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LEGAL RESEARCH FOUNDATION OF NEW ZEALAND

50TH ANNIVERSARY CELEBRATION

AUCKLAND, NEW ZEALAND

25 SEPTEMBER 2015

THE FOUNDATION AT 50: OF PAVLOVAS, SPLIT ENZ, PHAR LAP AND RENEWAL

The Hon. Michael Kirby AC CMG

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CELEBRATIONS & RECOLLECTIONS

It is a great honour to deliver this address at the dinner that marks the Golden Jubilee of the New Zealand Legal Research Foundation.

The celebration coincides with A conference in Auckland to mark the 800th anniversary of the acceptance by King John at Runnymede of the first version of the *Magna Carta*. That notable occasion in English legal history is important for those happy lands that derive their legal tradition, institutions and basic legal system from England.

It is therefore suitable, and symbolic, that Lord Chief Justice Thomas should have travelled to the antipodes to mark the occasion and to attend this diner. Likewise, Justice Huscroft from Canada joins us. I make up the Australia contingent. Most of the others in attendance are from New Zealand. They include the Right Hon. Sir Anand Satyanand (past Governor-General of New Zealand) and the Right Hon. Sir Geoffrey Palmer QC (past Prime Minister). It is a singular and star

* Senior ANZAC Fellow, NZ Government, 1981; Honorary Fellow of the Legal Research Foundation Inc (NZ) 1984; Justice of the High Court of Australia (1996-2009).

studded occasion. But it is in a distant dominion of its own traditions, so we will not be too self-satisfied.

Honorary fellowship of the Foundation is conferred on a select few who are deemed to have made outstanding contributions to the Foundation and to legal research. I was honoured in 1984, being only the second person to receive the distinction. The other honorary fellows have been:

* Professor Jack Northey;
* Emeritus Professor Dick Webb;
* The Hon. Sir Ian Barker QC;
* Associate Professor Bernard Brown;
* The Right Hon. Lord Cooke of Thorndon ONZ, KBE;
* The Hon. Sir Bruce Robertson KNZM, QC;
* The Right Hon. Chief Justice Dame Sian Elias GNZM;
* The Right Hon. Sir Kenneth Keith ONZ, KBE, QC;
* Professor John Burrows QC;
* The Hon. Rodney Hansen QC;
* Mr Bruce Gray QC; and
* Mr Andrew Brown QC.

It is a delight to us all that a number of the honorary fellows have graced this occasion. Alas too many have already departed this life; but we honour them too for contributing to the cause of legal research and law reform in New Zealand. All of us must be grateful to Bernard Brown,

who with Barbara Relph wrote the history of the Foundation, aptly titled *50 Not Out.*[1]

ORIGINS AND CONTRIBUTIONS

The Foundation, we are told, had small and humble beginnings in 1965. But it did not take long for its early activists to become involved in important activities, recorded first in modest publications that described the ups and downs of those early years. It began to publish the journal *Recent Law.* It also undertook research on tricky legal problems affecting the New Zealand scene. Looking at the list of these topics, one can see the changing moods of successive decades. Over the early years, the brilliant spirits of Professor Jack Northey (first Honorary Fellow) and Lord Cooke (6th Honorary Fellow) loom large. In 1989, as Sir Robin Cooke, the latter launched the *New Zealand Law Review*. The Foundation welcomed a parade of distinguished judicial visitors to New Zealand. They included Lord Bingham of Cornhill and Justice Scalia of Washington. What a contrast was there in the invitation list.

The Foundation organised student lectures. It promoted the cause of New Zealand research assistants for New Zealand's hard worked judges. It held celebratory conferences. It even occasionally invited me to cross the Tasman to earn my keep as an Honorary Fellow.

In 1979, soon after I was plucked from kindergarten to receive judicial appointment, and to take up the reins as inaugural chair of the Australian Law Reform Commission, I came to Auckland to speak to the New

[1] Bernard Brown with Barbara Relph, *50 Not Out*: *A History of the Legal Research Foundation Inc of New Zealand*, 2015.

Zealand Law Conference. I recall that my Calvinist sensibilities were challenged by the fact that the conference took place at the Auckland Racecourse. My talk was on the subject of law reform. Surprisingly, it was well received.

My second talk for the Foundation must have been very good indeed because, soon after, I was appointed an honorary fellow. The talk has been published on both sides of the Tasman. Beguilingly, it was titled "Closer Economic and Legal Relations Between Australia and New Zealand".[2] Subtly hidden in that text was the bold suggestion of constitutional union between Australia and New Zealand. This led to criticism of my presumption by the vigilant Sir Robert Muldoon, who suggested that I must be "a judicial comic". Eventually, I challenged him to a verbal duel on *Radio Pacific*. He melted under my honeyed offers for the terms of union. When I suggested that the North Island, South Island and Stewart Island should each become a state of Australasia and that statues of Sir Robert should be built from Albany and Broome to Hawkes Bay he began to see the merits of my argument. Alas, the dream got no further.

In 1986 I came across the Tasman again to take part in a wonderful conference organised by the brilliant Professor Michael Taggart who died too young. It was arranged to celebrate the memory of Jack Northey, who had by then died. It examined the area of Northey's discipline of administrative law. A splendid book collected the papers: *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*.[3] By chance, my paper concerned "Accountability and the

[2] (1984) 58 *Australian Law Journal* 383.
[3] Edited by Michael Taggart, OUP, published in cooperation with the Legal Research Foundation Inc. (1986).

Right to Reasons".[4] It was as understated a criticism as I could possibly have written of the common law view that administrators had no obligation to provide reasons for their decisions under statute that adversely affected a citizen and who sought an explanation.[5] However, an announcement was made, in the midst of the conference, that the High Court of Australia had just unanimously reversed the majority judgment of the Court of Appeal of New South Wales in which Justice Priestley and I (over the dissent of Justice Glass) had upheld a right to reasons.[6] The decision of the High Court of Australia came as a body blow; especially because one of the authors (Sir Gerard Brennan) was attending the conference.[7]

My friends from the Foundation rallied around me to tend the wounds. To say the least, the ruling of the High Court of Australia[8] left me a shattered and broken man. In the years that followed, after my own elevation to that the High Court in 1996, I waited with saintly patience for an advocate to challenge *Osmond*. But challenge came there none. When, at my State Funeral, I make my last journey from this world, carved on my heart will be the single word "*Osmond*".

I came back for the Foundation in 1989, in the midst of a grave epidemic, to offer a paper on the legal issues presented by AIDS and the HIV virus.[9] Then in 1998, I was invited by the Foundation to participate in the exploration of issues of bioethics presented by the mapping of the human genome. It was in multidisciplinary tasks of this kind that the

[4] Ibid, 36.
[5] *T. Fleximan Ltd v Franklin County Council* [1979] 2 NZLR 690 (HC) per Barker J and *R v Awatere* [1982] 1NZLR 644 (CA) at 648 per Woodhouse P.
[6] *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447.
[7] F.G. Brennan, "The Purpose and Scope of Judicial Reasons" in *Taggart*, above n.3, 18-35.
[8] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
[9] Cf M.D. Kirby, "AIDS Legislation, Turning Up the Heat" (1986) 60 *Australian Law Journal* 324.

Foundation demonstrated its greatest skills of research and the promotion of public debate on absolutely new and sensitive matters of public policy of relevance to everyone.

MANY BLESSINGS

Looking back over the 50 years since the Foundation was established and since I, in Australia, joined the legal profession, I must acknowledge many blessings in legal reform. In all of them, there have been parallel (and sometimes still greater) blessings in the law in New Zealand:

* The law relating to indigenous people of our two countries has been extended, developed and corrected. In Australia, there was a greater need for correction than in New Zealand for we had no *Treaty of Waitangi.* As in New Zealand, some of the greatest advances in law reform were made by the independent judiciary not by Parliament. I refer, in Australia, to the great decision of *Mabo v Queensland* [No.2].[10] The self-same Justice Brennan, whose decision in *Osmond* broke my heart, lifted the spirits of all thoughtful Australians by finding a pathway to recognise and respect the rights in law of the Australian Aboriginals to the protection of their 'native title'. In New Zealand, Sir Robin Cooke wrote decisions of great wisdom in respect of Maori rights over land and the seabed. Much remains to be done, but the journey of correction and reform on these topics has now started on both sides of the Tasman.

[10] (1992) 175 CLR 1. See especially at 42.

- Similarly, in Australia, the incontestably racist immigration policy of White Australia began to be replaced, after 1966, with a multicultural approach which is still in place. The changing face of the population of both countries is visible to anyone with open eyes who knew those earlier prejudiced times;

- The rights of women have been changed, both in society and in the law. The old rules that subsumed a wife's property in that of her husband were repealed. Australia, at Federation, quickly followed New Zealand which had been the first country in the world to give women the right to vote. Likewise, soon after Right Hon. Helen Clark left office as Prime Minister, Australia was to see the service of the Hon. Julia Gillard, as its first woman Prime Minister. New Zealand continues to advance at a faster rate on this and on other scores; and

- The laws on sexual minorities have also changed on both sides of the Tasman. The old imperial criminal laws that oppressed LGBTI people were removed by the legislatures. The New Zealand Parliament took a further lead, in this correction, with the enactment of the marriage equality law in 2014.[11] Australia once again is lagging behind. However, the High Court of Australia, in a unanimous decision, has affirmed that the Federal Parliament has full power to enact same-sex marriage, if the political will is there.[12]

An objective person, looking at these changes, will acknowledge that most of them would have been unthinkable when our nations received

[11] *Marriage Amendment Act* 2014 (NZ).
[12] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 (HCA).

Dominion status from the Imperial Parliament. Many of the reforms would even have appeared far-fetched when the Foundation was established. This demonstrates the progress we have made.

But can it be said that everything now is perfect? That the wrongs in society that first led to the establishment of the Foundation have now been fully addressed? That nothing, or little, remains to be done?

NO ROOM FOR COMPLACENCY

Alas, I do not believe that any of us can feel complacent. There remains much for the Legal Research Foundation to address and for lawmakers on both sides of the Tasman to examine with a view to further reform:

* *Prisons and Indigenes:* The prison population on both sides of the Tasman has expanded greatly, even in the past decade. In Australia, it has reached a 10 year high, with almost 34,000 prisoners, sentenced and unsentenced, in custodial institutions. This represents an increase of 10%. Worst of all, the incarceration of indigenous offenders is a special source of shame in Australia. Nearly 9,500 of our prisoners identify as Aboriginals or Torres Strait Islanders. This represents more than a third of the total population of the prisons, although indigenous Australians are fewer than 2% of our population. The figures in New Zealand are comparable and equally disturbing. It does not have to be so. In Sweden in the 10 years to 2014, the national prison population dropped from 5,722 to 4,500 in a total population of 9.5 million. There was no consequent crime wave to challenge the reduction in incarceration. Sweden appears to be doing something

correctly. Australia and New Zealand need to study the economic and human costs of copying blindly the American model of heavy incarceration as a penalty of common resort, rather than a punishment of last resort as the common law and statutory provisions assert that it should be.[13]

* *More diverse lawyers*: But what of the population that has been described as 'prisoners in pinstripes'. What of the lawyers who are part of the supposed assurance of access to justice and equality before the law? Research by the late Professor John Goldring in Australia, in 1965 and 1975, showed the very high proportion of lawyers in the practising legal system who were educated in private schools or colleges and who came from families on much higher than average incomes. [14] The research showed how, even at law school, most of the legal intake was conservative in political inclination and seriously lacking in the diversity of the general population. I do not doubt that some of these features exist also in New Zealand. Law is not an ordinary profession. As *Osmond, Mabo* and countless other decisions show, it is a vocation of values and principles. Its personnel reflect their own values, consciously or unconsciously, in their judicial and professional decisions, in what they teach and write and in the way they practise law. If we truly wish for a legal profession that understands and helps the entire cross section of our communities, we must address the intake of law students. Values in. Values out. I commend the conduct in New Zealand of

[13] See Australian Red Cross, *Vulnerability Report*, 2016. Foreword by M.D. Kirby (2016). See also *Sentencing Trends in Australia* (2015).
[14] M.D. Kirby, "J.L. Goldring, Legal Education and a most Unusual Occupation" (2014) 38 *Australian Bar Review* 226.

the type of research that Professor Goldring performed in Australia. At least then we know the problem that confronts us.

* *Vulnerability of lawyers:* The vulnerability of the members of legal profession has increased with the greater pressures of the current age. Research has shown that the stress and pressure felt by law students is greater than that experienced in other disciplines.[15] Bullying is an unacceptable feature of the practice of surgery and of law. Doubtless also in other vocations. Perhaps in consequence, or for whatever reason, clinical depression is a major problem in the law. Suicide is a major challenge for law students.[16] Especially in the cohort of LGBTI law students in Australia, reports indicate that 16% of them admit to having considered suicide. We need to be more protective of the members of our profession, especially the younger members; and kinder to one another. Perhaps then we will accept a principle of zero tolerance for bullying. Bullying of lawyers, of clients and witnesses. Bullying by judges of those in their court who generally feel unable to answer. Bullying by some judges of others. No. Everything in the garden is not rosy. There is much research and analysis still to be done. The work of the Legal Research Foundation of New Zealand has demonstrated that the beginning of a realisation of problems and of the directions of reform is impartial research and impartial legal analysis.

[15] M. D. Kirby, "Judicial Stress and Judicial Bullying" (2013) 87 *Australian Law Journal 516; cf* "Judicial Stress- A Reply" (1997) 71 *Australian Law Journal* 791.
[16] M.D. Kirby, "Lawyers' Suicide – the Influence of Legal Studies and Practice, Stress, Clinical Depression and Sexuality" (2013) 38 *UNSW Law Journal*.

AND WHAT OF THE FOUNDATION?

So we think with pride about the achievements of the Legal Research Foundation of New Zealand. We think with special pride of the bold spirits who were once amongst us; but are no more. Let their spirits embolden us to look with critical eyes on our societies, our legal system and ourselves.

Glancing around this most distinguished, glittering dinner, it has to be said we are not typical. We are not typical of our community. Nor are we typical even of the legal profession today. We are not typical of the future, whom the law serves. We are older. We are much more male. We are still overwhelmingly Anglo Celtic. Whilst we have been about the busy activities of our lives, our society and its legal profession have changed. The Legal Foundation of New Zealand must also change in the next 50 years: hopefully much sooner. A starting point of change would be the election of more women to fellowship of the Foundation.

I have known a number of women judges and lawyers of New Zealand who have been more than worthy of election to Fellowship. It is hard to think that in 50 years only one distinguished New Zealand woman lawyer has been worthy of the call. I myself could name many. I am sure that this audience could name still more. Likewise with membership and fellowship for Maori and other ethnic minorities. The time has come to correct the imbalances of the past. If all the cardinals are men, it is unsurprising that all the popes elected by them will be men. Change sometimes begets change. Yet change may not come until the electors themselves are changed. And as my former colleague,

the first woman Justice of the High Court of Australia, the Honourable Mary Gaudron once said, talent in law and lawyering is certainly not exclusively written on the Y chromosome.

I realise that New Zealanders think that Australians are boastful, pushy people who are always sounding off and criticising others – even New Zealanders. Recently, I saw endless complaints in New Zealand newspapers that Australians had falsely claimed that they had invented the Pavlova, given birth to Split Enz and produced the champion horse Phar Lap. Whereas the whole world knew that these, and much else, were true blue, dinky di, New Zealand icons. Like so much else that is good in the world. From the land of the long white cloud.

One newspaper, responding to an Australian minister's suggestion that we should get closer together felt as Sir Robert Muldoon did until the statues crossed his mind. The Minister's suggestion (like mine earlier) was the last straw. "Cricky, cobber" they protested. Now they want us!"[17]

I hope my suggestions on this occasion are not viewed in the same category and that these remarks will not join Pavlova, Split Enz and Par Lap in the category of outrageous intrusions. The Legal Research Foundation of New Zealand is a true bright jewel of New Zealand. I am sure that its future will be even more dazzling. This is what I take the Foundation to stand for: Challenging ideas. Critical discourse. Empiricism. Progressive discourse. Adaptation of changed laws for a constantly changing society.

[17] "Cricky Cobber! – Pavlova, Spit Enz and Phar Lap – Now Oz Wants NZ!" *New Zealand Herald*, 25 November 2015, p.1.

I promise to return to the 60th, 70th and, with a bit of luck, even the 80th anniversaries of the Foundation. I hope, and expect, that on these occasions we will celebrate in a broader community and rejoice in our greater diversity. Diversity is the protectress of freedom.[18]

(A toast to the fifteenth anniversary of the New Zealand Legal Research Foundation was then honoured)

[18] A statement attributed to Chief Justice John Bray of South Australia. See J.J. Bray, "The Juristic Basis of the Law Relating to Offences against Public Morality and Decency" (1972) 46 *Australian Law Journal* 100.