority and Others* (Supreme Court (Administrative Division), Christchurch, 22, 30 November 1971. Wild C.J.).

BROADCASTING AUTHORITY ACT 1968—MATTERS WHICH AUTHORITY MAY TAKE INTO ACCOUNT IN GRANTING A LICENCE

Rearranging of control of stations taken into account—Wrongful exercise of Authority's discretion—Broadcasting Authority Act 1968, ss. 9 (1) (e), 16, 19 (9), 21, 28, 29. Practice—Appeals to Supreme Court—From Tribunals Commissions—Appeal from Broadcasting Authority's decision—Admission of further evidence of fact on appeal—Court's power to reverse a decision made in exercise of a discretion—Broadcasting Authority Act 1968, s. 23 (7) (8). This was an appeal by the N.Z.B.C. against the Broadcasting Authority's decision to grant a sound radio warrant for a private commercial broadcasting station to Avon upon conditions. The conditions imposed are to be found in *Commercial Broadcasting Services Ltd. v. N.Z.B.C. and Others*. This case considers the scope of the Authority's functions under the Broad-

non-existent as in towns such as Nelson, to the (adult) cells of the local police station. In three or four bigger centres, children from the age of 13 could be remanded to an adult prison including the dungeons of Mt Eden or Mt Crawford. Māori children figured disproportionately among children remanded in custody.

Establishing a 'do it yourself' duty solicitor scheme

A Department of Justice study at the time showed that in the magistrate's courts, twice as many non-Māori offenders had lawyers as did Māori – 86.7 per cent compared with 44.5 per cent. Correspondingly, Māori tended to plead guilty more often. As the author of the study concluded, 'with a greater proportion of Māori pleading guilty, and fewer having representation, there is of course a greater likelihood of Māori being convicted'.

Having reviewed all the statistics and loudly criticised the Department of Justice for the racism they demonstrated, we decided that the most practical thing we in the Nelson Māori Committee could do would be to establish our own legal aid scheme. So, in 1972 we aimed to get legal representation for every Māori or Pasifika defendant appearing in the Nelson Magistrate's or Children's Court. We recruited two local lawyers, Warwick Reid and Brian Smythe who would take on these cases pro bono if not on legal aid. We got the agreement of the Nelson Superintendent of Police to advise us when there was any Māori or Pasifika arrested and we would visit them either in the cells or on bail, and then arrange for the lawyers to represent them in court.

The Nelson Māori Committee ran the scheme for all of 1972 and then decided to evaluate it. With the agreement of the Nelson Court Registrar, we were allowed access to the index cards summarising all the cases before the Nelson Magistrates Court for the years 1970, 1971 and 1972. The magistrate, Joe Watts, was the same in all three years. Of the 14,000 files in all, we set aside the traffic cases and for the remaining criminal cases, we tabulated data on ethnicity, charges faced, the outcome and whether or not the defendant was represented.

The results were striking. In 1970 and 1971, about 18 per cent of Māori defendants had lawyers; in 1972 the figure was 79 per cent. A comparison of the pleas, conviction rates and penalties showed marked differences. In 1972 there was a significant increase in the number of not guilty pleas and for the first time in the survey period, some cases against Māori defendants were dismissed – previously not one had been. Imprisonments were down by a third from 34 per cent of convicted defendants to 19 per cent. This rate of imprisonment was actually lower than the corresponding rate for non-Māori – a first for New Zealand. Sentences to periods of probation were even more drastically reduced, from 17 per cent in 1970/71 to 5 per cent in 1972. There was a corresponding rise in the proportion of Māori who were fined, from 38 per cent in 1970/71 to 60 per cent in 1972. We concluded that if representation by counsel had a similar effect on sentencing

in courts elsewhere as it had in Nelson, then at least one of every three Māori in prison should not be there.

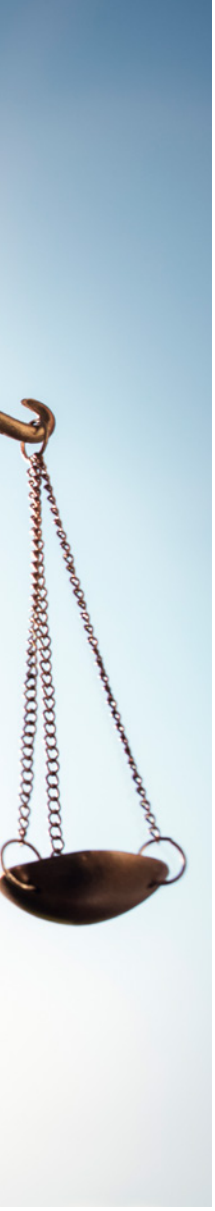
Together with co-authors John Hippolite, Ross Galbreath and Anne Smith, I presented these startling results in a paper delivered to the New Zealand Race Relations Council on 10 February 1973. The paper, which was entitled *Justice and Race: a monocultural system in a multicultural society*, and made its point clear in its opening sentence: "Together with venereal disease and measles the judicial system was brought to this country by pākehā colonists." Our accusation of institutional racism, greatly upset the politicians and the judiciary.

We argued that while not eliminating the racism of the system, a national duty solicitor scheme modelled on our Nelson scheme would certainly improve the overall justice of the system. So, we repeated the demands that we had made to the Minister of Justice, Sir Roy Jack in mid-1972: (i) all defendants appearing in court on criminal charges and liable to deprivation of liberty should be represented by counsel; (ii) a lawyer must accompany all children whenever they are questioned in a police station by police officers; (iii) all children appearing in court must be represented by counsel.

When I presented *Justice and Race* to the New Zealand Race Relations Council conference, arguing and offering proof that the judicial system was a racist system the most powerful response came from Will 'Ilolahia from the Polynesian Panther Party and Syd Jackson, trade unionist and leading Māori activist from Nga Tamatoa. Their challenge, articulated most uncompromisingly by Will, was that "racism is a white problem, it's up to you pākehā to do something about it." So a small group of us went away and set up the Auckland Committee on Racism and Discrimination (ACORD). One of our first priorities was to carry on the campaign for the establishment of a nationwide duty solicitor scheme.

There was support expressed in the Law Journal thanks to its editor Jeremy Pope. In 1972 he published an editorial supporting our campaign and advocating a national duty solicitor scheme. He followed this up by publishing *Justice and Race*. The publicity led to the ad hoc establishment of duty solicitor schemes in various regions around the country during 1973. At the same time the new Minister of Justice in the Kirk Government Dr Martyn Finlay announced that he would continue to progress the work of the interdepartmental committee planning a national duty solicitor scheme which had been established by his predecessor Sir Roy Jack

In 1973, to keep up the pressure on the government, I spoke to over twenty meetings of various groups including a number of law societies. One of these was organised by the Young Lawyers Committee of the



Auckland District Law Society, a group who included Robert Ludbrook, David Lange, Jim McLay and Peter Williams. Robert had arranged the event which was held in May 1973 and had me facing a well-known and very conservative Auckland magistrate, Hector Gilliand, and Ken Flint, the Director of Social Welfare in Auckland; the fourth speaker was Peter Williams.

The meeting was my opportunity to present ACORD's blueprint for a comprehensive approach to child offending, completely outside the monocultural and punitive Victorian concept of justice to which the New Zealand child welfare and judicial systems had so long been wedded. The present children's court system and its associated penal policy, in place since 1925, should be completely abandoned, I argued. It had failed by all measures – including equity of outcome – as the national statistics for Māori and non-Māori children showed. It was racist by virtue of its very existence as a wholly Pākehā system in a multicultural society. Māori and Pākehā must jointly re-design our whole approach to justice and child welfare. As a short term measure, all children must be accompanied by a lawyer when being questioned by the police and when they appeared in court.

By now, the politicians were slowly accepting the shortcomings of the system. Dr Finlay acknowledged that there was 'some substance to the charge that New Zealand's justice system was racist'. But, he went on, 'it was more of an unconscious bias than a deliberate policy'. He concluded that he was 'beginning to lean toward the notion that separate but equal institutions for the races could have some merit in New Zealand'. Finlay may have been the first Pākehā politician to accept this concept. An editorial in the Dominion at the time said that "Dr Finlay moved into a new area for a non-Māori in public affairs."

Invoking the Official Secrets Act

Meanwhile, the Labour Government's proposal for a national duty solicitor scheme was caught up in bureaucracy and progressing painfully slowly. Too slowly for at least one person in the Department of Justice who in May 1974 anonymously sent a draft cabinet paper on the proposal to me.

We were very interested to read the leaked cabinet paper and to see what the Government had in mind – and were not impressed. We wrote to Dr Finlay to say so, pointing out that unless some key changes were made, we would make the whole Cabinet paper public. Finlay was incensed and demanded that we return the paper and reveal who had leaked it to us or else he would hand the matter over to the Police for investigation under the Official Secrets Act 1951 (the Act). We were not about to comply with either of his two requests and told him so.

The present children's court system and its associated penal policy, in place since 1925, should be completely abandoned, I argued. It had failed by all measures – including equity of outcome

On Tuesday 14 May 1974, Dr Finlay passed the correspondence between himself and ACORD to the secretary of the Minister of Police, Mick Connelly, under a memorandum calling for urgent action by the police with a view to an investigation being made under the Act.

We hurriedly familiarised ourselves with the very draconian provisions of the Act – in particular the fact that we could face a 7 year prison

term for failing to answer any question or for answering any question falsely. We would not be permitted to take advice from a lawyer. My wife Ulla, as an alien, could possibly be deported.

On Monday we were picked up by the police and escorted to the 10th floor of Auckland Central Police station for questioning. We found it intensely intimidating. We were certain that this action by the Government was provoked by our criticism of the heavy-handed police actions in Auckland at the time and our protests at the discriminatory treatment of Māori children by the police and the justice and social welfare systems.

The Auckland Council for Civil Liberties took up the cudgels on my behalf, stating that it appeared that the Government was using the Act to try to silence its own critics. The consensus of media commentators and editorialists, and there were many, was that prosecution of me was unlikely and that the Government had over-reacted in invoking the Act. There was no prosecution, but it was the end of that Act, which was replaced by the Official Information Act 1982.

National Duty Solicitor Scheme initiated

Dr Finlay's national duty solicitor scheme got under way in July 1974. The proposal which he had put to his cabinet colleagues, which guaranteed legal advice to defendants but not legal representation, and only for those in custody, fell far short of what we, Ngā Tamatoa and the Polynesian Panthers had been campaigning for. ACORD argued that what was proposed would not end racial discrimination in the courts and that it overlooked the particular needs of Māori and Pasifika children and their parents. Ngā Tamatoa said that the scheme 'did nothing to attack the basic problem of the institutionalised racism which continues to exist in the whole of the judicial system and which ensures that Māori remain the jail fodder in this society'. They were right of course. Nevertheless, within a week of its announcement, over 100 lawyers had volunteered for the scheme and Dr Finlay appointed ACORD as a member of the scheme's administrative committee. But it was not until 1989 and the passage of the Children, Young Persons and their Families Act (later re-named the Oranga Tamariki Act) that legal representation of children and young people became routine.

Looking back we can ask 'have things changed?' Well, duty solicitors are now deeply embedded in the judicial system; and... children are no longer remanded to adult prison

Looking back we can ask 'have things changed?' Well, duty solicitors are now deeply embedded in the judicial system; and thanks to Judge Augusta Wallace's 1984 report into ACORD's complaint over children being remanded to Mt Eden Prison, and to Geoffrey Palmer's support as Minister of Justice at the time, children are no longer remanded to adult prisons; but notwithstanding a continuing campaign by Judge Andrew Becroft, the remanding of children in police cells continues, and a disproportionate number of those are Māori – about 70 per cent. The good news is that in some centres, e.g. Nelson where it all started, remands to community residences has replaced remands in police cells.

Acknowledgements

I am happy to acknowledge the trailblazing work and persistence of the Nelson Maori Committee in the early 1970s and its chair John Hippolite. I am very grateful to Ulla Sköld and Ross Galbreath for reviewing this paper. ■

1. This article draws heavily on Oliver Sutherland, *Justice and race: campaigns against racism and abuse in Aotearoa New Zealand*, 2020, Steele Roberts, Wellington, 288pp.
2. O.R.W. Sutherland, J.T. Hippolite, R.A. Galbreath, A.M. Smith, Justice and race: a monocultural system in a multicultural society, reprinted in *New Zealand Law Journal*, May, 1973, pp. 175 – 180.
3. Jeremy Pope, Duty solicitors, *New Zealand Law Journal*, 23 May 1972, 193-194.

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Te Pūkenga

KEY LEGAL MILESTONES

Our most significant legislator

Few other people have shaped our legal and constitutional order more so than Sir Geoffrey Palmer. His public contribution spanning over six decades has led to some of the most important and significant changes to our democracy in our nation's history. Whether it is his New Zealand Bill of Rights Act 1990 (BORA) which codified rights, or setting up the royal commission into the electoral system, or his world-leading work towards what became the Resource Management Act 1993, Sir Geoffrey's touch across all of these have undoubtedly shaped and defined many generations of Aotearoa New Zealand.

Born in Nelson, Sir Geoffrey Palmer KC was admitted as a solicitor in 1965 and to the bar in 1966, and practiced in Wellington with O'Flynn and Christie before taking up a British Commonwealth Fellowship to the University of Chicago where he graduated JD cum laude in 1967. He was a law professor in the United States and New Zealand for some years before entering politics as the MP for Christchurch Central in 1979. In Parliament he held the offices of Attorney-General, Minister of Justice, Leader of the House, Deputy Prime Minister and Prime Minister.

In 1994 he became a Foundation Partner of Chen & Palmer Public Law Specialists where he remained until 2005 when he was appointed President of the Law Commission, a position he occupied until 2010. During that period he also chaired the Legislation Advisory Committee. He has appeared extensively in the superior courts including the Privy Council.

LawTalk spoke to Sir Geoffrey Palmer about all things New Zealand, and received some interesting insights into how our country has come to be and where it is going.

"I think New Zealand is a curious country in many ways," begins Sir Geoffrey.

"It is so remote from the rest of the world and peopled entirely by immigrants. Indigenous Māori were here first, undisturbed for some centuries, and then followed by Captain Cook... of course, it was not for a long time – till 1840 – that the British decided they were interested in having settlements in New Zealand... it was a difficult transition."

> People really think that Covid-19 is over – it isn't. It has disrupted our lives, it has disrupted the government, it has caused more law to be made on this subject more quickly than any other thing that we have ever done

It is a "mixed story" since then when it comes to our relatively streamlined ability to shape and reshape our constitutional and legal frameworks, says Sir Geoffrey.

"I think that we had so much social cohesion for much of the 20th century that government was pretty easy to conduct and didn't require much infrastructure. That has changed. It is a highly diverse society now with considerable ranges of wealth that didn't use to be the case, and different views about what policy should be and actually a very small parliament with very few checks and balances and an unwritten constitution.

"However, we have a more highly developed sense of our own identity, of what we stand for and what our values are than we had at the end of the Second World War. Much more."

In 2016, Sir Geoffrey Palmer and Andrew Butler proposed and published a written, codified constitution for Aotearoa New Zealand. Since then the authors have travelled the country, discussing with the public the nature of New Zealand's identity and where the country is headed. After considering their conversations and formal submission, a second book – with its revised proposal for a codified constitution – is the product of a year in development.

However, he is concerned about how his advocacy for a codified constitution has become misconstrued as support for a United States-style constitution.

"I do not believe the United States at the moment is a successful democracy," says Sir Geoffrey.

"The whole US constitution is so difficult to amend – it hasn't gotten there by itself. So is Australia's – the Australian constitution is frozen in time as well and has been difficult to amend.

"So New Zealand has advantages over both those countries by being able to adjust to change."

As Sir Geoffrey points out, our 'sandbox' system has had benefits even more recently with Covid-19.

"We are going through something of an emergency at the moment – we have had Covid-19. Covid-19 has been one of the biggest challenges to our system of government that has ever been entertained. And we've done it in peace time, but it has been war time conditions we have been operating under. The way in which politics operates has been totally changed."

"People really think that Covid-19 is over – it isn't. It has disrupted our lives, it has disrupted the government, it has caused more law to be made on this subject more quickly than any other thing that we have ever done – and we were the fastest law makers in the West.

"We are in a difficult bind right now. If dissatisfaction rises, you have a trend toward autocracy, a belief towards populism, and a whole lot of conspiracy theorists causing people to go down rabbit holes that they never emerge from."

Does he think Covid-19 has harmed our democratic systems?

"I don't think we have repaired our democratic systems enough. I think you have to change the way governments deal with people. You need a much heavier programme of citizen engagement. The various things that have been done overseas – like the abortion issue in Ireland through citizens assemblies – is a much richer way than dealing with select committees.

"The select committee system has not worked well recently because the whole system is overloaded

with work and it can't get through it. That leads to a whole lot of difficulties about not thinking things through and not getting things right. We always thought we could handle all this but I am not sure that over the long term we can be confident that our machinery is adequate."

Was the way we handled Covid-19 appropriate from a legal and constitutional perspective?

"I think we handled Covid-19 very well. What went wrong with it has been that it has not gone away. That is not something the government can control. People think the government can do anything – they can't.

"All the systems of checks and balances we have – the representative government system – worked well. The regulations review committee – a very important hand break on delegated legislation – functioned extremely well over the Covid-19 period and did a terrific amount of work. The Bill of Rights Act 1990 was very active. People challenged the government's activities under the BORA. They had limited success because people don't understand it is not an absolute.

"The courts did well with the Bill of Rights. People weren't happy because they weren't winning. But I am afraid that is the nature of litigation. There is a fundamental misunderstanding amongst the non-legal public that it protects rights absolutely. It does not. It was never designed to do so. And in fact parliament can overrule it. There's been a very important change just recently with the Taylor case, which said the court can make declarations of inconsistency with the BORA. Parliament has arrived at the conclusion that that can be done, so there is now a chink in the armour of parliamentary sovereignty insofar as that when rights have been abridged unreasonably that parliament will have to address that."

"There is a deficit in our understanding of our own democracy."

Most New Zealanders indeed take little interest in our constitutional or legal structures. Fewer than fifty per cent of New Zealanders vote at local elections and fewer would understand the ins and outs of our system of government. Sir Geoffrey has a warning about that lack of understanding and New Zealand's milquetoast or bored attitude towards our constitutional and legal frameworks, "if you think like that, you'll lose your democracy.

"If people lack confidence or knowledge of our institutions, then they will die. Institutional trust is an essential element of any successful democracy. In New Zealand, we used to have enormous political parties through mass memberships. We don't have that now. The emboldenment [sic] of people in democratic discourse is less than it was due to distractions and I sort of feel we are losing a grip on things from the point of view of how our government should be conducted and whether it's up-to-date with our aspirations."

"I think the political parties themselves need to be reformed. If you look at the Royal Commission's report in 1986, the recommendations that were not followed were those that involved having some greater scrutiny on how political parties function.

"The difficulty is you can have an institution but the life falls out of it. When you had 250,000+ New Zealanders as members of political parties, that meant something. It means less now. The institutions of the government don't keep pace with the changes in the population. I couldn't believe it when I went to parliament when I first became an MP in 1979, how as antiquated the procedures were and how little they reflected the reality out there and how lacking in diversity the Parliament was.

One of the difficulties has been political parties have to raise funds and the fundraising has become very problematic... You cannot have the big money bags running the system

"One of the difficulties has been political parties have to raise funds and the fundraising has become very problematic. That has been obvious for years and it needs to be reformed. You cannot have the big money bags running the system. A system of state funding would be much better."

"There is a very small group of members of parliament whose job it is to hold the Government to account. I really think the most important thing you could do to make immediate change to improve the situation would be to have 150 members of parliament to have enough backbenchers.

"If you look at what's going on in the Conservative Party Leadership election in the United Kingdom, there's an enormous debate going on within the Party about who should lead it. It's been in the open to a large extent. In New Zealand, our system is byzantine in its complexity and to keep sort of control of all the details of it is a tremendously difficult time."

Following the Labour Party's victory in the 1984 election, the aforementioned Royal Commission on the Electoral System was duly established in early 1985.

Its report, completed in December 1986, was surprisingly radical. It recommended New Zealand adopt the German-style MMP system, in which each elector would get two votes, one for an electorate MP and one for a party. The size of Parliament would increase to 120 MPs: half would be elected in single-member constituencies (as before); the other half would be selected from party lists so that in general each party's share of all 120 seats corresponded to its share of the overall vote.

Few of Labour's leaders welcomed the Commission's recommendations, however, and the government tried to sideline the issue. Although National's leadership also disliked the idea of MMP, they saw an opportunity to embarrass the government over its failure to respond to the Commission's proposals. The Fourth Labour Government was heavily defeated in the 1990 election, but its National successor was soon under fire for breaking election promises. Confidence and trust in politicians and Parliament plunged to new depths. Polls

showed that politicians ranked alongside used-car salespeople as the least-respected occupational group in the country.

Both governments adopted few of the recommendations from the Royal Commission's report. But Sir Geoffrey doesn't regret not moving faster to implement more of the recommendations. "I couldn't – there were only thirteen members of the Labour Party caucus that supported it!

"National and Labour were both against proportional representation, but they lost because people felt they hadn't been sufficiently accountable. I am so pleased that the referendum carried.

"Political decision-makers don't like obstacles to their own freedom of action. A triennial general election doesn't really solve very much – it can't. You have a multitude of parties making a multitude of promises, most of which cannot be implemented because they don't have the numbers.

"The New Zealand system – admirable as it is – has more weaknesses than those in charge will admit."

We have what Sir Geoffrey suggests is a 'racing' version of the Westminster system of parliamentary democracy.

"We have a small parliament, no upper house, no formal checks and balances. When you go to Westminster you see the House of Lords, they have a whole lot of life peers with real expertise. They really do add something to the quality of the debates even if they don't prevail. Because the backbenchers in the UK are larger than the ministry, they sometimes win – here they do not, and that is not always a good thing. There's a sort of problem of scale here.

National and Labour were both against proportional representation, but they lost because people felt they hadn't been sufficiently accountable. I am so pleased that the referendum carried

"A small country has some advantages but also has some disadvantages. That is, a lack of expertise in many areas. We need a number of international experts to help us, but we don't expect MPs to be experts. But much of the expertise is corralled in the public service and that is not accessible by the public. The public service has become less publicly-oriented and more ministerial-oriented in recent years than it used to be.

"There is no substitute for a properly thought through policy based on proper statistical evidence and research... there has been a tendency in recent years for cabinet papers to be written without options. The main job of the cabinet is to choose between the options. That has gone into the background in recent years and I would like to see a return to that.

"This tendency is lamentable. The essence of Westminster government is to have choices to choose from, properly defined and thought through. There are very few problems that only have one solution. If the machinery of government can't work properly with providing choice, then it isn't going to provide good decisions.

"The way you make decisions is of infinite importance. Take Covid-19 for example – the whole cabinet system had to be re-engineered over Covid-19. It did mean the Cabinet was able to make decisive decisions with proper advice and make decisions quickly."

The way our parliament functions – particularly when it comes to debate – has changed over time. Whereas politicians in times past would have more license to speak freely, at more length and in more depth, nowadays almost always members of parliament speak from prepared notes delivered by their research units to stick to the party line.

"It is regrettable," says Sir Geoffrey.

"A lot of the debates in parliament have sometimes become quite superficial, quite hurried and not indepth. We ought to be doing better than that.

"You have to be able to ensure that the decision makers are answerable to the House of Representatives that has sufficient independent members in it, that sufficient questions are asked and not Dorothy Dixers. In a small parliament with a weak opposition, you aren't going to do very well. Our parliament is the thing that probably needs to be reformed.

"I was on the Operation Burnham inquiry which was an important and interesting assignment. But what we found was that the Foreign Affairs Committee were having hearings on all the things that were going on in Afghanistan but they were not known to the public and remained with the members of parliament. I am not sure that should have been the case even though there were a lot of delicate issues involved there. A lot of what they were doing in the parliament was holding the Defence Force to account in very explicit terms."

Possibly the piece of legislation Sir Geoffrey is most well known for – the New Zealand Bill of Rights Act 1990 – is one of the most controversial. One criticism often lobbed at the Bill of Rights is that it lacks teeth, in part due to sections four through six which in a circular, roundabout way vest more power in the actions parliament has taken over protecting rights absolutely.

"It was designed to be superior law, binding on the whole system. It took five years to go through the various political development. It was such a novel idea at the time. The New Zealand Law Society opposed it which hardly demonstrated any forward vision. The difficulty was that in order to get anything through, I had to trim it. I still say that on many of the difficulties we have faced and still face, they would have been easier to face if it had been entrenched law. It doesn't give unlimited power to judges – they are extremely careful."

Is it the courts fault we haven't seen much movement in the rights space?

"The Bill of Rights is part of New Zealand law. You have to therefore interpret it, and it took years for the judges to come to terms with declarations of inconsistency... the courts have to get on with it. The parliament now has a coherent way with dealing with declarations of inconsistency which is quite well thought through.

"We are making progress but it has been terribly slow."

"Not all human rights are justiciable. Someone asked me the other day whether there should be a right to food. I don't think that is justiciable – are you going to sue McDonalds because they didn't give you a hamburger and you were hungry? I don't think so.

"You have to be sensible about it. The prime thing is parliament. The courts are there to interpret the law, that's very important, but I would still entrench the Bill of Rights. And I think that might happen eventually. But you require political commitment and that is quite difficult to secure."

Is it right the Attorney-General continues to perform the function of providing section 7 notices on legislation before the House of Representatives?

"The Attorney is a unique constitutional being. The Attorney is a guardian of the constitution and a guardian of the rule of law. I always thought it was good for the Attorney being in cabinet because you can stop stupid things being done. And you had to!

"I don't think enough energy has been given to the writing of the reports. Many of them have been written in the Ministry of Justice and I have various questions about that. I think it would be better to have a group who was writing them that developed expertise that didn't have any other jobs to do."

And what about the future?

Since its inception in 1990, there have been some calls for further political, social, economic, cultural and environmental rights to be included in the BORA. However, Sir Geoffrey is cautious that any right within the BORA is justiciable.

The Resource Management Act 1993 (RMA), although passed after the end of the Fourth Labour Government, were born from Sir Geoffrey's work first as Minister for the Environment.

"I think that the way in which the RMA was treated within the system of government after it was enacted was pretty poor. The main elements that weren't used that could have been used by central government to produce environmental regulation and to do various other things they didn't do. To a large extent the RMA was passed and left to moulder.

"To some extent, the way in which central government dealt with the RMA is typical of law making generally when you have ambitious programmes. Ambitious programmes require a more hands-on approach. Hands-on means public service, analysis, reports and ministers making decisions. That's why some of these things don't work well. I hope the successor works better, but I am convinced the successor statute when it is passed will deal with some of the problems the natural environment is facing which are urgent."

The State Owned Enterprises Act 1986 is important for many reasons, but the inclusion of the recognition of principles of Te Tiriti o Waitangi has perhaps been its most important or controversial. We started by

> New Zealand's sense of community is the most important thing. We have to have a coherent sense of our own self, what we stand for. It's that that will enable us to bind ourselves together and be successful

asking Sir Geoffrey whether it was regrettable that the principles were so oblique in their reference.

"Yes. I think government was getting nervous of the Treaty."

In 1989, there was a cabinet paper that went to cabinet that outlined what those principles were. But Sir Geoffrey actually wanted more than that. "I wanted both the Treaty itself in both languages in the Bill of Rights entrenched."

Significant landmark cases and litigations around these principles have ensued. "I think New Zealand is sort of devoted to incremental solutions to everything and doesn't really look too much at the big picture. In a strange sort of a way, the way the Treaty conversation has developed over time has been a good thing because there is more acceptance of it than there has been."

Has this been good for Māori that they have had to go to court to argue what they know to be the principles?

"I think that the important thing to understand is that the courts have deferred to the Waitangi Tribunal findings... I think that for instance the water issue is still something that Māori could go to court over. The time is ticking for the Government on these issues, and there has been a lot of activity on them. Chris Finlayson KC has done a lot of good work on this and it needs to be recognised."

Is there space to still entrench the Treaty?

"I do think these issues are so big, so important and so difficult that there needs to be something like a royal commission on how it should be approached. What you can't do is get support for that as things stand because everyone says the most important things are the cost of living, the inflation, and health. We don't ever look at the things that drive this, but we should.

"The problem with the Treaty is that there has been no proper constitutional consideration of what its role is in the body politik. It is half-in, half-out of the law.

"You need to have a profound national conversation about what its application should be in contemporary New Zealand."

Sir Geoffrey has seen much change over his lifetime. The last forty years has seen drastic political, social, economic, and cultural and environmental change.

So what does the next forty look like?

"The next forty years is a time of complexity. Policy problems of such complexity that you need different techniques for handling them, and there is going to be a lot of international strife. There is big power competition going on. New Zealand has to be very careful not to get caught up in that.

"What I worry about is politics has become such a difficult lifestyle now that people are not attracted to it. How many lawyers want to become politicians when they look at the financial sacrifices they have to make? The problem is if you don't do something for your country, it won't flourish.

"New Zealand's sense of community is the most important thing. We have to have a coherent sense of our own self, what we stand for. It's that that will enable us to bind ourselves together and be successful."

There is no doubt that Sir Geoffrey's legacy will impact New Zealand's self, what we stand for and how we operate for many more years to come. ■

KEY LEGAL MILESTONES

A view from the Minister

BY **KIRI ALLAN**

It is a privilege to address *LawTalk* in my capacity as the Minister of Justice, give you a sense of where I stand and what the Government is doing to deliver meaningful improvements that will benefit everyone who interacts with the justice system, including the 16,000 plus lawyers reading this column.

As a lawyer myself I'm only too aware there has been a lot of stress placed upon the justice sector as a consequence of the last two years, and the legal profession has been no exception. I see it when I visit courts across the country and speak with frontline staff, lawyers and officials. This has compounded in pressures on cost and human resources. For lawyers in particular, there's also the subsequent stress of not being able to navigate your client all the way through to an end result in a timely period, which creates a whole lot of additional anxiety.

I've heard it when speaking to the Criminal Bar Association and Community Law Centres, who are both at the forefront of ensuring access to justice is accorded to all without fear or favour. I heard it when meeting with Justices of the Peace in my electorate, who have volunteered their time and taken on positions of leadership in the community, including those who undertake judicial duties within the District Court. It has forced people to adapt and work differently. For example, meetings that were once in person now regularly take place online, and courts up and down the country are making wider use of AVL and video conferencing.

Improving access to justice is an enduring priority for this Government and at the heart of every decision I make in this role. As someone involved in the work of administering justice, I believe it's important to listen to the voices of those who need access to justice or who have experience in trying to do so, to understand what is working and what needs to change. As the Minister of Justice I have the privilege of being in a position to enact meaningful change and that means a significant programme of law reform is in motion, to improve the experiences of those on the frontline, including for victims and the thousands of lawyers working on their behalf.

Recently I announced major reforms to the Legal Aid system, which has come under significant strain in recent years, with settings largely unchanged since 2011 and the number of people eligible for legal aid decreasing. An investment of over $148.7 million across four years will ensure continued access to justice for New Zealanders

who cannot afford legal advice and means an additional 93,000 people will be eligible for legal aid from January.

Changes to the Legal Services Regulations 2011 and the Legal Services Act 2011, will address a number of the concerns that have been raised with me by removing the legal aid user charge; increasing both the income eligibility and debt repayment thresholds and removing interest on the repayment of unpaid legal debt. A 12% increase in the hourly rate of legal aid lawyers also came into effect at the start of July.

The Ministry will monitor the effect of changes once they have been implemented, including provider monitoring. They will also commence engagement with the profession on provider coverage, which is a matter I have already raised at select committee.

I have also heard clearly that there is discontent with the fixed fee regime, and I have heard the plea for an independent review into legal aid, which is something I have sought advice on.

Another area the Government is committed to addressing, and something many of you have experienced first-hand, is the ongoing challenge around court delays. As you will know, these delays are not new and they have definitely been exacerbated by Covid-19, with thousands of court events not able to take place since the pandemic began.

The Ministry, judiciary and the legal profession have worked together to ensure the Courts adapted through each Covid-19 wave, which have enabled more court events to proceed and more cases to be resolved. For example, in the District Court, during the first Covid-19 Alert Level 4 period only 32% of normal court events were able to be completed. During the Delta Alert Level 4 period this increased to 40%, and during the Omicron red setting this increased to above 90%.

This, of course, is little consolation to victims, defendants and lawyers affected by delays in getting to trial. I understand the effects of delays are very real, creating stress for lawyers, who feel pressure to get cases to trial, and for victims and defendants who have their lives on hold as they wait for their day in court.

The Government has responded by funding just over $76 million from recent Budgets to provide additional judicial resources, and work with the judiciary, legal profession, court staff and scheduling teams is ongoing to ensure cases are progressed.

The Criminal Process Improvement Programme – or CPIP – is a judicially-led cross-agency programme that will also help to reduce unnecessary adjournments and delays.

Its objectives are to reduce the average time (days) to disposal, the number of events that do not proceed on the day, the average number of events for a case from start to end and the number of days the accused spends in custody waiting for an outcome.

I'm also pleased to report the Three Strikes law has now been repealed. The Three Strikes Repeal Bill was about ensuring that discretion is

restored to sentencing courts so that they can sentence offenders proportionately to the crimes they committed. This will mean there will be no more cases where offenders receive grossly disproportionate sentences, such as a long period of imprisonment instead of a short community-based sentence, as happened in one notable case.

The Three Strikes law did not improve outcomes for victims. International evidence shows that three strikes regimes decrease the rate of guilty pleas. This means that victims who would otherwise be spared the trauma of giving evidence, may be re-victimised by having to testify. Put simply, it was a bad law that failed to be a deterrent to offenders and failed both victims and the tax-payer.

Repealing the Three Strikes law returns the law back to the status quo from pre 2010: where the judiciary exercised their discretion in accordance with the Sentencing Act, sentencing guidelines and the facts of the case.

Electoral law reform is another significant area of work that has been well signalled by the Government. I recently introduced two bills which will progress several important targeted changes ahead of next year's general election, including removing restrictions on the Māori Electoral Option, improving the transparency of political donations, and the eligibility of overseas voters. The proposed changes are aimed squarely at increasing participation in parliamentary elections and improving public trust and confidence in New Zealand's electoral system.

Key to these changes are the well canvassed proposed changes around political donations. Donations to political parties and candidates are absolutely a legitimate form of political participation. Appropriately regulated political donations and loans underpin public trust in the integrity of our electoral system and the key institutions of a democratic government. The Electoral Amendment Bill lowers the level at which the names of donors must be reported from $15,000 to $5,000. If someone is giving a political party large sums of donations, I believe it's fair to expect a level of transparency.

Across a longer timeframe, an independent panel will lead a review of New Zealand's electoral law. This will look at an array of election rules including the voting age and overseas voting, the length of the parliamentary term, the party vote and one electorate seat threshold, and the ratio of electorate seats to list seats.

Another key initiative this year was the introduction of the Justice Cluster Budget, which required the five justice agencies (Police, Ministry of Justice, Corrections, Serious Fraud Office and Crown Law) to collaborate to develop a joint budget from multi-year appropriations. The Cluster was allocated $2.73 billion total operating over the next four financial years, with four key priority areas identified in Budget 22 in order to achieve meaningful change across the criminal justice system: improved access to justice; addressing issues with remand; better outcomes for victims; and better enabled organisations and workforce.

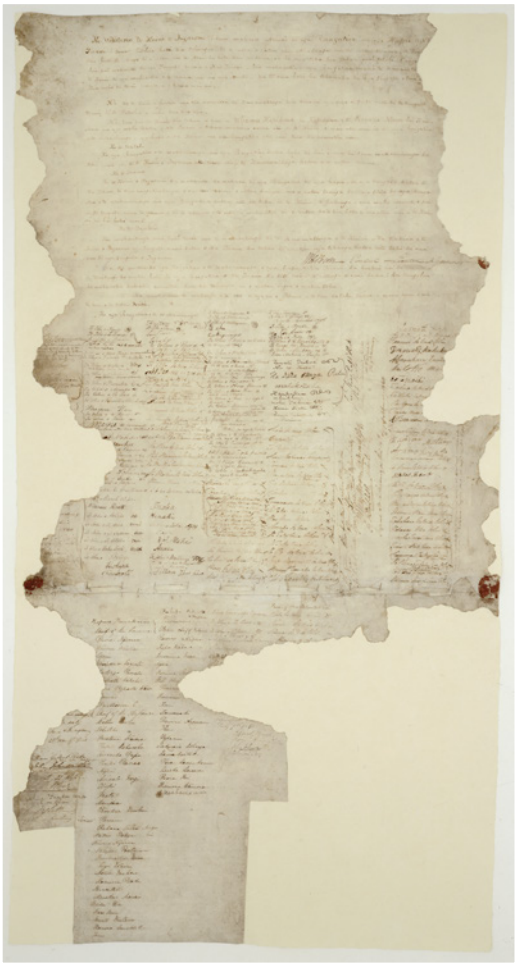
In the long-term, this approach aims to encourage a shift in investment from more traditional justice processes and infrastructure towards earlier community-based prevention, support activity and responses.

To achieve long term reform of the justice system we need co-ordinated change consistent with New Zealand values and aspirations, across both the criminal justice system and the social sector. There is a lot still to achieve, but I hope this overview has given you a sense of where this Government's priorities lie and my commitment to building a robust and fair justice system, accessible to all. ■

Key Legal Milestones in Aotearoa New Zealand's legal and constitutional development

Aotearoa New Zealand hasn't just been shaped by events themselves; people have shaped our legal and constitutional development in more ways than just taking part in significant moments. Whether they be leaders, regular New Zealanders or those from far away lands, our nation has had many people who not only have led and shaped events, but been captured by them and have had them shape their own desitiny.

As part of this edition of *LawTalk*, we spoke to four of our changemakers across the generations and from different parts of society to understand the key milestones or events that shaped either their own futures and caeers, or those events which shaped the future of Aotearoa New Zealand. An incredibly colourful mix of events right from the arrival of Kupe through to modern times with legislative and cultural instruments defining a generation of people.



▸ **The Waitangi Sheet of the Treaty of Waitangi, signed between the British Crown and various Māori chiefs in 1840.**

Sir Anand Satyanand

Sir Anand Satyanand is a former practitioner, judge, ombudsman and governor-general, and currently chancellor of the University of Waikato. Sir Anand was governor-general in a time of cultural and social change for New Zealand, and his leadership throughout the decades in the legal world spans a variety of different roles and responsibilities.

Five milestones for someone who has worked in and around the law for five decades, provide a large tapestry from which to identify highlights. My list is not in order of importance, but each item registers its presence in an enduring fashion. I have restricted mention to things with which I have had personal association.

1. The first is legal drafting, which I have seen close up as a practitioner, judge, ombudsman and most latterly as governor-general. It began with membership for a number of years of the government's Criminal Law Reform committee, where I came to admire the acuity of draftsman, Denzil Ward, as we worked on changes to the Crimes Act (to do with expression of the defence of self defence). Ward's knowledge of the law and ability with its expression, came to be admired against the skill sets of the other members including leading members of the law teaching profession and practitioners. The elegant expression of the Ombudsman Act 1962 which has lasted for 60 years this month remains a tribute to Ward, not least for the legislation's uptake in a number of other jurisdictions.

2. The second is the cessation of final rights of appeal to the Privy Council in London and the establishment of the Supreme Court in our own country. At the beginning of the 1980s, I conducted an unsuccessful appeal in the Downing Street London premises of the Privy Council. The circumstances of the case were of no great public importance but were crucial to the family of the litigant. I felt that the attention of the Law Lords was polite and kind, but so far removed from understanding the day to day circumstances of our own country that such called for replacement by a locally based tribunal.

3. The third is what I consider to be the efficacy of resolution to problems that is offered by the office of the Ombudsman which New Zealand instituted in 1962 as the first country in the English speaking world. In circumstances when combination of a judicial kind of oversight over governmental action that has occurred with a recommendation about what might be done to 'put things right' have been proved to be something that New Zealanders have accessed regularly for 60 years.

Hon Dame Lowell Goddard KC

Hon Dame Lowell Goddard KC is a barrister and King's Counsel, a former Deputy Solicitor-General, Crown Solicitor Nelson, High Court Judge and chaired the Independent Police Conduct Authority. She has also served as an expert member of the UN Subcommittee on Torture and other Inhumane treatment of persons in detention, chaired the UK Independent Inquiry Into Child Sexual Abuse and had been co-Convenor of Royal Society project on Fair Futures in Aoteoroa New Zealand.

4. The next milestones are to do with continuing legal education for practitioners and judges. Developments in the law, and techniques needed for its implementation are now part of regular experience of practitioners, and the more-so because of availability of programmes on line. In a similar way the Institute of Judicial Studies makes possible the upskilling in such things as judgement writing.

5. Lastly, I have been pleased to see develop and come into being, the PILON programme in which the successful model of the litigation skills programme developed in New Zealand, has been adapted and provided for legal practitioners in a number of Pacific settings. This has been adversely affected by the Covid-19 pandemic but is something that should, in the eyes of many, resume in the near future.

1.

Senior Counsel assisting the Cartwright Inquiry into the Treatment of Cervical Cancer at National Women's Hospital

The Inquiry, which took place during 1978/1988, was charged with investigating allegations of failure to adequately treat carcinoma in situ at the National Women's Hospital in Auckland; the reasons for that failure; and the period over which the failure occurred.

The Inquiry was ground-breaking and had a profound and lasting effect on the rights of patients going forward and on the legal obligations required of medical practitioners. In particular, it introduced the concept of a requirement for the informed consent of patients included in research or undergoing treatment. This requirement has since become universal across all patients in all areas of medical practice.

1987/1988

2.

Taking Silk

This was a significant milestone in my own career but also marked a major step forward in the recognition of women as competent, leading practitioners. Of great pleasure was the sharing of the occasion with my longstanding friend, Sian Elias, later to become the first woman Chief Justice of New Zealand.

1988

3.

Crown Law/Deputy Solicitor-General/Crown Solicitor Nelson

A further significant milestone occurred when I was recruited by John McGrath QC, the Solicitor-General, in 1989. John was embarking on a review and restructuring of the Crown Law Office and asked if I would lead the Criminal Law Team. The following six years were stimulating, challenging and rewarding. It was a time of high energy and huge change in the wake of Public Sector reforms and major developments in the law. Notable were the emergence of Treaty jurisprudence following the Lands Case of 1987; the enactment of the Bill of Rights Act 1990; reforms in the criminal law, including the development of sophisticated forensic techniques (DNA); the requirement to video-record suspect' interviews; the abolition of an unfettered right to cross-examine rape complainants on past sexual experience; and the video interviewing of child sexual complainants by specialist interviewers.

1989

4.

Appointment to the High Court Bench

In 1995, I was honoured to join Dame Silvia Cartwright and Dame Sian Elias on the High Court Bench and to be the first appointment of Māori descent.

1995

5.

Chair IPCA/2010–2016 Member of UN Subcommittee on the Prevention of Torture (SPT)

In 2007, I was seconded from the High Court Bench to chair the IPCA. During my 5 year tenure, the Authority exercised its statutory remit to also carry out reviews of Police practices, policies and procedures. Such reviews were into Deaths resulting from Police Pursuits; Deaths in Police custody between 2000 and 2010; and into the Treatment of teenagers in police cells. An Inquiry into Police handling of child abuse cases was conducted between 2009 and 2011. A significant investigation carried out during my tenure was into the Urewera Raids.

In 2007, the IPCA was designated a 'national preventive mechansim' under the Crimes of Torture Act, which required responsibility for monitoring conditions and treatment of detainees in police custody. In 2010, I was elected to membership of the United Nations SPT and served as an expert member until 2016. During that period I took part in a number of field missions to State Parties such as Ukraine, Argentina, Cambodia, Albania and Georgia.

2007–2012

Hon Amy Adams

Hon Amy Adams is a former Minister of Justice, member of parliament for the Selwyn electorate, partner and practitioner in Christchurch, and current Chancellor of the University of Canterbury. In her time as Justice Minister, Amy oversaw significant change alongside Attorney General Christopher Finlayson KC to our justice system, including heralding in the Senior Courts Act and other defining pieces of legislation.

It's an honour to be asked to reflect on the top five milestones or moments in my legal career.

In approaching this I've taken my legal career to include both the pracrtise of law and my time as a Member of Parliament, and subsequently Cabinet Minister.

Initailly I thought about the five most memorable laws that I have had a hand in passing or decisions I have made and I will reflect on some of those, but instead I've decided to approach the topic in terms of some, perhaps unexpected, moments that I believe have been key for me.

1. Address by Justice Susan Glazebrook in the 1990's

As a young female lawyer without a family background in law I remember vividly an address by Justice Glazebrook encouraging young female lawyers and talking about her path to the bench. Through hearing her story I came to believe that all things could be possible. This experience stuck with me over many years as to the importance of role models and the need to see people that look like us in successful roles to develop belief in our own ability.

2. Creation of a part-time/ flexi partnership model

One of the most imortant people in the development of my legal career was Simon Mortlock, then senior partner of Simon Mortlock Lawyers. Simon was a tireless champion for social progress and was determined that a new model could be developed, first for me to join the firm as a mother of two very young children on a part time basis, and later to become a partner in a similiarly flexible way. To my knowldge this was the first time this had occured in Christchurch and was pivotal in being able to remain in law while raising my children.

3. Election as an MP

After working as a lawyer for 16 years my increasing frustration at 'how the system was' saw me turn my mind to politics. Anyone with children will know how it focuses you on the future we are building for them and for me this saw me look toward Government. Having no family or training background in politics this was a total leap off a cliff but the opportunity to represent my community for 12 years was genuinely a pleasure.

4. Becoming a Cabinet Minister

Once you enter politics you quickly realise that to make significant change you have to be in the cabinet room so the Prime Minister of the day taking a chance me and giving me the opportunity to hold 14 different portfolios, including Minister of Justice, was huge. This is when you really get a chance to drive change.

5. Being part of important reforms/decisions

I've deliberately left this for last as none of these would ever have occurred but for each of the previous four. Ultimately to me success will always be measured in the difference you make and so reflecting back some of the work I'm most proud of would have to include developing a new set of family violence laws and practises, increasing fibre and cellular connectivity across NZ, creating a historical regime to expungment historical convictions for homosexuality and being part of the cross party abortion reform work.

You always leave Parliament with more you would've liked to do but I feel tremendously grateful that my legal career has allowed me so many opportunities to date.

The Honourable Justice Joe Williams

The Honourable Justice Joe Williams made history as New Zealand's first Māori Supreme Court judge. An accomplished expert in Indigenous law, he has served in various judicial roles: first, on New Zealand's specialised Indigenous courts (the Māori Land Court and Waitangi Tribunal), then the High Court, and Court of Appeal. He is of Ngati Pūkenga, Waitaha and Tapuika nation.

1.

Kupe and Kuramarotini arrive from Hawaiki circa 1250, bringing with them our first (tribally-based) legal and constitutional order. We know the whakapapa well but not the precise date. A modern legacy of this is the continuing Māori insistence on the expression of political mandate tribally pluralistically.

circa 1250

Women vote at their first election, Tahakopa.
Ref: PA1-o-550–34–1. Alexander Turnbull Library, Wellington, New Zealand.

3.

Electoral rights in the form of the universal (that is non-property-based) adult franchise are progressively recognised: male Māori over 21 – 1867; all males over 21 – 1879; all females over 21 - 1893. Over this period, there was a relatively small electoral population and high levels of elector political engagement at least among settlers. Large-scale settler immigration drove and required rapid transformation of the landscape and economy. These factors meant voters demanded and got a very centralised constitutional and legal order and a very active legislature. This political culture remains.

5.

MMP is introduced in 1993. This has led to the evolution of a very diverse legislature in terms of ethnicity, gender and political perspective. That in turn has helped New Zealand to locate itself more comfortably as a small but very diverse Pacific country.

2.

Treaty of Waitangi is signed 1840 signifying the tentative arrival of English law, leading eventually to revolutionary conflict between the old tribal and new centralised legal and constitutional orders. The old order is displaced to a significant extent in the succeeding 135 years, but not entirely (see item 4).

4.

Treaty of Waitangi Act 1975 signals the beginning of the process of recognising and recalibrating the place of the pre-1840 legal and constitutional order in contemporary New Zealand, a process that continues.

1840 1867–1893 1975 1993

CYBER SECURITY

Auckland barrister a victim of identity theft on bogus website

In June, Auckland barrister James Olsen had the discomforting experience of discovering a fake website created in his name. It featured his photo but contained career details lifted from the website of another lawyer. The website was being hosted by a US-based company, NameSilo LLC, and the site appeared to be operated out of Nigeria. The scammer had also created a fake profile on social media network LinkedIn.

"I was about to go out on my own and was in the process of creating a website when I came across this fake website purporting to be me," he said. "It used a photo of me from my then-employer's site but had recorded another lawyer's career experience."

"There was a disconcerting and unknown aspect to what had been done in my name coupled with the unknown motivation behind such a site."

Mr Olsen filed a complaint with the Police, who said they only had limited options.

Scam a threat to public confidence in the legal profession

After communication with the website host, he applied to the High Court for a takedown order. Mr Olsen told the High Court in Auckland that it appeared the site was a scam which could be luring people into paying an advance fee for legal services which would not be provided.

In his judgment Justice Simon Moore said that the website posed an obvious risk to members of the public seeking legal assistance, who may unwittingly be duped by someone impersonating a lawyer. Justice Moore said that "the false statements could well operate to undermine public confidence in the legal profession. Parties and potential clients seeking legal assistance may also send sensitive information to the contact details wrongly believing that the site is genuine. Inadvertent disclosure of sensitive information plainly undermines the administration of justice."

Mr Olsen provided the judgment and the sealed orders to website host NameSilo, but they didn't respond.

Dealing with the tech giants

Mr Olsen also gave the takedown order to Google New Zealand to de-index the site from search results. "Google came back promptly and took it out of the New Zealand search results. Although people overseas could still find the site." He reported the fake profile to LinkedIn, but didn't receive a response. The fake profile is still on LinkedIn.

Mr Olsen also submitted an abuse request to the Internet Corporation For Assigned Names and Numbers (ICANN). It was ICANN who were finally able to get the site taken down, around two months after Mr Olsen first discovered it.

Google yourself, and address problems quickly

Mr Olsen's advice to anyone in a similar situation is to get onto it as soon as possible, as it takes quite a while to get things moving. "It took about a month to get the order from the High Court. Given it was happening overseas, there was no jurisdiction to enforce orders."

He feels that the provisions in the Lawyers and Conveyancers Act 2006, such as s.43 which is aimed at preventing non-lawyers from holding themselves out as lawyers, may no longer be fit for purpose as they were drafted when the internet was far less prominent. "And to get a court order under the Harmful Digital Communications Act 2015 you have to show that you've suffered emotional distress or harm. Even though this was distressing, I don't think I could have reached that threshold."

Mr Olsen says that online identity theft is going to be on the rise given the prevalence of online activity and the lack of regulation of the internet.

"The simple solution is to regularly Google yourself. It sounds vain, but keep an eye open as to what appears online about you. It just shows that in this digital age, it's something that lawyers need to do to make sure they are not being impersonated."

What should you do if you think you are a victim of identity theft?

The Department of Internal Affairs (DIA) says that identity theft can damage your personal, professional and financial reputation. DIA suggest that victims act quickly to minimise the impact of the identity theft. If you have evidence that your information is being fraudulently used by another person, DIA recommend that you report this to the Police.

If you need support and advice, registered charity IDCARE provides cyber support services to victims of identity theft.

Cyber security tips

CERT NZ Acting Incident Response Manager, Jordan Heersping, says that cyber security is one of the top priorities for all businesses, but especially small to medium businesses (SMEs).

"We've found that New Zealanders don't often realise the severity of the losses that businesses can incur from attacks, these could include loss of personal information and records, income, assets, productivity or customer trust and goodwill. And most of these can be stopped with some basic steps at personal level."

Heersping recommends that a good place to start is to do the following:

- Back up your information and records.
- Have strong passwords that aren't used on multiple accounts.
- Make sure apps and devices have got the latest updates installed.

- Make sure two-factor authentication is used wherever possible.

"Businesses and organisations should make sure their remote access systems are as secure as they can be and pay very careful attention to emails requesting payment or personal information, particularly invoices," Heersping says.

CERT NZ has a list of tips for businesses to make sure they are protecting their data, their network, their customer information and their reputation: *www.cert.govt.nz/business/guides/top-11-cyber-security-tips-for-your-business/*

Dealing with a cyber security breach

Law Society General Manager of Professional Standards, Katie Rusbatch says that the Law Society receives regular calls from firms where they have been a victim of a security breach. "Our advice is that your first port of call should be to contact your insurer. Even if your firm does not have specific cyber security insurance, we encourage you to have a conversation with your insurer if something goes wrong. You may be liable if client funds are lost from the trust account or if trust account records are held to ransom and you have insufficient backups of your records.

"Firms fall prey to cyber security breaches on a regular basis, and these instances can be devastating for all involved."

Heersping says that in the event of an incident, your response team should report to the national computer emergency response team, CERT NZ. "Even if the event is contained or being worked through, CERT NZ can inform other organisations who may also be affected or targeted. Reporting to CERT NZ is always anonymous. CERT NZ's Incident Response team can assist you through the steps to recover from the attack and be more resilient in the future.

"Under the Privacy Act 2020, if your organisation or business has a privacy breach that either has caused or is likely to cause anyone serious harm, you must notify the Privacy Commissioner and any affected people as soon as you are practically able."

The phrase "serious harm" can seem ambiguous, the Privacy Commission gives examples including:

- physical, psychological or emotional harm or intimidation; and
- financial fraud including unauthorised credit card transactions or credit fraud.

"CERT NZ strongly urges you to report any breach or potential breach to the Privacy Commission regardless of the level of severity", Heersping says. "Doing so gives greater reassurance to your stakeholders, even if the breach was a lower level."

The Privacy Commission expect to be notified of breaches no later than 72 hours after your organisation becomes aware of it.

Our advice is that your first port of call should be to contact your insurer. Even if your firm does not have specific cyber security insurance, we encourage you to have a conversation with your insurer if something goes wrong

Trends in cyber crime

The 1 April to 30 June quarter of 2022 saw a 14% drop in reports to CERT NZ but a slight increase in direct financial loss, up to almost $4 million. Notably 32% of those who reported a financial loss, lost more than $1,000.

The current trends being reported to CERT NZ are rising scams targeting individuals, specifically financial and romance scams.

These scams can also affect businesses as the person targeted can give over specific information about the company or accidentally allow the scammer to gain access to internal systems. The scammers may also target a person to take over their social media accounts to in-turn attempt to run scams on the target's followers. ■

THE LEGAL PROFESSION

An update from the Independent Review

The Independent Review of the framework for the regulation and representation of lawyers in Aotearoa New Zealand has entered a new phase now that the formal consultation period has ended.

The Review Panel has spent the past three months engaging with stakeholders over the issues canvassed in the discussion document – topics that go to the heart of how lawyers practise and are regulated.

Good levels of engagement

"We're pleased with the levels of engagement we've had so far. We've received plenty of thoughtful submissions, which we're now working our way through," Panel Chair, Ron Paterson says.

"The key to the success of this review has always been to get the widest possible engagement from the legal profession – and we're confident we've achieved that."

The consultation process to date has included:

- 1,835 individual survey responses, many of which have made extensive submissions on the issues raised in the discussion document;
- 157 written submissions so far, including several on behalf of large representative groups of lawyers;
- three webinars and five events held by the Panel through Law Society branches for lawyers to attend to engage with the Panel, which were attended by 375 people;
- 38 meetings held by the Panel with stakeholders with stakeholders over the consultation period, including representative groups for lawyers, consumer groups, public sector bodies, and individual lawyers; and
- the Panel has also met with legal services regulators from England and Wales, Scotland, Ireland, Canada, and Australia.

"While the formal consultation process may have ended, our engagement is still underway at pace," says Ron Paterson.

"Over the next month we will continue to canvas the issues raised in the discussion document, including hosting several focus groups and meeting with policy makers. We're determined to ensure that the views of the profession and consumers are adequately captured."

Several important issues to the forefront

While it is too early to provide insights into the themes from submissions, it has been clear from the Panel's engagement that there are several issues on which members of the profession typically hold strongly, and often diverging, views.

The question of an independent regulator

One of the central issues facing the review is whether the Law Society should continue to exercise both regulatory and representative functions, or whether there is a case for establishing a regulator with a greater degree of independence from the profession.

"We're hearing strong views on both sides of this issue," says Panel member, Jane Meares.

"Many in the profession believe that self-regulation is an integral part of having a cohesive and collegial profession, that lawyers are best placed to develop regulatory standards, and that requiring the regulator to be governed by lay members could undermine the ability of the profession to act as a check on the Executive."

"There have been equally strong views expressed to us that the current arrangements are not working as well as they could – that there is an inherent conflict in the Law Society managing competing organisational objectives and that the regulation and representation of the profession could be done more effectively by two separate bodies."

Promoting a positive and supportive culture

"The topic in our discussion document that appears to have generated the strongest response has been the steps that can be taken to improve both the culture of the legal profession and the health and wellbeing of lawyers," says Panel member, Jacinta Ruru.

> We're pleased with the levels of engagement we've had so far... The key to the success of this review has always been to get the widest possible engagement from the legal profession – and we're confident we've achieved that

"Many individuals have provided us with incredibly personal stories of the challenges they've faced within the workplace. We've also heard from people who have encountered challenges trying to practise on their own account and who describe the current arrangements as creating significant barriers for those looking to do contracting or re-enter the workforce on a part-time basis."

Complaints and discipline

Lawyers at the Panel events have recounted their own experience of the complaints handling system, with many commenting that the biggest problem is the amount of time it takes for even minor complaints to be resolved. The current delays appear to be contributing to stress and mental health issues for some lawyers.

"An effective complaints system must be responsive. We've heard that the current model is slow and inflexible, and is not meeting the needs of lawyers or consumers," says Jane Meares.

"As the discussion document noted, many of the current problems are due to the prescriptive nature of the Lawyers and Conveyancers Act 2006 on how complaints must be handled. The Panel is focused on identifying areas where improvements can be made, including examining models used overseas and in other professions."

The role of Te Tiriti within the profession

Another issue that often comes up in our discussions with the profession is whether the legislative framework should make reference to the bicultural foundations of Aotearoa New Zealand – and, if so, what those references should be.

"The discussion document sought views on whether there was a case to make reference to matters such as Te Tiriti in the purpose statement of the Act (s 3), the fundamental obligations on individual lawyers (s 4), and whether any objectives of the regulator should refer to matters such as the relevance of tikanga in the law and te reo," says Jacinta Ruru.

"We've received many thoughtful submissions on these points, which we're looking forward to considering in more detail."

Next steps

The Panel will spend the next three months reading submissions, deliberating, and drafting its final report says Ron Paterson.

"We're grateful for the considerable time and effort that so many in the profession have put into engaging with this review.

"We have a challenging task ahead of us, but we're committed to producing a high-quality report and set of recommendations that will set a pathway for regulation of lawyers into the future."

The Panel is due to provide its final report to the Board of the Law Society by the end of the year. ■

THE LEGAL PROFESSION

Preventing complaints about your fees

Each year the Lawyers Complaints Service receives numerous complaints about fees. In the past five years, complaints that include claims of overcharging made up 25% of all complaints. Being the subject of a complaint is often unwelcome, time-consuming, and potentially stressful for the lawyer.

So, what can you do to reduce the likelihood of being the subject of a complaint about overcharging?

Clear communication and ensuring the client has realistic expectations can go a long way towards avoiding problems later. Make sure you provide details around your fee structure, fixed fees, including the scope of any work covered, and time allocated for services. This ensures that clients understand the level of fees they can expect for the services they need.

Invoicing in a timely manner also reduces the likelihood of a complaint.

Clear communication with your client on fees

Be up front about how you will be billing, and what you are billing for. Some clients may not be experienced in working with a lawyer and won't know what to expect. Basic steps such as explaining the fee structure, providing a written letter of engagement containing information about the fees , and updating clients about milestone dates and actions taken can mitigate the need for lengthy explanations and contentions later.

Clear communication and ensuring the client has realistic expectations can go a long way towards avoiding problems later. Make sure you provide details around your fee structure, fixed fees, including the scope of any work covered, and time allocated for services

In a decision earlier this year, *KC v TG [2022] NZLCRO 41* (6/5/22), the Legal Complaints Review Officer (LCRO) said that just providing the terms of engagement including an hourly rate would have little meaning for most clients, especially those who are not accustomed to legal processes or instructing lawyers. "Without context, simple reference to an hourly rate in connection with legal work to be undertaken, is meaningless."

The LCRO noted that most lawyers included in their terms of engagement a provision for monthly invoicing, or invoicing at the conclusion of significant events. This helped clients with their budgeting and gave a good indication of how legal fees were tracking.

"In my view, given the requirement for a lawyer to only charge a fee that is fair and reasonable to both parties, where time is the only fee factor referred to and the matter is urgent and important, there is an obligation on a lawyer … to ensure that their client is regularly … updated about where fees sit."

In terms of what you can charge, some of the factors considered reasonable in making up a fee include but are not limited to:

- time and labour;
- skill, knowledge and responsibility required to perform the services properly;
- circumstances of urgency and any relevant time limitations;
- complexity of the matter;
- experience and ability of the lawyer(s) involved; and
- reasonable costs of running a practice.

The types of complaints that are associated with fees are mostly that fees are high, not broken down, and exceed the quote. Many also include fees that were deducted before an invoice was supplied.

Trusts and estates, family law, and property are consistently the areas with the most fee complaints. Clients may only go through the process of settling an estate once in their lives. It should not be assumed they know what is involved in administering and settling an estate.

Complaints in this area are often to do with estate settlement fees and taking fees from estate funds without consent or prior warning. Such complaints may come from estate beneficiaries who have not been aware of costs but who have a right to complain under s 160 of the Lawyers and Conveyancers Act 2006.

Timeliness and keeping on top of billing

Delaying the sending of invoices can result in clients challenging the amount due. There is a direct correlation between when invoices are sent out and the time it takes a client to pay/the likelihood of collecting payment. Keeping on top of current invoicing can speed up the payment process and ensure all parties have a clearer memory of what activities were undertaken during the period of service.

Other fees-related complaints which alleged incompetence involved junior lawyers undertaking most of the work with insufficient supervision.

Improving transparency for consumers – developments in the United Kingdom

The UK's Competition and Markets Authority (CMA) conducted a market study in 2016 which found that there was not enough information available on price, quality, and service to help those needing legal support to choose the best option for them.

This limited transparency made it more difficult for consumers to compare legal service providers, thereby weakening competition. The CMA found that this may have contributed to the large differences in the prices charged by different providers for the same services, meaning that some consumers were likely to be paying more than they should.

Information shortcomings, including limited consumer understanding of the sector and the lack of transparency offered by providers, also led to some consumers believing they could not afford legal advice and resorting to doing nothing or attempting to resolve their issue themselves.

The CMA recently followed up on this work with a review of the legal services market in December 2020. Their goal was to assess the implementation and impact of the CMA's market study recommendations.

Since the Market Study, the CMA found that all of the regulatory bodies had taken steps to introduce minimum requirements for price and service transparency, mostly through the adoption of regulatory requirements.

The result has been a very substantial increase in the availability of such information, especially once the regulatory changes came into effect. The CMA encouraged regulatory bodies to take action to ensure high levels of compliance.

Managing client's expectations of a successful outcome

A client's perceived 'value for money' can sometimes rely on whether representation or actions resulted in the client's success. Being realistic about a client's chance of success, and explaining the cost of both outcomes, will enable a client to consider a situation in which they are not successful.

Standards Committees outcomes

In their discussion document, the Independent Review Panel noted that "there is usually an information asymmetry between buyers and sellers of legal services, since the average client is not well equipped to judge the quality of the service being provided."

Many complaints to Standards Committees result in the complaint being dismissed and no further

action being taken. In the past five years 81% of all complaints resulted in no further action.

Complaints about fees have a slightly lower 'no further action' rate of 76.5%. This means that fees complaints were more likely to either be resolved by negotiation between the parties, or result in an order. Resolved complaints include situations where the resolution was agreed, settled, or mediated between the parties, or the complaint was withdrawn or discontinued.

When compared to all complaints, fees complaints also result in an order against the lawyer more frequently than all complaints on average. Orders made include costs or a fine, an apology, practice intervention or education. This indicates that where the complaint is upheld, if the parties do not come to an agreed resolution, orders are more frequently made against the lawyer in a fees complaint.

Complaints about fees have a slightly lower 'no further action' rate of 76.5%. This means that fees complaints were more likely to either be resolved by negotiation between the parties, or result in an order

Challenging a Standards Committee decision – Legal Complaints Review Officer

Twenty percent of fees complaints are referred to the LCRO. The average rate of referral to the LCRO for all complaints is 16 percent. The higher referral rate for fees complaints is largely due to 'Orders made' being challenged by lawyers, with a few 'no further action' decisions challenged by complainants.

This indicates that the LCRO is used more by lawyers than complainants (mostly members of the public).

Fees complaints result in fewer referrals to the Tribunal than all complaints together.

Summary

- Ensure the client's needs are fully understood.
- Follow best practice with letters of engagement outlining fee structures.
- Communicate clearly and in a timely manner with clients and make sure they understand their chances of success.
- Issue invoices promptly, with a breakdown of charges, to avoid later contentions about the amount or services. ■

WILLS MONTH

September is conversations about philanthropy

Helping your clients understand their options

BY **ELEANOR CATER**

It's starting to happen: the long talked about 'biggest intergenerational wealth transfer in human history' – from the baby boomer generation to the next – is beginning to take place.

It's a wealth transfer that, in New Zealand, is estimated to be over $150 billion over the next 20 years.[1]

Within families and within society, an immense amount of wealth is changing hands. It's also a significant moment in history for New Zealand: how we as individuals, and as a country, choose to channel this wealth could have a big impact on our nation's future.

It's also a moment in time where legal advice is key.

New research – bequests to charity are on the rise

At the same time as the baby boomers are asset and estate planning vis-à-vis their wealth, new research tells us that more people are leaving bequests to charity in their wills.

A recent study by the Fundraising Institute of New Zealand[2] found that around 5% of the public have already made provision for a gift in their will to charity, with a further 21% likely to or "considering doing so."

This trend is reflected overseas with bequests to charities growing across the world. New data from the UK[3] shows that charity legacies are growing at a rapid rate, rising 15% over the previous 12 months.

At the same time this research is becoming available, we are increasingly seeing, both in New Zealand and internationally, that will-making is on the rise[4] and that baby boomers are becoming more strategic with their giving.

It's a moment in time that having informed and meaningful conversations regarding philanthropy are becoming an important part of the asset and estate planning service offered by lawyers.

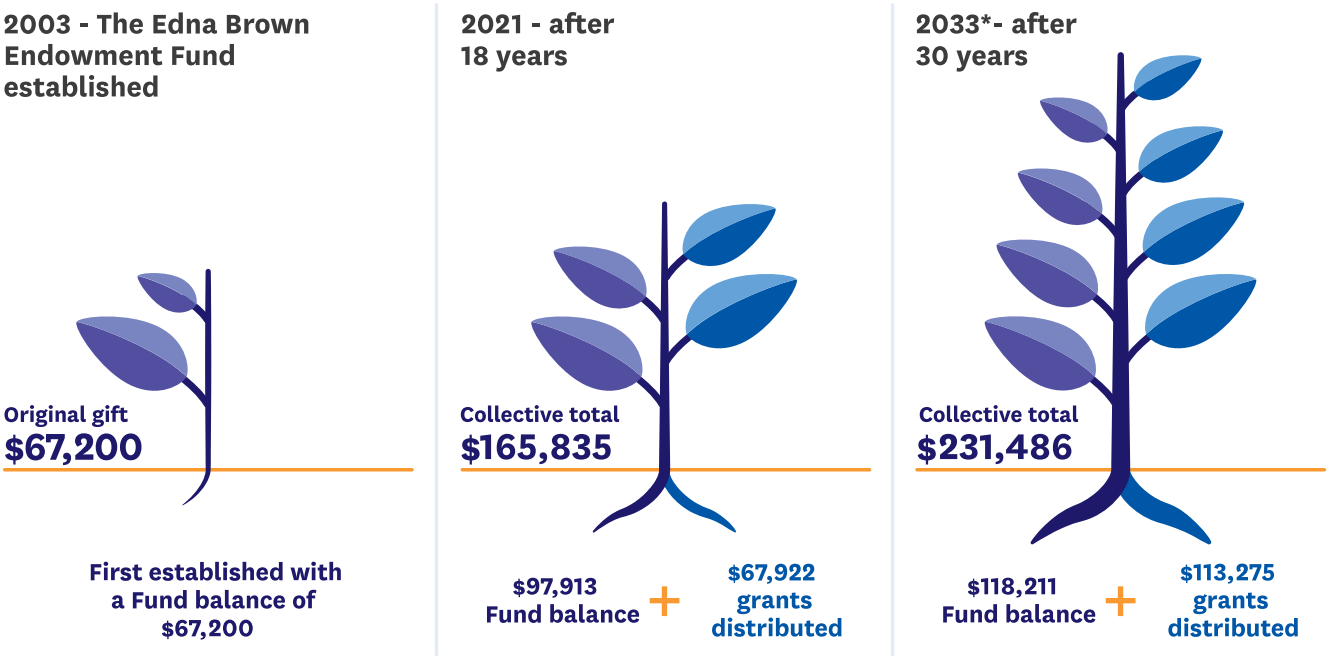
The role of lawyers – informed conversations about philanthropy

In the current environment it's crucial that the legal sector is adequately informed and confident about having conversations regarding philanthropy.

In our line of work, it can be surprising at times to hear slight hesitancy from lawyers to start these conversations. Perhaps there is something in the Kiwi psyche which has us avoiding conversations about the trio of death, money and philanthropy. However, we find that most Kiwis do like to discuss, with a trusted professional advisor, the idea of leaving a legacy. And, while ethically lawyers certainly cannot advise clients which charities or causes to support, they can be discussing their clients' philanthropic hopes and dreams, and advising their clients about the giving options available to them.

It is certainly part of any property, asset and estate planning lawyer's role to be listening for cues from their clients and to help them to make informed decisions regarding the philanthropic choices available to them.

The most common times to have conversations with clients about philanthropy are when a will is being written or



*Estimate growth rate of 6.5% for future years and annual distribution of 4%.

▲ An example of an actual invested endowment fund with Acorn Foundation, with actual and projections of how it can grow and give over time.

changed, which may be as part of routine asset and estate planning, or following life's milestone events (such as a house purchase, divorce, widowhood or diagnosis with a terminal illness).

The options to give to charity

Interestingly, research around the world consistently signals that the main reason people do not leave a bequest to charity in their will is because they "didn't know it was an option."[5] Many people also do not know of any other options beyond traditional charity giving, or a direct donation to the charity itself.

In New Zealand, there are essentially three options for your clients when they are considering leaving a bequest to charity:

1. Direct donations to charities or causes of their choice;
2. Personal invested (endowment) or other donor-advised fund (where the income can be directed to charities or causes of their choice); and
3. Establishment of their own charitable trust.

Option 2 above – personal invested endowment funds – are by far the least known option for charity bequests, and this is where Community Foundations, or a commercial Trustee Company, comes in.

What are Community Foundations?

Community Foundations are not-for-profit organisations that run a local service for personal philanthropy. Their model protects the capital, invests donations for the long-term and gives the income back to communities.

Community Foundations are a worldwide movement, which began in North America more than 100 years ago. Today, there are more than 1800 Community Foundations worldwide, with 17 of them across New Zealand, all with a mission to grow local philanthropy.

How does it work? Essentially, donations are invested in individual endowment funds and pooled together, with the investment income going back to communities, each year. Clients can choose areas of particular interest, or even specific charities to support on an ongoing basis.

For clients, Community Foundations provide a robust structure to set up their own personal invested fund, without commercial fees. Community Foundations have all the existing governance, management and distribution structures already in place; it's a bit like offering clients the option to have their own charitable trust, without any of the hassle of governance, compliance and succession.

Property, asset and estate planning lawyers will know that many New Zealanders struggle to find a home for their wealth, and to be informed

and (importantly) strategic about their giving. In many instances Community Foundations can offer a good solution, and peace of mind, during the asset and estate planning process.

Community Foundations are a relatively young movement in New Zealand, which only really started to take off around 20 years ago with the establishment of The Acorn Foundation in Tauranga.

The Acorn Foundation

At less than 20 years of age The Acorn Foundation already has over $60m in invested funds and a 'pipeline of anticipated bequests' stretching into the hundreds of millions – this, in its youth, and all from local generosity (in the main, bequests).

It's a Foundation dedicated to working with generous locals to look after the current and future needs of the Western Bay of Plenty.

More and more Kiwis are taking up tailored philanthropy services through New Zealand's network of 17 Community Foundations, today with over $230m invested in current funds and over 600 bequests already made, for future funds. Across New Zealand the Foundations are growing at a rapid pace – collectively at around 20% each year – and are now a network conservatively estimated to be worth over $750m (including the 'pipeline of anticipated bequests').

What can lawyers do?

Lawyers are in a very privileged position, as part of the asset and estate planning process, to advise clients about philanthropy. However, legal education doesn't explicitly cover this specialist subject. At the very least lawyers should be in the position to start conversations regarding philanthropic options for clients, and then refer to an organisation such as the local Community Foundation for specialist expertise, when required.

It's a bit like offering clients the option to have their own charitable trust, without any of the hassle of governance, compliance and succession

Lawyers can, as part of the will-making process, start to have conversations about philanthropy by asking two simple questions:

1. "Have you considered leaving a gift in your Will to benefit a charity or cause that you care about? It's something other people do.[6]"
2. "Do you know about the options to give?"
   - Direct charitable donations to charities of your choice;
   - Personal invested (endowment) fund (which you can set up with your local Community Foundation or via another donor-advised fund) to benefit charities of your choice, or
   - Establishment of your own charitable trust.

These two simple questions can lead to a big conversation, and help your clients consider something very meaningful, to think more strategically about their giving, and potentially make their generosity last well beyond their lifetime.

It doesn't take much more than a real interest in a client's hopes and dreams, and an understanding of the different giving options available, to have a meaningful conversation about philanthropy. Try it this Wills Month in September, and beyond – you might be surprised where the conversation leads, and the joy that giving well can bring to your clients. ■

Eleanor Cater is Director of Membership Services for NZ's Community Foundations network, and a local philanthropy advisor in Wellington. See more at *www.communityfoundations.org.nz*

1. Source: Philanthropy NZ
2. 2021 research by FINZ and Perpetual Guardian
3. UK Legacy Foresight's benchmarking programme March 2022 -*https://www.legacyforesight.co.uk/*
4. 2021 research by FINZ and Perpetual Guardian
5. Include A Charity Australia 2018
6. UK 2016 Legacy Giving and Behavioural Insights Research showed that social framing (e.g. "it's something other people do") is a powerful prompt for enabling giving.

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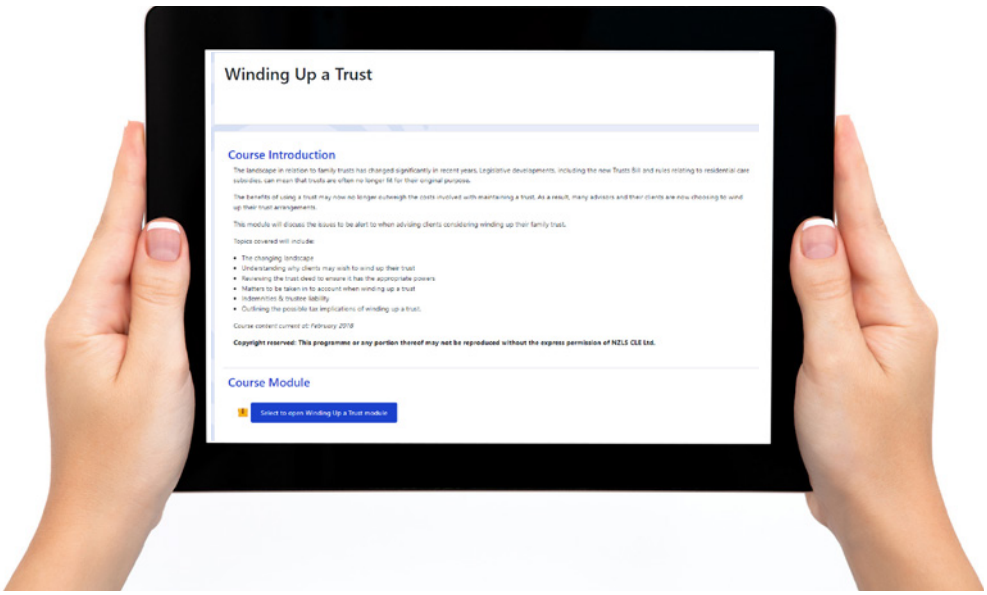

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