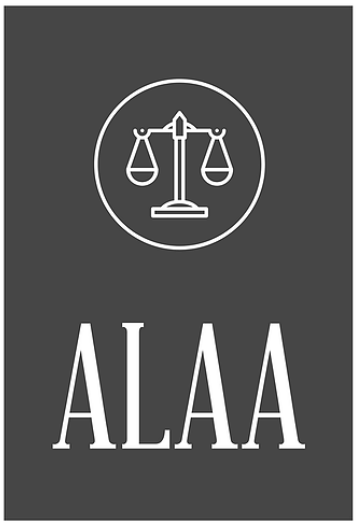
JOURNAL OF THE AUSTRALASIAN LAW ACADEMICS ASSOCIATION

VOLUME 17(2)

ALAA



JOURNAL OF THE AUSTRALASIAN LAW ACADEMICS ASSOCIATION

(2024) Volume 17(2)

CONTENTS

FOREWORD

Jonathan Barrett, Editor

The articles in this second issue of volume 17 of *JALAA* were developed from papers presented at the 2024 ALAA Conference, hosted by Flinders University in Adelaide. I wish to acknowledge the Traditional Owners and Custodians of the lands on which Flinders University's campuses are located. These are the Traditional Lands of the Arrernte, Dagoman, First Nations of the South East, First Peoples of the River Murray and Mallee region, Jawoyn, Kaurna, Larrakia, Ngadjuri, Ngarrindjeri, Ramindjeri, Warumungu, Wardaman and Yolngu people.

Due to unanticipated delays, we decided to spread volume 17 over two issues. This second issue includes three more thought-provoking articles covering a range of issues that demonstrates the breadth and depth of ALAA members' research.

Louisa Di Bartolomeo, Louise Boon-Kuo, Fady Aoun and Elisa Arcioni report and reflect on a project of embedding the First Nation practice of truth-telling in the University of Sydney's Law School. While Di Bartolomeo et al consider contemporary Indigenous-settler relations, Dara Dimitrov examines a historical, but possibly extant, fiduciary duty owed by the Crown to Māori in colonial New Zealand. Finally, Indrani Bandyopadhyay presents a provocative argument about the role of law schools in protecting graduates as they transition into a sometimes hostile legal profession.

As always, I wish to thank the authors for choosing to submit their work for publication with *JALAA*. I am especially grateful to the reviewers for their time, thoughts and constructive feedback. ALAA is a particular community of scholars and a sense of common purpose is invariably reflected in the review process. As Editor, I have greatly benefited from the support of the Editorial Board, and four ALAA Chairs – Nick James, Natalie Skead, Kate Galloway and now Judith Marychurch. For this issue, I would particualrly like to thank Franci Cantatore for her wise counsel. Finally, my to thanks are owed Tash Terbeeke for her administraive support.

LAW SCHOOLS AS AGENTS OF CHANGE

Indrani Bandyopadhyay*

ABSTRACT

When lawyers envisage the idea of social justice, we do not necessarily consider its application to legal practitioners, or the law students who will in future become practitioners. In this article, I argue that as the main suppliers of labour to the legal profession, law schools possess the power to shape the profession and need to understand and acknowledge their role as a major supply chain stakeholder – a pivotal role which should allow them to set and demand standards and positive requirements for good behaviour from law firms and individual practitioners. Furthermore, law schools can act as mediators between students and the legal profession. By providing ongoing support and assistance to alumni, they can ensure the safety and proper treatment of their alumni within the workplace. As university fees increase sharply, law faculties arguably have a business case, as well as a moral imperative, to ensure their students are supported and properly cared for – not just at university – but while they navigate the complexities and challenges of the legal profession.

I INTRODUCTION

In 2009, my postgraduate Juris Doctor degree cost $50,000 in university fees. Fifteen years later, as fees for domestic Juris Doctor degrees approach $150,000,1 cultural change within the legal profession has not progressed quite as quickly. The profession continues to lose talented young practitioners.2 Indeed, early career lawyers, especially women, are leaving in droves.3 Whether on issues of mental health, work-life balance, gender equality, inclusivity and diversity (especially in the upper echelons of the profession), or sexual harassment and bullying, the legal profession today leaves much to be desired.

* Lecturer in Public Law and Criminology at Australian Catholic University and Corporate Governance at Kaplan Business School, Sydney.

[1] See eg, 'Juris Doctor', *University of Melbourne* (Web Page, 2024) <https://study.unimelb.edu.au/find/courses/graduate/juris-doctor/fees/>.

[2] See Hannah Wootton, 'Most young lawyers to leave firm or industry in next five years', *Financial Review* (online, 3 February 2022) <https://www.afr.com/companies/professional-services/majority-of-young-lawyers-to-leave-firm-or-industry-in-next-five-years-20220203-p59tgh>. There is a separate issue of lawyers leaving community legal sector law simply because they cannot afford to live on the money offered: see Julius Dennis, 'Lawyers are leaving the community legal sector due to low pay, creating an experience gap', *ABC* (Web Page, 9 April 2024) <https://www.abc.net.au/news/2024-04-09/qld-communty-legal-sector-young-lawyers-leaving-call-for-funding/103638270>.

[3] See 'The State of Gender Equality the Australian Legal Profession', *College of Law* (Web Page, 16 November 2022) <https://www.collaw.edu.au/news/2022/11/16/gender-inequality-in-legal-profession>; Stefanie Costi, 'It seems, to me, that more and more young lawyers want to leave the law', *Lawyers' Weekly* (Web Page, 14 November 2023) <https://www.lawyersweekly.com.au/biglaw/38477-it-seems-to-me-that-more-and-more-young-lawyers-want-to-leave-the-law>. Private sector law firms face similar problems: see Wooten (n 2).

Good governance within the legal profession not only goes to the heart of the rule of law,[4] but also public and practitioner confidence in the profession. As the Law Council of Australia's *The Lawyer Project* observes, lawyers play a vital role in Australian society through their contributions to the administration of justice and the economy, as well as through their participation in the activities and mechanisms that ensure the proper functioning of a healthy democracy, underpinned by the principles of social justice.[5]

In this article, I argue for a wholistic, corporate governance-style sustainability/supply-chain approach to cultural change within the legal profession and propose that law schools take a larger role in monitoring culture and driving good cultural practices across the profession as a whole. As the main 'suppliers' of labour to the legal profession, law schools have the power to reshape the profession. By setting and demanding standards of behaviour, instituting positive requirements of good behaviour from law firms and individual practitioners (rather than simply encouraging or hoping for good behaviour). By acting as mediators between law students and the legal profession, and by providing ongoing, career-long support and assistance for alumni, law schools can make the legal profession a healthier, happier place to work *and* give students better value for money, while also improving their faculty's own competitive edge at university, national and international levels.

The sharp increase in university fees implies that law schools now have a business case as well as a moral imperative to ensure their students are supported and properly cared for, not just at university, but as they navigate the complexities and challenges of the legal profession. In its 2021 report on mental health in the legal profession, the International Bar Association ('IBA') noted that law schools have a unique advantage in that they are 'closer to the evolving needs and expectations of future lawyers and can, with the appropriate supports, be experimental and progress more rapidly on these issues, therefore potentially leading the way for other legal stakeholders'.[6]

In this article, I discuss key issues affecting the legal profession and explore ways forward for both the profession and law schools, including adoption of frameworks and approaches widely used in the corporate world, which has many parallels with the legal profession in terms of structure and complexity, and which, like the legal profession, has been grappling with its own problems of toxic culture and poor governance. As Kieran Pender's IBA report on bullying and sexual harassment within the legal profession noted, '[b]eing a fit and proper person is at the heart of what it means to be a member of [this] esteemed and trusted profession. All

[4] See Robert van Krieken, 'The Organization of Ignorance: The Australian *Robodebt* Affair' *Bureaucracy, Law and Politics* (2024) 50 (7-8) *Critical Sociology* 1379 <https://journals.sagepub.com/doi/epdf/10.1177/08969205241245257>.

[5] 'The Lawyer Project', *Law Council of Australia* (Report, September 2021) 4-5 <https://lawcouncil.au/publicassets/330febe2-323d-ec11-9443-005056be13b5/The%20Lawyer%20Project%20Report.pdf>.

[6] 'Mental Wellbeing in the Legal Profession: A Global Study', *International Bar Association* (Report, October 2021) 14 <https://www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study>.

stakeholders within this profession must play their role in upholding this core value.'[7] As the main supplier of lawyers to the profession, universities and law schools have a special and important role.

II A PROBLEMATIC PROFESSION

Janet Chan, Suzanne Poynton and Jasmine Bruce found that legal professionals

> were more likely than other similar professionals to report moderate to severe symptoms of depression and use alcohol and other drugs to manage feelings of sadness and depression … A 2009 survey of over 2000 Australian law students, solicitors and barristers suggested that nearly 60 per cent of the respondents reported moderate to very high levels of psychological distress.[8]

According to the IBA, legal professionals were

> thought to experience higher levels of depression, anxiety, stress and lower levels of mental wellbeing than members of the general population. Deploying potentially 'harmful coping mechanisms' has led to levels of alcohol and substance abuse among lawyers that are higher than the norm for members of the general population in some jurisdictions. In some jurisdictions it has been suggested that this abuse may be ingrained and normalised as part of the legal culture.

In a degree that focuses on procedure, etiquette, and the law, it can come as a shock that the standards and behaviours taught at university do not necessarily apply upon entering the profession. In a study on the challenges faced by female solicitors in England and Wales, Hilary Sommerlad and Peter Sanderson noted that many of their respondents were 'baffled, angered and shocked by their experiences'.[9] Respondents explained that they went into the profession with 'the belief that modern society and its institutions are characterised by formal, rational procedures, and objective decision-making, and the resulting confusion when experience proves otherwise' was deeply distressing.[10]

The New South Wales College of Law acknowledged that 'at law school, women are outnumbering men in the College of Law's PLT programs female students completing their PLT accreditation have outnumbered men for a number of years … However, as women lawyers ascend the career ladder, their numbers thin significantly.'[11] Barristers Richard Scruby SC and Brenda Tronson pointed out that as of 30 June 2017, of all barristers in New South

---

[7] See Kieran Pender, 'Executive Summary' in International Bar Association, *Beyond Us Too? Regulatory Responses to Bullying and Sexual Harassment in the Legal Profession* (Report, April 2022) 7 <https://www.ibanet.org/document?id=Regulatory-Responses-to-Bullying-and-Sexual-Harassment>.

[8] Janet Chan, Suzanne Poynton and Jasmine Bruce, 'Lawyering Stress and Work Culture: An Australian Study' (2014) 37(3) *University of New South Wales Law Journal* 1062.

[9] Hilary Sommerlad and Peter John Sanderson, *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status* (Routledge, 2019) 7.

[10] Ibid.

[11] 'The State of Gender Equity in the Australian Legal Profession', *College of Law* (Web Page, 20 November 2022) <https://www.collaw.edu.au/community/news/gender-inequality-in-legal-profession/#:~:text=However%2C%20at%20engineering%2Dheavy%20University,for%20a%20number%20of%20years>.

Wales (civil and criminal), only 22% were women.[12] This was the same as the percentage of female solicitors practising in 1990.[13]

In 2004, the NSW Bar Association adopted the Law Council of Australia's 'Model Equal Opportunity Briefing Policy for Female Barristers and Advocates'[14] with the aim of bringing a greater number of female barristers into contact with solicitors and others looking to brief counsel.[15] Since then, the Law Council's 'Equitable Briefing Policy' has been adopted and endorsed by various corporations and organisations,[16] but for most organisations, it is voluntary, and female barristers are still not briefed in numbers anywhere near close to their male counterparts.[17]

While the High Court of Australia,[18] Law Council of Australia,[19] Law Society of New South Wales,[20] and Office of the NSW Legal Services Commissioner,[21] along with other professional legal associations across Australia have been increasingly vocal about eliminating sexual harassment and have been actively encouraging the reporting of sexual harassment and bullying, reporting harassment tends to be for more extreme cases and is not necessarily a mechanism for dealing with what has been described as the 'men's room' environment of the legal profession.[22] The Law Council of Australia reported in its 2020 National Action Plan to Reduce Sexual Harassment in the Legal Profession

[12] Richard Scruby and Brenda Tronson, 'Some recent statistics on women at the New South Wales Bar': Committee Roundup', *Journal of the NSW Bar Association (Bar News)* (Summer 2018) 50, 51 <https://www5.austlii.edu.au/au/journals/NSWBarAssocNews/2018/107.pdf>.

[13] By June 2018, 50% of all practising solicitors in NSW were women. Ibid.

[14] The author would like to gratefully acknowledge NSW barrister and academic Brenda Tronson (UNSW) for her discussion and insights into the history and adoption of the Law Council of Australia's 'Gender Equitable Briefing Policy' by the Bar Council of the NSW Bar Association.

[15] 'Being at the Bar', *NSW Bar Association* (Web Page) <https://nswbar.asn.au/wbf/being-at-the-bar>.

[16] 'Equitable Briefing Policy', *Law Council of Australia* (Web Page, 27 February 2025) <https://lawcouncil.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>.

[17] Ibid.

[18] "Justices' Policy On Workplace Conduct', *High Court of Australia* (Web Page, March 2022): <https://cdn.hcourt.gov.au/assets/assets/corporate/policies/Justices%20Policy%20on%20Workplace%20Conduct.pdf>.

[19] See Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Report, 2014). See also, 'Bullying and harassment in the workplace', *Law Council of Australia* (Web Page) <https://lawcouncil.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/bullying-and-harassment-in-the-workplace> and 'Australian Solicitors' Conduct Rules', *Law Council of Australia* (Web Page) <https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>.

[20] See 'Sexual Harassment in the Law', *Law Society of New South Wales* (Web Page) <https://lawsociety.com.au/sexual-harassment.>. See also, 'Workplace Guide And Model Discrimination And Harassment Policies', *Law Society of New South Wales* (Report, May 2021) <https://www.lawsociety.com.au/sites/default/files/2021-05/LS3498_PAP_Workplace-guide_2021-05-13.pdf>.

[21] 'Inappropriate Personal Conduct', *Office of the NSW Legal Services Commissioner* (Web Page, 20 October 2023) <https://olsc.nsw.gov.au/for-the-profession/inappropriate-personal-conduct.html>.

[22] See Sommerlad and Sanderson (n 9).

('NAP Report') that most lawyers who experienced sexual harassment in the legal profession did not report it for reasons ranging from fear of reprisal to the behaviour being 'openly displayed and accepted…[and] tolerated at the top'.[23]

Organisational change is slow, multi-dimensional and by its very nature, requires the tone to be set and enforced from the top,[24] but the legal profession is large and multimodal. Finding 'the top', that is, reaching the leaders, some of whom have themselves may have been responsible for misbehaviour, is not always easy. While it is reassuring that the High Court and various state courts have acted, the reality is that bad behaviour within the legal profession has been widely known and tolerated for a very long time, and in some cases even celebrated. The behaviour of former barrister Charles Waterstreet were well publicised through his 'edgy' newspaper columns, books, and even a television series about a 'rakish' barrister on the ABC. While a finding of professional misconduct was finally handed down in 2024,[25] the complaints against Waterstreet dated back to 2014. While prosecutions and complaints mechanisms are essential, simply reacting to incidences of bad behaviour is not enough and creates the illusion of a 'bad egg' when numerous studies in Australia and overseas have demonstrated that problems of bad behaviour (including sexual harassment) are systemic, complex and deeply entrenched.

To counter sexual harassment, the Law Council of Australia's NAP Report recommended, among other things, a positive duty to tackle and reduce sexual harassment in the workplace.[26] In December 2022, a legal obligation for a positive duty was introduced by the Australian government through an amendment to the *Sex Discrimination Act 1984* (Cth).[27] This now means that people and organisations across Australia to whom the *Sex Discrimination Act* applies are required by law to actively take steps to eliminate sexual harassment and other forms of sexual discrimination from their organisation, regardless of whether a complaint of sexual harassment has been lodged.

This is a positive and important breakthrough and emphasises the increasing importance of managing culture in an attempt to transform the work environment. Of course, sexual harassment is only one of a multitude of challenges facing the legal profession, but the positive

[23] 'National Action Plan to Reduce Sexual Harassment in the Legal Profession' ('NAP Report'), *Law Council of Australia* (Report, 23 December 2020) 15 <https://lawcouncil.au/publicassets/4c3d5a37-b744-eb11-9437-005056be13b5/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf>. See ibid 8-9 for state-by-state statistics.

[24] On the role of directors in managing culture, see Chartered Accountants Australia New Zealand and the Ethics Centre, Governance Institute of Australia and Institute of Internal Auditors Australia, 'Managing Culture: A Good Practice Guide', *ASX* (Report, December 2017) 15 <https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/managing-culture-a-good-practice-guide_iiaa-ethics-centre-et-al.pdf>.

[25] Bar Association of Queensland, 'Barrister Guilty of Professional Misconduct for Sexual Harassment of Part-Time Research Staff', *Hearsay* [Issue 96] (online, June 2024) <https://www.hearsay.org.au/professional-misconduct-by-sexual-harassment-of-part-time-research-staff-but-still-fit-and-proper-to-practice-due-to-undiagnosed-causative-psychiatric/>.

[26] NAP Report (n 23) 7.

[27] 'Factsheet Series: Positive Duty under the *Sex Discrimination Act 1984* (Cth), 'Steps to Meet the Positive Duty Factsheet', *Australian Human Rights Commission* (Web Page, October 2023) <https://humanrights.gov.au/sites/default/files/2310_fs_steps_to_meet_the_positive_duty_v2_0.pdf>.

duty approach (along with the ASX Principles and other governance and sustainability tools) offers a useful framework for identifying and tackling a range of cultural issues within the Australian legal profession for organisations and practices of all sizes.

III A CORPORATE GOVERNANCE/SUSTAINABILITY APPROACH

After the spectacular and devastating failure of US energy corporation Enron in 2001,[28] the corporate world finally moved towards embedding tougher corporate governance measures on top of pre-existing corporations law and directors' duty provisions. In Australia, the Australian Securities Exchange (now ASX) convened the Corporate Governance Council (comprised of members from the heart of the financial and legal world). After wide consultation, the ASX devised a list of principles and recommendations known as the ASX Corporate Governance Council Principles and Recommendations ('ASX Principles') for use by directors of companies listed on the ASX.[29]

The ASX Principles are a set of eight Principles and Recommendations recorded in a forty page user-friendly document that explains in practical terms what directors of public corporations can do to facilitate and practise good governance in the day-to-day running of their organisation.[30] Topics range from guidance on conducting background checks for incoming directors and executives, determining board composition, judging the independence of directors, safeguarding the integrity of corporate reports and creating a diversity policy, to maintaining a good reputation in the wider community and providing guidelines for risk management and director remuneration[31]. The Principles retain a level of flexibility in that they accommodate the varying needs of corporations but set a standard separate from financial performance against which publicly listed corporations can be measured. Not all publicly listed corporations are equal and neither are their responses to the ASX Principles, but every company listed on the ASX is required under ASX Listing Rule 4.10.3 to disclose

> the extent to which the entity has followed the recommendations set by the Council during the reporting period. If the entity has not followed a recommendation for any part of the reporting period, its corporate governance statement must separately identify that recommendation and the period during which it was not followed and state its reasons for not following the recommendation and what (if any) alternative governance practices it adopted in lieu of the recommendation during that period.[32]

Members of the public can read a company's responses to the ASX Principles on its corporate website and make up their own mind as to the sincerity with which a company follows the ASX

[28] Simon Constable, 'How the Enron Scandal Changed American Business Forever', *Time* (online, 2 December 2021) <https://time.com/6125253/enron-scandal-changed-american-business-forever/>.
[29] ASX Corporate Governance Council, 'About the Council', *ASX* (Web Page) <https://www.asx.com.au/about/regulation/asx-corporate-governance-council#:~:text=About%20the%20Council,and%20perspectives%20on%20governance%20issues>.
[30] ASX Corporate Governance Council, 'ASX Corporate Governance Council Principles and Recommendations', *ASX* (Report, February 2019) <https://www.asx.com.au/content/dam/asx/about/corporate-governance-council/cgc-principles-and-recommendations-fourth-edn.pdf>.
[31] Ibid.
[32] Ibid.

Principles. The corporate governance statement provides a window into the company's culture and attitude to governance and provides stakeholders, whether they are prospective investors or potential employees, insights that might otherwise be difficult to ascertain without a relatively prolonged interaction with the company. Culture is an important indicator of an organisation's health and considerable emphasis has been placed on organisational culture in the corporate world in recent years with positive results.

ASX Principle 3 explains that a company's reputation within the community and among its stakeholders is an important measure of a company's value.[33] Principle 3 cites the Ethics Centre's *Managing Culture: A Good Practice Guide*[34], which sets out Edgar Schein's three-layered organisational culture model.[35] This model can be used to detect 'red flags' and diagnose potential problems within an organisation. Schein's model was recently used for a review of company culture at Crown Resorts,[36] which was provided as an exhibit to the Victorian Royal Commission into the Casino Operator and Licence, held to determine Crown Melbourne's suitability to hold a casino licence after money laundering and organised crime links were exposed by the earlier Bergin Report.[37]

The corporate world shares similarities with the legal profession in that they are both heavily regulated but also multi-layered and multi-nodal and are comprised of a large number of firms ranging in size from sole operators to large multinationals. The size and broadness of both these sectors renders them difficult to regulate from a culture perspective. The Australian Securities and Investments Commission, Australia's corporate regulator, and the ASX have a level of control over the culture of public corporations. Stringent and heavily regulated reporting requirements mean that large corporations can be closely monitored, and the public availability of their documents means they also attract public and media scrutiny. However, private corporations and small and family firms, which make up the vast majority of the corporate and business world, are more difficult to regulate and rely largely on staff reporting bad behaviour through courts and tribunals. While these avenues may provide relief for individual workers, they do not necessarily do anything to change an organisation's *culture*.

While governments have attempted to improve the culture of small businesses, political pressure often means that they are limited to regulating culture in larger firms, for example, the Gillard government's *Workplace Gender Equality Act 2012* (Cth) was forced to limit its reporting to firms of one hundred employees and larger.[38] Similarly, the *Modern Slavery Act 2018* (Cth) only applies to organisations with more than $100 million turnover. In contrast, the

[33] Ibid 16.

[34] 'Managing Culture: A Good Practice Guide' (n 24).

[35] Edgar H Schein, *Organizational Culture and Leadership* (John Wiley & Sons, 1992).

[36] Deloitte Risk Advisory (Deloitte Touche Tohmatsu), *Crown Culture Review: Current State Culture — Final Report* (Report, July 2021) <https://rccol.archive.royalcommission.vic.gov.au/sites/default/files/2021-08/Exhibit%20RC1419%20Deloitte%20Current%20Culture%20Review%20Final%20Report%2C%20July%202021%2C%20tendered%202%20August%202021%20.pdf>.

[37] See *Royal Commission into the Casino Operator and Licence* (Final Report, October 2021) vol.1, 124-27.

[38] See Mark Humphrey-Jenner, 'Australia's new pay equality law risks failing women – unless we make this simple fix', *The Conversation* (Web Page, 10 February 2023) <https://theconversation.com/australias-new-pay-equality-law-risks-failing-women-unless-we-make-this-simple-fix-199587>.

Albanese government's positive duty amendments to the *Sex Discrimination Act* now require all Australian businesses and organisations, including law firms, that have obligations under the Act to take reasonable and proportionate measures to eliminate certain sex-based harassment, including collecting data and monitoring and assessing workplace culture:[39] 'Regardless of their size or resources … all organisations that have obligations under the *Sex Discrimination Act* must satisfy the positive duty. This includes sole traders and the self-employed, as well as small, medium and large businesses, and government.'[40]

This marks an important shift in the way culture (at least pertaining to sexual harassment and discrimination) can now be managed across businesses and organisations across Australia. Small firms can no longer disappear under the radar. The size and available resources of individual business have been factored in and there is some flexibility in terms of data collection and implementation methods, but under the new positive duty requirements senior leaders are 'responsible for ensuring that appropriate measures for preventing and responding to relevant unlawful conduct are developed, recorded in writing, communicated to workers and implemented…and regularly review the effectiveness of these measures and update workers.'[41]

IV TOLERATING BAD BEHAVIOUR – A WILL TO IGNORANCE?

There is an argument that generational change will take care of inequalities in the workplace (sometimes couched as the "old White man" problem).[42] However, despite decades of affirmative action, the *2024 SGD Gender Index* has found that gender equality is stalling around the world,[43] and only the Netherlands can be classed as having 'very good' levels of gender equality, with a further twenty three countries, including Australia, being classed as having 'good' levels of gender equality.[44] The remaining 115 countries in the study range from 'fair' (the United States) to 'very poor'. The study notes that 'if current trends continue, global gender equality won't be achieved until the 22nd century'.[45]

Gender stereotyping and inequality also appear to be deeply entrenched within the younger generations. A 2018 study of 4,564 young people aged 14 to 17 across five European countries (including the UK and Norway) found that 41% of British teenage girls surveyed had been

[39] See 'Guidelines for Complying with Positive Duty', *Australia Human Rights Commission* (Web Page, August 2023) 75 <https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf>.

[40] See 'Information Guide Positive Duty under the Sex Discrimination Act 1984 (Cth): Relevant Unlawful Conduct, Drivers, Risk Factors and Impacts', *Australian Human Rights Commission* (Web Page, August 2023) 5 <https://humanrights.gov.au/sites/default/files/2023-08/information_guide_on_the_positive_duty_2023.pdf >.

[41] Ibid.

[42] See eg, Darrell Ehrlich, 'The problem and the solution to old, White men (as told by an aging White man)', *Daily Montanan* (online, 31 March 2022) <https://dailymontanan.com/2022/03/31/the-problem-and-the-solution-of-old-white-men-as-told-by-an-aging-white-man/>.

[43] See '2024 SDG Gender Equality Index', *Equal Measures 2030* (Web Page) <https://equalmeasures2030.org/2024-sdg-gender-index>. 'SGD' refers to the United Nations Sustainable Development Goals. See 'The 17 Goals', *United Nations* (Web Page) <https://sdgs.un.org/goals>.

[44] Ibid.

[45] Ibid.

coerced into sex and other intimate acts by their boyfriends.[46] The study also found that sexting among this age group was a common occurrence. Between 52 and 77% of teenage girls surveyed had received a text message of a sexual nature, and many of them felt pressured to respond in kind.[47]

Universities Australia's 2021 *National Student Safety Survey* found many Australian university students had experienced sexual harassment in their lifetime.

> One in two (48.0%) students had experienced sexual harassment at least once in their lifetime. Female students (62.9%), transgender students (62.8%) and students who were non-binary or identified as another gender (76.8%) were more likely to have experienced sexual harassment in their lifetime than male students (26.0%). In an Australian university context, one in six (16.1%) students had been sexually harassed since starting at university and one in twelve (8.1%) had been sexually harassed in the past 12 months. Female students (10.5%), transgender students (14.7%) and non-binary students (22.4%) were more likely to have had these experiences in a university context in the past 12 months when compared with male students (3.9%).[48]

In a recent piece in *The Conversation* Australian researchers noted a 'disturbing rise in sexist, misogynist behaviour from students in school classrooms. This includes [a number of Australian studies] which show how the extreme views of the "manosphere" (online anti-women and anti-women's empowerment communities) have infiltrated schools"[49] and are filtering through to universities.[50]

During his 2024 election campaign, the then presidential nominee, Donald Trump, shared a post on his social media platform Truth Social of a photograph of Hillary Clinton and the current Democratic presidential nominee, Vice President Kamala Harris captioned, 'Funny how blowjobs impacted both their careers differently'.[51] Trump is seventy-eight years old, and yes, an 'old White man', but his forty year old Vice Presidential nominee JD Vance, a lawyer, former corporal in US Marines and US Senator (and now Vice President), waved the comment away as 'entertainment', preferable, he argued. to being a 'boring old scold'.[52] Vance made his

[46]See Nicky Stanley et al, 'Pornography, Sexual Coercion and Abuse and Sexting in Young People's Intimate Relationships: A European Study' (2016) 33(19) *Journal of Interpersonal Violence* 2919, 2931.
[47] Ibid.
[48] Wendy Heywood et al, 'National Student Safety Survey: Report on the prevalence of sexual harassment and sexual assault among university students in 2021', *Social Research Centre* (Report, 2022) 1 <https://cdn.prod.website-files.com/61c2583e4730c0d5b054b8ab/623ba530bc6676dfcdb1d5dc_2021%20NSSS%20National%20Report.pdf>.
[49] Samantha Schulz, '"They eat snacks during class and swing on chairs": the worrying, sexist behaviour of some young men at uni', *The Conversation* (Web Page, 13 March, 2025) <https://theconversation.com>.
[50] Ibid.
[51] Margaret Hartmann, 'What Trump Said in His Vulgar and Unhinged Truth Social Spree', *New York Magazine* (online, 29 August 2024) <https://nymag.com/intelligencer/article/what-trump-said-vulgar-truth-social-posts.html>.
[52] Hayes Brown, 'Opinion | JD Vance can't explain the "joke"', *Yahoo!News* (Web Page, 3 September 2024) <https://www.yahoo.com/news/opinion-jd-vance-cant-explain-132453972.html>.

own disdain of women clear by using the pejorative term 'childless cat ladies' to describe professional women.[53]

Relying on generational attrition for cultural transformation is unrealistic. As the corporate world has demonstrated, culture in the workplace must be monitored and managed continuously. Neither is abusive behaviour the exclusive domain of old (or young) White men. An increasingly multi-cultural legal profession means entrenched attitudes within different ethnic and religious groups needs to be considered, and the Law Council of Australia's NARS Report found women are also not immune from engaging in bad behaviour, and some respondents reported being abused by women in senior positions.[54]

Sociologist Robert van Krieken describes the difficulties of achieving deep cultural change. He refers to a 'thick' conception of human psychology

> in which human beings are understood as having a relatively stable set of habits and dispositions – what Norbert Elias (2000) and Pierre Bourdieu (1984) refer to as *habitus*—which has emerged in the course of their biography and which drives the individual's conduct as much, if not more so, than the demands and requirements of their immediate organizational context. This is the realm of culture, norms, values in the social world beyond the organization itself, which individual members bring with them and which constitute their normative orientation towards the kinds of indeterminate choices they are daily confronted with.[55]

From a perspective of organisational sociology, van Krieken argues, 'a central problem is the consistency between the forms of behaviour within organizations that are understood as unethical, and those extra-organizational behavioural principles that have in fact become normalized in social life today'.[56] This suggests good behaviour in the workplace may be shallow and performative.[57] Once people leave the workplace, they go back to the habits and behaviours they are used to at home and within their social circles – including habits and behaviours that are reinforced by the media and public spheres they engage with. Transformation takes time and depends on the level of authentic engagement that occurs between organisations and their individual members.

Organisational ethics operate by creating ideal/ised spaces that do not necessarily exist in an employee's world beyond the organisation. To achieve change, organisational and professional norms need to be articulated and enforced through various means, such as repetition, mimesis

---

[53] See Rachel Treisman, 'JD Vance went viral for "cat lady" comments. The centuries-old trope has a long tail', *NPR* (Web Page, 29 July 2024) <https://www.npr.org/2024/07/29/nx-s1-5055616/jd-vance-childless-cat-lady-history>.

[54] 'Not all perpetrators of bullying and intimidation were senior men. A number of participants reported bullying and intimidation were perpetrated by some senior women in the profession.' See 'National Attrition and Re-engagement Study (NARS) Factsheet', *Law Council of Australia* (Web Page, 2013) <https://lawcouncil.au/publicassets/13667976-d32b-e711-80d2-005056be66b1/NARS_FactSheets.pdf>:

[55] See Robert van Krieken, 'The Ethics of Corporate Legal Personality' in Stewart Clegg and Carl Rhodes (eds), *Management Ethics: Contemporary Contexts* (Routledge, 2006) 77.

[56] See van Krieken (n 4) 1392.

[57] See Thibaut Bardon, Emmanuel Josserand and Florence Villesèche, 'Beyond nostalgia: Identity work in corporate alumni networks' (2014) 68(4) *Human Relations* 583 for an insightful discussion of Goffmanian performativity among corporate alumni and what organisations can do to foster authentic engagement.

(mimicry) and coercion (threatened or actual consequences).[58] Institutional change theorists argue that managed properly, both the organisation and its members will eventually undergo a transformation, which will then begin to shift behaviour across the wider industry as organisations and their members,[59] and begin to reproduce behaviours they see as giving their peers a competitive advantage.

V THE ROLE OF THE LAW SCHOOL

In 2021/2022, I conducted a small research project for UTS Law as part of UTS's First and Further Year project's Belonging at UTS study.[60] Part of the brief was to design a set of questions and conduct focus groups with current UTS Law students and understand their level of engagement and sense of belonging within the Faculty, the university and the legal profession as a whole. Students described a perceived lack of diversity and inclusiveness within the legal profession and expressed a sense of disconnection with the profession itself. Even final year students who had participated in mentoring programmes and mooting or worked at law firms and barristers' chambers felt little connection with the profession as a whole.

Studies have found that the lack of connection with the wider profession also extends to new lawyers. The longer a lawyer has been in practice, the more likely they are to be satisfied with their work-life.[61] However, the attrition rate of young lawyers means that many lawyers will never make it that far,[62] and those who manage to stay on tend to shape the profession according to their own preferences, rather the needs of younger practitioners.

For universities, the issue is complicated by the fact that law schools rely on firms for scholarships, mentoring and internships, as well as advertising and fundraising, and may not always be willing to call out bad behaviour within the legal industry. There are often close and mutually beneficial relationships between faculties, firms, practitioners and members of the judiciary. In a recent article on *Robodebt*, Robert van Krieken describes the Nietzschean concept of 'a will to ignorance'.[63] According to van Krieken, '[a]s Moore and Tumin argued in 1949, "ignorance must be viewed not simply as a passive or dysfunctional condition, but as an active and often positive element in operating structures and relations"'.[64] Van Krieken explains that ignorance is such an entrenched cultural phenomenon that it even has its own specialist study area,

[58] See Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 (2) *American Sociological Review* 147.
[59] In the legal profession, this would include individual practitioners, who compete against each other for jobs, promotions and reputation.
[60] See Alyssa Percy, 'Building belonging in 2022', *UTS LX Blog* (11 November 2021) <https://lx.uts.edu.au/blog/2021/11/11/building-belonging-in-2022/>.
[61] This is interesting because it is also at odds with studies that have found increased incidences of depression, alcoholism and drug use in older practitioners, which is why much more research into the profession is needed.
[62] 'Women, junior lawyers most likely to leave firms', *Lawyers' Weekly* (Web Page, 17 February 2023) <https://www.lawyersweekly.com.au/careers/36691-women-junior-lawyers-most-likely-to-leave-firms>.
[63] Van Krieken (n 4) 1385.
[64] Ibid.

> '[A]gnotology' is the scientific study of 'agnosis' – the generation of ignorance – aiming to explore how ignorance is produced or maintained in diverse settings, through mechanisms such as deliberate or inadvertent neglect, secrecy, and suppression, document destruction, unquestioned tradition, and myriad forms of inherent (or avoidable) culture-political selectivity…[65]

However, law schools with leaders who understand the growing importance of good governance and sustainability, including the increasing emphasis placed on reputation.[66]will appreciate that taking a stand against bad behaviour, even if it causes initial discomfort, can provide a competitive edge, not just within the crowded universities sector, but for the reputation of the legal profession, and Australia's reputation internationally. Along with teaching students to write letters and briefs, law schools must prepare their students for the realities of legal practice.

Most faculties already have alumni associations but could do more to create community. They could deepen their alumni programmes to be more than mechanisms for fundraising and marketing, and instead use them to encourage and promote cultures of authenticity. Rather than mainly focusing on showcasing 'successful' alumni, faculties could talk deeply with alumni who are struggling and work harder to understand the challenges and barriers within the profession and try to understand what faculties themselves could do to tackle some of these systemic issues as a 'champion' for their students.[67]

Faculties could offer counselling and access to legal advice for their alumni, and where necessary, create outreach programmes with law firms. Just because lawyers practise law does not mean they are equipped to deal with their own problems. By doing this, faculties would take a *stewardship* approach towards their alumni. By providing safe harbour for their former students, they would signal to law firms and practitioners that their employees are not alone or unsupported. In order to do this, law schools would need to acknowledge culture problems within the profession, including firms and people they have regular (and friendly) dealings with. Cultural change will require the courage to face issues head on,[68] and a willingness to have difficult conversations, including the ability to admit to students that the legal profession is far from perfect.

Emma Jones, whose work explores the role of emotion and well-being in legal education and the legal profession, argues that

> the traditional dominance of the doctrinal tradition has…led to a continuing disregard for, and suppression of, emotions within undergraduate legal education in England and Wales. Its focus on 'so-called "science"'…demonstrates the desire of the law to preserve reason in its purest

[65] Ibid.

[66] See Principle 3 of the 'ASX Corporate Governance Council Principles and Recommendations' (n 30) 16.

[67] See especially Bardon, Josserand and Villesèche (n 58).

[68] Michaela Whitbourn and Pallavi Singhal, 'Charles Waterstreet banned from advertising for staff on University of Sydney website', *The Sydney Morning Herald* (online, 26 October 2017) <https://www.smh.com.au/national/nsw/charles-waterstreet-banned-from-advertising-for-staff-on-university-of-sydney-website-20171026-gz8oh2.html>.

> form without attempting to sully it with the messy and complicated tapestry of emotions to which it perceives itself as bringing order and rationality.[69]

While some law schools do take a critical view of the legal landscape and attempt to address issues within the profession through mentoring and other programmes, these programmes are not universal, and problems within the legal profession still tend to be vague and unclaimed 'shapeless' problems *over there* for *someone else* to solve. All too often students enter the profession unaware of the breadth and depth of the issues they are likely to face and find themselves stranded without tools or support structures.

Law schools produce lawyers and therefore control the supply of labour to law firms. That function gives them a great deal of leverage, but they need to use it. Stefan Hoejmose, Jens Roehrich and Johanne Grosvold argue:

> Failure to manage the supply chain in a socially and environmentally responsible manner can have significant implications for a firm's corporate reputation. Responsible supply chain management which encapsulates socially (e.g. child labour, working conditions, human rights) and/or environmentally (e.g. waste management, recycling, use of natural resources) responsible supply chain issues can help protect a company's reputation by shielding the firm from negative media attention and consumer boycotts […] Conversely, corporate reputations are jeopardized by irresponsible supply chain practices which can [harm a business] and damage [its] brands and the trust [it has] established.[70]

While a student's credentials are relatively transparent (transcripts, CVs, letters of recommendation), a law firm's cultural credentials are less obvious. Larger firms may advertise their workplace culture awards, but unless employees speak out, it is difficult to know what a firm's *real* culture is. In a 2022 interview with *LSJ Online* Kate Galloway noted

> there are long-running cultural problems around working hours in the legal industry, such as 'presenteeism'. [In big law firms]…overwork is often most ingrained…a 'don't ask don't tell' situation in many cases. Based on what I'm told by a lot of junior lawyers who go in there is that they have constraints around working after 6pm, so they already have strategies to stop their grad lawyers, their junior staff, from working late unless they have partner permission…But what happens is there is a tacit understanding that you will stay to get the work done regardless. You can have a right to disconnect and you can have an explicit office policy that says you're not permitted to work after this time, but those junior lawyers who produce the work—that they have to work all of that extra time for – are the ones that get rewarded.[71]

If law firms were required to report on matters such as staff turnover as many ASX listed corporations do via their sustainability reports, prospective employees would have a clearer

[69] Emma Jones, 'Transforming legal education through emotions' (2018) 38 *Legal Studies* 450.
[70] Stefan U Hoejmose, Jens K Roehrich and Johanne Grosvold, 'Is doing more doing better? The relationship between responsible supply chain management and corporate reputation' (2014) 43(1) *Industrial Marketing Management* 77, 77.
[71] See Sam McKeith, 'Curbing lawyer burnout', *LSJ Online* (Web Page, 22 March 2024) <https://lsj.com.au/articles/curbing-lawyer-burnout/>.

picture of the organisation. In an industry where burnout is a problem,[72] staff working hours could be something firms are required to report and be audited on.

Law faculties may not realise they're part of larger supply chains, but they are. In 2017 the University of Sydney banned barrister Charles Waterstreet from advertising for employees on the university's website after sexual harassment claims were raised by students during job interviews with Waterstreet. *New Matilda* published an article titled, 'Students To Protest Sydney Uni Funnelling Young Women Into Charlie's Web'.[73] It may not have been explicitly *labelled* a supply chain issue in the article, but as the headline suggests, in substance, that is *exactly* what it was. In this case, the university responded to student protests, but it is well documented that university students are vulnerable to workplace exploitation on many levels and university jobs boards could do more to vet advertisers.

VI A SUSTAINABILITY/SUPPLY CHAIN APPROACH AS PART OF TRANSITION PEDAGOGIES – PRACTICAL STEPS AND RECOMMENDATIONS

The UTS Belonging in Law and First and Further Year Experience projects discussed earlier were inspired by the work of Sally Kift as part of what are widely known as *transition pedagogies*. While Kift tends to focus on transitions *within* university degrees and has a particular focus on first year students, she explains that transitions can take any form required. What determines the form and direction of these transitions is student need:

> Transitions can be vertical (e.g., from preparatory education to pre-orientation, to orientation, *onto* first year, *onto* later years, *onto* final year and then *onto* work and/or further learning). They can be horizontal (e.g., across concurrent subjects, between co-existing senses of self, across diverse ways of knowing). Transitions can be timebound and transient (e.g., point-in-time orientation, moving between course years). They can be cumulative and/ or iterative, for example: thresholds of increasing success…across formal, informal and non-formal learning; up- and re-skilling in response to changing labour market demands. Transitions can occur within and between sectors and providers: between vocational education and [higher education]; between formal macro-qualifications and shorter-form micro credentials…the goal should be to create smooth transitions and better outcomes for students across a diversifying system…[74]

By managing the transition of graduates from law school *into* the legal profession (or *onto* work according to Kift) and then *within* the legal profession, law schools will not only create better outcomes for graduates but can take the increasingly inclusive cultures percolating within the better law schools and extend that diversity and support through the law graduate's practice experience. Rather than abandon students to their fates once they have completed their degrees (as happens now), law schools can become key players in community building across the

---

[72] See Justice Jayne Jagot (Minds Count Annual Lecture, 2023) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/jagotj/Minds%20Count%20annual%20lecture%20-%20Jagot%20J.pdf>.

[73] Anna Hush, 'Students to Protest Sydney Uni Funnelling Young Women into Charlie's Web', *New Matilda* (We Page, 26 October 2017) <https://newmatilda.com/2017/10/26/students-to-protest-sydney-uni-funnelling-young-women-into-charlie-waterstreets-web/>.

[74] Sally Kift, 'Chapter 10: Transition pedagogy for 21st-century student success' in Chi Baik and Ella R Kahu (eds), *Research Handbook on the Student Experience in Higher Education* (Edward Elgar Publishing, 2023) 132, 136.

profession and with regular alumni contact and support services, help usher in change on a profession-wide level.

By working with other universities, firms, student groups and key regulators within the legal profession, law schools could help develop an ASX Principles-style framework with mandatory reporting requirements for firms of all sizes. Responses could be recorded in an ASX Principles-style governance statement signed by the principals and made publicly available on firms' websites. In the case of very small firms or individual practitioners. without a website. governance statements could be made available on request via email. This would create a level of uniformity across the profession in terms of cultural expectations and force change akin to the federal government's positive duty obligations. New lawyers would be better protected, and law schools would send a clear message to the profession that people are watching and checking.

Mandatory reporting could have the further flow-on effect of creating an external support network for the principals of smaller firms who are themselves often isolated, or so focused on keeping the business afloat that they neglect workplace culture. State law societies or the Law Council of Australia could be alerted and assist and provide support for principals and firms. In time, good culture would be something all firms would strive for, and eventually compete with each other for and in doing so, they would transform the legal profession.

Deans, academics and budgets are already stretched. Law schools, therefore, need to act strategically by using and developing tools already available. Kift takes a stakeholder analysis approach,[75] and while her framework is geared towards an intra-faculty analysis, her model could easily be 'upcycled' to a broader industry-based stakeholder analysis using pre-existing ESG (Environmental, Social, Governance)/sustainability frameworks and tools and because ESG is an ethical approach, harm minimisation, inclusion and diversity lie at its heart. There is no need to reinvent the wheel.

The Global Reporting Initiative has established a set of free-of-charge material topic 'standards' that cover environmental, social, economic and governance impacts, and are used by companies around the world for sustainability reporting.[76] Some of these material topics would be immediately applicable to the legal profession, while others would need to be modified or developed for specific industry requirements, but this is not difficult.

As lawyers and legal academics, we are stakeholders in the legal profession, and have a vested interest in the improvement and modernisation of *our* profession. As society's problems become increasingly complex, good lawyers will be essential, and society will need them to stay in the profession.

The nature of higher education has also changed. Law students expect more than acquisition of technical knowledge. An ESG-based supply chain approach would remove the piecemeal

[75] See also R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press, 2010) for a detailed discussion of stakeholder theory.
[76] 'GRI Standards', *Global Reporting Initiative* (Web Page) <https://www.globalreporting.org/standards/>.

approach to cultural change and problem-solving currently adopted within the legal profession, and allow for a more wholistic, streamlined, tried and tested, practical approach with measurable solutions. The tools already exist, they just need to be taken up and applied.

NGARA: EMBEDDING TRUTH-TELLING ABOUT THE LEGAL SYSTEM IN THE SYDNEY LAW SCHOOL CURRICULUM

Louisa Di Bartolomeo, Louise Boon-Kuo, Fady Aoun and Elisa Arcioni*

ABSTRACT

Truth-telling is core to the University of Sydney's commitment to promoting equality and diversity. Sydney Law School seeks to take responsibility for the system that we work within through facilitating truth-telling by listening to and learning from Aboriginal and Torres Strait Islander knowledges and voices about the legal system in legal education. This article traces the journey towards the School's adoption of a new Course Learning Outcome, with the aim that all law graduates will listen, hear and think about 'Aboriginal and Torres Strait Islander Peoples' knowledges and perspectives, including the ongoing effects of colonisation, and ... the cultural specificity of law'.

* Sydney Law School, The University of Sydney.

I INTRODUCTION

The University of Sydney Law School's work on curriculum development has been shaped by the long history of Aboriginal and Torres Strait Islander peoples' calls for truth-telling and recent commitments towards truth-telling at the University and Law School. In 2025 the Law School is implementing a renewed curriculum, including a new course learning outcome for Bachelor of Laws and Juris Doctor students. Seven out of 17 compulsory units in each course are incorporating material to ensure all law graduates will listen, hear, and think about 'Aboriginal and Torres Strait Islander Peoples' knowledges and perspectives, including the ongoing effects of colonisation, and ... the cultural specificity of law'.

The formal School-wide work towards embedding truth-telling in the curriculum has spanned over a decade. It has been an iterative process which has included two curriculum reviews; involved leading Aboriginal and Torres Strait Islander and non-Indigenous scholars, practitioners, and students; necessitated learning by educators; the incorporation of Aboriginal and Torres Strait Islander knowledges, perspectives, lived experience and other relevant content in stand-alone units; seen the establishment of an annual Wingarra Djuraliyin Public Lecture on Indigenous Peoples and Law; the establishment of an academic advisor role for Aboriginal and Torres Strait Islander students; appointment of a Professor of Practice and First Nations Practitioners in Residence; First Nations Postgraduate Fellow and more. The current work is not complete. It is and will continue to be an ongoing journey.

This article documents some of the key institutional steps and regulatory changes that have been instrumental in arriving at a School-wide agreement to adopt this new course learning outcome and its naming. This institutional and regulatory history confirms literature contending that while individual 'buy-in' is necessary for respectful and intellectually rigorous teaching approaches, a top-down approach 'almost guarantees adequate levels of acceptance and support'.[1] The Sydney Law School experience suggests that a combination of both is required. This article also traces a subtle shift in the expression of institutional priorities from cultural competence to truth-telling, which we argue has been critical to the cultural change needed for effective implementation. This article is structured as follows. First, it outlines the Law School's curriculum review work with respect to embedding Aboriginal and Torres Strait Islander voices over the last decade. Second, it traces the development of a new course learning outcome ('CLO') as part of a wider curriculum review. Third, it focuses on the naming of the CLO in the Gadi Language as expression of both means and ends of the curriculum review. This article concludes with an outline of next steps in this process.

II OVERVIEW OF DEVELOPMENTS AT SYDNEY LAW SCHOOL

A *Indigenous Cultural Competence*

The current work on truth-telling at Sydney Law School continues the long history of this practice by educators in individual units, and broader institutional strategies, one key point in that history being the University's Aboriginal and Torres Strait Islander higher education strategy *Wingara Mura – Bunga Barrabugu* in 2012.[2] This strategy did not use the language of 'truth-telling'. While the strategy engaged with the substantive meaning of truth-telling by identifying shared individual and institutional responsibilities about how to interpret, talk about and engage with history in Australia honestly, respectfully and competently, the need to educate students and staff of the truth of Australia's history was primarily operationalised across the University under the banner of 'cultural competence'.

Cultural competence was a key initiative to support capability across different elements of *Wingara Mura-Bunga Barrabugu*. This emphasis reflected the discourse in higher education at the time, as expressed in the 2011 Universities Australia *National Best Practice Framework for Indigenous Cultural Competency*.[3] The *Wingara Mura-Bunga Barrabugu* strategy led to the establishment of the National Centre for Cultural Competence,[4] the inclusion of cultural

---

[1] Universities Australia, *Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities* (October 2011) 42, 82, 241; Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program Final Report* (Australian Government Department of Education and Training, 2019) 19.

[2] 'Thinking path to make tomorrow': the title and meaning of the strategy (2012–2016) were drawn from Aboriginal language of the Sydney region, based on the various works of Professor Jakelin Troy. The University of Sydney (2012) *Wingara Mura – Bunga Barrabugu The University of Sydney Aboriginal and Torres Strait Islander Integrated Strategy*.

[3] Universities Australia (n 1).

[4] 'National Centre for Cultural Competence', *The University of Sydney* (Web Page) <https://www.sydney.edu.au/nccc/>.

competence as a university-wide graduate quality,[5] and shaped the framing of the Law School's first review in 2014–2015 of the Bachelor of Laws ('LLB') and Juris Doctor ('JD') curricula content relating to Aboriginal and Torres Strait Islander knowledges and perspectives.

Sydney Law School's Wingara Mura Committee undertook a 'Cultural Competence Curriculum Review' together with student research assistants and guidance from Professor Asmi Wood (The Australian National University), a leading Indigenous scholar with ancestry from the Western Torres Strait.[6] Thirty five academics across 13 compulsory subjects and 34 electives in the LLB and JD programs were interviewed to gauge existing coverage of Aboriginal and Torres Strait Islander knowledges and perspectives and cultural competence, gather ideas for new content and approaches, and identify assistance required to further develop the curriculum.

Drawing on literature and critique of cultural competence,[7] the Law School's internal report noted the danger of regarding 'cultural competence' as implemented through merely awareness of one's own cultural subjectivity, its potential failure to engage an understanding of power, and its potential to essentialise culture and operate as a new form of racism. The emancipatory potential for 'cultural competence' as a vehicle to achieve anti-racist aims in education depends very much on how it is deployed in institutional projects.[8] The Law School's report emphasised that to avoid cultural competence being implicated in practices of domination, the curriculum must engage with the historical and ongoing processes of racism and settler colonialism that continue to shape cross-cultural relations.

There was widespread support by academics in the Law School for a coordinated and integrated approach towards developing cultural competence in the LLB and JD programs, yet there were also concerns. Staff concerns reflected those documented in law schools across Australia including the need to avoid tokenism; that the curriculum was already busy; and perceptions of a lack of academic expertise.[9] The report concluded that it was premature to map the embedding of such content as staff required learning before this stage. Following this review, Sydney Law School facilitated educators' learning journeys through expert seminars,

[5] University of Sydney Graduate quality: 'Cultural Competence is the ability to actively, ethically, respectfully, and successfully engage across and between cultures. In the Australian context, this includes and celebrates Aboriginal and Torres Strait Islander cultures, knowledge systems, and a mature understanding of contemporary issues.' See 'Graduate Qualities', *The University of Sydney* (Web Page) <https://www.sydney.edu.au/students/graduate-qualities.html>.

[6] The Wingara Mura Committee, of which the first two authors were members, implemented a range of initiatives from *Wingara Mura-Bunga Barrabugu* (n 2) at Sydney Law School relating to students, staff, research, education and community engagement.

[7] See eg, Gordon Pon, 'Cultural competency as new racism: an ontology of forgetting' (2009) 20(1) *Journal of Progressive Human Services* 59; Izumi Sakamoto, 'An anti-oppressive approach to cultural competence' (2007) 24(1) *Canadian Social Work Review* 105; and more recently, Asmi Wood and Nicole Watson, 'Mirror, Mirror on the Wall, Who Is the Fairest of Them All?' (2018) 28(2) *Legal Education Review* 1, 10.

[8] Bronwyn Fredericks and Debbie Bargallie, 'An Indigenous Australian Cultural Competence Course: Talking Culture, Race and Power' in Jack Frawley, Gabrielle Russell and Juanita Sherwood (eds), *Cultural Competence and the Higher Education Sector Australian Perspectives, Policies and Practice* (Springer, 2020) 305.

[9] Burns, Lee Hong and Wood (n 1) 18.

supported the development of content for units, and staff participation in cultural competence training.

Cultural competence was embedded as a CLO for graduates of the LLB and JD programs in 2017 and provides a snapshot of the outcome of debate at the time. The CLO was broadly framed to foster collaboration across diverse groups and included specific reference to Aboriginal and Torres Strait Islander peoples' culture, traditions and beliefs and the contemporary and historical ways in which law interacts with issues of race (see Figure 1). It did not encapsulate the need to examine the historical and ongoing processes of racism and colonisation that continue to shape cross-cultural relations, which had been identified in the Sydney Law School Cultural Competence Curriculum Review Report. Staff concerns about the rigour of assessing student's cultural competence persisted. While individual compulsory and elective units incorporated Aboriginal and Torres Strait Islander knowledges, perspectives and experiences, such perspectives and the development of cultural competence were not embedded systematically across the LLB and JD programs.

B *Towards a Framework of Truth-Telling*

Following this period, several significant institutional initiatives accentuated the importance of incorporating Aboriginal and Torres Strait Islander knowledges, perspectives and engagement with Anglo-Australian law. As explored further below, pluralism was part of the institutional conversation regarding the curriculum review with a strategic choice taken to begin modestly while allowing for change over time. Specifically, the Law School was not yet in a position to comprehensively teach First Law without establishing relevant relationships with Indigenous authority-holders. In 2019, the final report by the *Indigenous Cultural Competency for Legal Academics Program* was released. The report included historical and ongoing Indigenous experiences of colonisation and lived experiences of Aboriginal and Torres Strait Islander peoples, and content in the Priestley-11 relating to Indigenous peoples in the list of the knowledge, attitude and skills needed to be embedded into the law curriculum to develop student Indigenous cultural competence.[10] In 2020 the Council of Australian Law Deans ('CALD') amended the Australian Law School Standards for program certification to include the requirement that curriculum seek to develop 'knowledge and understanding of … Aboriginal and Torres Strait Islander perspectives on and intersections with the law'.[11] CALD introduced these standards in response to the Universities Australia *Indigenous Strategy 2017–2020.*[12] Following these broader initiatives, the University launched its *One Sydney, Many People Strategy 2021–2024*, which included a focus on supporting the embedding of Aboriginal and Torres Strait Islander values, culture and teachings in curriculum.[13] The Strategy identified Sydney Law School as one of three parts of the University to commence

[10] Ibid 21.
[11] Council of Australian Law Deans, *Australian Law Standards with Guidance Notes*, (2020) Standard 2.3.3(a), 17.
[12] Universities Australia, *Indigenous Strategy 2017–2020* (2017).
[13] 'One Sydney, Many People Strategy 2021–2024', *The University of Sydney* (Web Page, 2021) <https://www.sydney.edu.au/content/dam/corporate/documents/about-us/values-and-visions/one-sydney-many-people-digital.pdf>.

this work and ushered in funding support for Law academics.[14] While funding is a strong indicia of institutional commitment and helps address concerns about mere tokenism, it is in and of itself not sufficient to ensure the Strategy's full implementation. It is nevertheless promising and establishes a foundation for deeper commitment at the institutional level through ongoing support.

At the same time, truth-telling was becoming more prominent in institutional discourse within the University, in higher education around the world, and within community. In February 2024 the Law School adopted a strategic direction of Truth Telling and Responsibility.[15] This occurred as part of the development of the most recent Law School strategy, and following a series of organic and iterative discussions post-Voice referendum regarding how to continue to contribute to reform. Truth-telling was identified as a constructive focus for action amongst Law School academic and professional staff. Before then, in 2021, the Law School committed to the *Uluru Statement from the Heart* which called for Truth as well as Voice and Treaty.[16] Law School staff, including then-First Nations Practitioner-in-Residence Teela Reid (now Professor of Practice in the Law School) and Professor Elisa Arcioni, Associate Dean (Indigenous Strategy and Services), were involved in education campaigns for the referendum within and outside the academy.[17] This movement towards truth-telling is supported by the embedding of truth-telling in the wider university framework, most recently in the *Anti-Racism Statement*, adopted by University leadership in 2023, which includes committing to a truth-telling process about how the University has been complicit with and engaged in racial ideas and practices and the impact this has had on Aboriginal and Torres Strait Islander peoples.[18] There is cross-University work proceeding under a Truth Telling Working Group. This intersects with the University's Indigenous strategy which seeks to 'appropriately embed Aboriginal and Torres Strait Islander peoples' cultural identity, knowledge and world views into our work, research and education',[19] and which is incorporated into the *2032 Strategy*, that notes: 'Recognising and valuing Aboriginal and Torres Strait Islander knowledges is what is needed for us all to belong here now, no matter how or when we came.'[20] This approach has been bolstered by the University of Sydney's recent *Indigenisation of Curricula* circular, which encourages non-Indigenous staff to experience the potentially 'unsettling and liberating'

[14] Ibid 16.
[15]The University of Sydney Law School Strategic Plan 2024–25', *The University of Sydney* (Web Page, 2024) 4 <https://www.sydney.edu.au/content/dam/corporate/documents/sydney-law-school/about/law-school-strategy/sydney-law-school-strategic-plan-2024_25.pdf>.
[16] 'Uluru Statement from the Heart' (First Nations National Constitutional Convention, 26 May 2017). <https://ulurustatement.org/the-statement/>.
[17] This was facilitated by a dedicated Law School website highlighting the expertise across the Law School. The position of First Nations Practitioner in Residence has since been continued – with two practitioners appointed in 2025. These positions, and the Professor of Practice appointment, form part of the Law School's ongoing attempts to implement a sustainable Indigenous employment strategy.
[18] 'Promoting cultural diversity and combatting racism', *The University of Sydney* (Web Page) <https://www.sydney.edu.au/about-us/vision-and-values/diversity/cultural-diversity.html>.
[19] 'One Sydney, Many People Strategy 2021–2024' (n 13) 7.
[20] 'Sydney in 2032 Strategy', *The University of Sydney* (Web Page, 2022) 7 <https://www.sydney.edu.au/content/dam/corporate/documents/about-us/strategy-2032/strategic-plan-2032-final.pdf>.

practices of 'reflecting on their understanding, attitude, and behaviours with the aim of identifying how these may be reflected in and projected onto curricula whilst simultaneously unpacking how their actions may be complicit in maintaining disparate outcomes and "gaps"'.[21]

The University sector across Australia and internationally is involved in similar projects. Most recently, the University of Melbourne released its book *Dhoombak Goobgoowana: A History of Indigenous Australia and the University of Melbourne*.[22] Internationally, investigations of universities' complicity in relation to slavery,[23] and racism against Indigenous peoples extending to genocide and ethnic cleansing, have been highlighted.[24]

The professional environment of law and government is also replete with examples of truth-telling.[25] Internationally there is the Truth and Reconciliation Commission in South Africa post-apartheid,[26] the Truth and Reconciliation Commission in Canada that found that the residential school system that forcibly separated Aboriginal children from their families was a form of cultural genocide,[27] and more recently a Truth and Reconciliation Commission in Maine, USA, which addressed the history of forced removal of Wabanaki children.[28] Within Australia, a contemporary process is the Yoorrook Justice Commission occurring in Victoria, set up by agreement between the First Peoples' Assembly of Victoria and the Victorian Government.[29] Yoorrook is a Wemba Wemba/Wamba Wamba word for truth.[30] The most well-

[21] 'Indigenisation of Curricula: Background, Implementation and Next Steps', *The University of Sydney* (2025) 7.
[22] Ross L Jones et al, *A History of Indigenous Australia and the University of Melbourne - Volume 1: Truth* (Melbourne University Press, 2024).
[23] Hannah Capella, 'Glasgow University's "bold" move to pay back slave trade profits', BBC (Web Page, 23 August 2019) <https://www.bbc.com/news/uk-scotland-glasgow-west-49435041>.
[24] See eg, Dan Kraker and Melissa Olson, 'Researchers reveal U's painful past with Minnesota's Indigenous people', MPR News (Web Page, 11 April 2023) <https://www.mprnews.org/story/2023/04/11/university-minnesota-indigenous-people-mistreatment-history-report>.
[25] Purai Global Indigenous History Centre, 'Truth Telling: A history of Australian Indigenous Education in New South Wales', *The University of Newcastle* (Web Page) <https://www.newcastle.edu.au/research/centre/purai/truth-telling-a-history-of-australian-indigenous-education-in-new-south-wales>.
[26] *Promotion of National Unity and Reconciliation Act 34 of 1995* (South Africa).
[27] *Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future* (Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2015) 1.
[28] 'Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission', *Wabanaki REACH* (Web Page) <https://www.wabanakireach.org/truth_reconciliation>.
[29] On 12 May 2021, the Governor of Victoria signed the letters patent, as required under the Inquiries Act 2014 (Vic) to legally establish the Yoorrook Justice Commission as a Royal Commission and set its Terms of Reference. The Commission operates independently of both the Victorian government and the First Peoples Assembly. It is democratically elected and in its second term.
[30] First Peoples' Assembly of Victoria, "Tyerri Yoo-rrook" (Seed of truth) Report to the Yoo-rrook Justice Commission from the First Peoples' Assembly of Victoria (June 2021) 4.

known national processes are the *Royal Commission into Aboriginal Deaths in Custody*[31] and the *Inquiry Into the Separation of Aboriginal Children From Their Families*.[32]

The truth-telling framework can serve as an anchor for conversations with colleagues about the ethics of teaching. It can be used to push back against presumptions that the curriculum as it stands is culturally neutral. Legal educators make choices about what is privileged, communicated, and assessed in the way they design and conduct teaching. Students are taught that honesty and candour are fundamental ethical duties owed by legal professionals and essential characteristics related to fitness to practise law.[33] Truth-telling has been labelled 'the linchpin of academic trust' and a key academic duty (the counterpart to academic freedom) owed by educators to students, the university and the public.[34] CALD has recognised the duty of Australian law schools 'in full partnership with First Nations peoples' to expose, critique and remedy 'all forms of institutionalised injustice', acknowledging the role that Australian legal education has played in supporting 'the law's systemic discrimination and structural bias against First Nations peoples'.[35]

Importantly, the truth-telling framework has shifted education discussions from merely assessing students' cross-cultural competence to addressing Professor Asmi Wood's provocative challenge of exposing the legal fictions that legitimised colonisation and the consequences of those fictions.[36] The Law School has thus been discussing the responsibilities of legal educators to ensure students learn the reality of British law's imposition onto unceded lands and waters, and the lack of recognition of Indigenous legal sovereignty, as the basis for what is now the Australian legal system. Doing this does not fracture the legal system[37] – it exposes tensions, opens fora for debate, and leads to consideration of what could change and how.

Within the Law School curricula two components of truth-telling can currently be pursued.[38] First, supporting and facilitating Indigenous truth-telling, that is, ensuring that Aboriginal and Torres Strait Islander voices are heard and respected. This includes integrating scholarly and other learning materials, including materials on legal pluralism, and a proactive commitment

[31] 1987-1991, which culminated in the Royal Commission into Aboriginal Deaths in Custody. See 'Royal Commission into Aboriginal Deaths in Custody', *National Archives of Australia* (Web Page) <https://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.
[32] 1995-1997, which culminated in 'Bringing Them Home Report (1997)', *Australian Human Rights Commission* <https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>. This Report considered similar policies as outlined in the Truth and Reconciliation Commissions held in Maine and Canada noted above.
[33] New South Wales Government, Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 rule 4. We also engage students in critical analysis of how these duties manifest in practice regarding truth-telling in the Anglo-Australian legal system.
[34] Donald Kennedy, *Academic Duty* (Harvard University Press, 1997) 210.
[35] 'CALD Statement on Racism and Law Schools', *CALD* (Web Page, 31 January 2024) <https://cald.asn.au/first-nations-peoples/>.
[36] Asmi Wood, 'Unmasking Indigenous Invisibility: Reforming and Decolonising the Pedagogy of Terra Nullius' in Foluke I Adebisi, Suhraiya Jivraj, and Ntina Tzouvala (eds), *Decolonisation, Anti-Racism, and Legal Pedagogy: Strategies, successes and challenges* (Routledge, 2024) 149.
[37] See use of the metaphor of such fracturing by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29.
[38] Wood (n 36) 116-17.

to anti-racist teaching practices to ensure students truly listen and engage.[39] In 2024 the Law School developed and adopted a language guide for teaching and learning based on the recognition that language in Anglo-Australian law has had a powerful social effect in presenting dehumanising harm as neutral or even positive. Aside from guidance in respectful terminology and addressing inappropriate language in the classroom, the guide encourages educators to explain the truth-telling purpose of not altering learning materials which may include outdated and offensive language. It also provides links to examples which formalise terminology expectations for students via assessment rubrics.[40]

Secondly, another important component of truth telling within the Law School is embracing the individual and collective responsibility of Law School staff to learn about, share and speak the truth of the Anglo-Australian legal system that we are teaching. This can be complex and involves deciding how to find and describe truth; the significance of perspective and positioning; the challenges of hearing, listening and acting; sensitivities and concern about speaking for or taking the space of Aboriginal and Torres Strait Islander people; and making mistakes. However, if non-Indigenous legal academics stay silent by deliberately withdrawing their effort and expertise, they may inadvertently contribute towards 'invisibilising' the struggle and thus place all the responsibility on Aboriginal and Torres Strait Islander people. Put bluntly, non-Indigenous legal educators have a responsibility to act.

There has been an institutional shift in how the challenge in curriculum has been framed, and this shift has supported greater clarity and confidence in changes needed in legal education. The shift can be understood as being from one that centres students' journeys towards cultural competence (which incorporates historical and contemporary context as an element of knowledge development) to the present one of centring truth-telling (which incorporates and develops students' sense of their own cultural subjectivity, and in law the cultural subjectivity of Anglo-Australian law). This shift has provided part of the setting for the second curriculum review which has led to the adoption of the new CLOs in the LLB and JD programs.

[39] See eg, Suhraiya Jivra, Towards Anti-racist Legal pedagogy: A resource', University of Kent (Report, 2020) <https://research.kent.ac.uk/decolonising-law-schools/wp-content/uploads/sites/866/2020/09/Towards-Anti-racist-Legal-Pedagogy-A-Resource.pdf>.

[40] Tamika Worrell, Noeleen Lumby and Innez Haua, 'Including Indigenous perspectives across the curriculum: Practical advice and guidance to ensure you have the skills and resources to support meaningful inclusion of Indigenous perspectives in your unit', *Teche* (Web Page) <https://teche.mq.edu.au/2024/02/including-indigenous-perspectives-across-the-curriculum/>.

III INSTITUTIONAL AND REGULATORY SETTINGS OF THE CURRICULUM REVIEW

A *The Story of Course Learning Outcome ('CLO') Ngara*

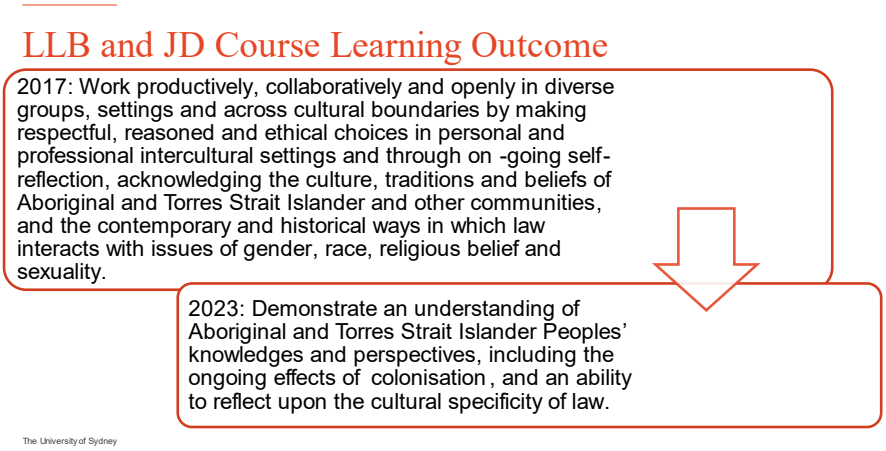


Figure 1: Bachelor of Laws and Juris Doctor Course Learning Outcomes

Appropriately embedding Aboriginal and Torres Strait Islander peoples' knowledges, histories and cultures in teaching is part of the 'Ngara' component of the University's *One Sydney, Many People* strategy.[41] The Law School's Indigenous Services and Strategy Committee, the successor of the Wingara Mura Committee, proposed a five-year process for further embedding Indigenous knowledges into the curriculum in 2021. The three-year 2022–2024 LLB and JD Curriculum Review and Renewal at Sydney Law School provided the opportunity for systemic integration. The review covered all elements of the compulsory units in the LLB and JD programs, including the scaffolded development of legal research skills and structural changes to the progression of core units.

The embedding of Aboriginal and Torres Strait Islander knowledges, perspectives and experiences was only one aspect of the Law School curriculum review. This approach has prevented the conceptualisation of Indigenous content curricula changes as peripheral and instead has integrated these discussions into the core focus of what knowledge and skills require deliberate development across the curricula. In March 2023, the Law School Board endorsed the embedding of Aboriginal and Torres Strait Islander Peoples' laws and/or knowledges and/or perspectives and/or cultures into some units within the core curriculum of the LLB and the JD award courses. This resulted from information gathered in the first stage of the review, which involved benchmarking against other Australian law schools, multiple stakeholder consultations, and extensive consultation with academic staff; and the second stage of consultation on revising course learning outcomes for the LLB and JD across the new curriculum.

[41] 'One Sydney, Many People Strategy 2021–2024' (n 13) 16.

Two months later, in May 2023, the Law School Board resolved that graduates of the LLB must demonstrate: 'An understanding of Aboriginal and Torres Strait Islander Peoples' knowledges and perspectives, including the ongoing effects of colonisation, and an ability to reflect upon the cultural specificity of law.'

The Law School adopted a similar course learning outcome for the JD.[42]

Course learning outcomes must be able to be measured and assessed in the units adopting that CLO,[43] but do not limit what is taught. The Law School recognised that developing curricula in which student understanding of First Law could be taught and assessed necessitates a thorough process of appropriate consultation, collaboration, and attention to issues of cultural authority. The Law School's intention manifest through the phrase 'an ability to reflect upon the cultural specificity of law' in the CLO is that students gain an understanding of the fact that Australia is a legally pluralistic environment, that First Law exists and continues to be practised, and that law in Australia is more than Anglo-Australian law. 'Aboriginal and Torres Strait Islander Peoples' knowledges' is intended to be broad enough to include principles of Aboriginal culture,[44] First Law, as well as Aboriginal and Torres Strait Islander peoples' knowledge of racism and colonialism.[45] Some units may involve educators or guests who have cultural authority to teach First Law. The use of the term 'knowledges' to include First Law is not intended to challenge the reality of First Law as law, but rather to encompass a concept that is more than law, and to reflect that the Law School cannot guarantee that students engage with such learning at this stage. Embedding 'Aboriginal and Torres Strait Islander Peoples' perspectives' engages students with Aboriginal and Torres Strait Islander peoples' scholarship, policy commentary, and lived experiences. 'The ongoing effects of colonisation' are centred in the curriculum because of the historical and current role of law and legal processes in ongoing forms of colonisation.

Ngara invites educators and students to take a critical and reflective approach to law. These curricula changes have involved elements of a 'top-down' and 'bottom-up' approach. The top-down approach is usually understood to mean one where Indigenisation of curricula is *mandated* from above. This is not the approach the University of Sydney has taken. However, the Law School Board's endorsement of the new CLO *in effect* mandated that at least some units take steps to embed Aboriginal and Torres Strait Islander knowledges and cultural reflexivity into the curricula. No unit was required to undertake this, as it was believed that involving hesitant educators could harm learning and jeopardise classroom safety. Seven of 17

[42] The JD CLO adopts similar phrasing: 'An advanced understanding of Aboriginal and Torres Strait Islander Peoples' knowledges and perspectives, including the ongoing effects of colonisation, and an ability to reflect upon the cultural specificity of law.'

[43] See eg, Richard Johnstone, 'Whole-of-Curriculum Design in Law' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011) 2, 11.

[44] Identified by the ICCLAP Consultation Workshop which developed a list of the knowledge, attitudes and skills that need to be embedded into law curriculum to foster ICC in students, including key principles of Aboriginal culture: The Indigenous Cultural Competency for Legal Academics Program, Consultation Workshop Report (ICCLAP, 2016).

[45] Burns, Lee Hong and Wood (n 1) 4; Martin Nakata, 'Indigenous Knowledge and the Cultural Interface: underlying issues at the intersection of knowledge and information systems' (2002) 28(5-6) *IFLA Journal* 281.

core law units self-nominated to embed content and assessment in the first iteration of the new curricula commencing in 2025, with other units including content but not necessarily constructively aligned assessment. All educators must now recognise that the self-nominated units are contributing to this School-adopted course level learning. Further, the institutionalisation of commitments through measures such as CLOs means that the continuity and consistency of teaching of Indigenous knowledges and skills is not solely reliant on individual advocates.

As discussed above, the Law School's whole-of-course review avoided positioning Indigenous content curricula change as peripheral. Relatedly, the Law School decision to undertake a three-year whole of course curriculum review meant that discussions about the resources needed for curriculum changes were expected and planned. The Associate Dean (Education) Professor Nicole Graham, who drove the curriculum review, applied for central university grants to enable support for educators involved in this curriculum development. The support allowed for seminars and discussions by leading Aboriginal and Torres Strait Islander, Indigenous, and non-Indigenous legal scholars, and some marking relief. The Law School introduced the role of CLO Leads. The Ngara Leads – being the first three authors of this article – are supporting colleagues embedding the CLO in core units. The Leads have consolidated resources recommended by experts that provide guidance regarding developing and evaluating learning materials – including the AIATSIS Guide,[46] Indigenous Cultural and Intellectual Property Protocol for Curriculum,[47] anti-racist teaching and cultural competence professional development opportunities, and Aboriginal and Torres Strait Islander perspectives on legal education. They have also shared unit of study specific lists of annotated sources for consideration in the spirit of developing a community of practice around Ngara, but on the understanding that Ngara leads are not subject matter specialists.

B *Naming Ngara*

As the CLOs came to be used, institutional documents started to use abbreviations. There was a strong desire to employ a word that would speak to the intention of the learning outcome with concerns that a mere contraction to 'Indigenous' would be reductive and counterproductive to the stated aims.

'Ngara' captures the intent: it is a Gadi word from the language of the Sydney basin, which means 'listen, hear, think'.[48] The word Ngara has been used by the University of Sydney in other contexts, but it was important to engage in consultation on whether its use in the context of the Sydney Law School curriculum would be appropriate. There was widespread support from consultations with Aboriginal and Torres Strait Islander and non-Indigenous staff and students at the Law School through committees and leadership groups, as well as Professor Jakelin Troy, Director, Aboriginal and Torres Strait Islander Research Portfolio, and Professor

[46] *AIATSIS Guide to evaluating and selecting education resources* (AIATSIS, 2022).
[47] Danika Wright et al, *Indigenous Cultural and Intellectual Property Protocol for Curriculum* (The University of Sydney Business School, 2023).
[48] Jakelin Troy, *The Sydney Language* (AIATSIS, 1994) 74.

Jennifer Barrett, Pro-Vice-Chancellor Indigenous (Academic). Sydney Law School Board endorsed the renaming of the CLO as Ngara in May 2024, followed by approval and noting by the University's Graduate and Undergraduate Studies Committees in July 2024.

Naming the CLO in language is not only the means, it also serves the substantive ends of this course learning outcome. Quinnell, Troy and Poll describe the revival of the Sydney language 'a proactive declaration of the strong living presence of the Gadigal people in the University's community'.[49] Naming the CLO Ngara anchors the learning outcomes in Aboriginal and Torres Strait Islander peoples' cultural strength and resilience. For readers unfamiliar with the first Sydney language, the use of Gadi words inserts a reminder of one's own role as a learner, the plurality of language (and thus law) of this Country, and potentially encourages cultural humility on the part of non-Indigenous scholars and educators.

Law School specific language guidance for educators has been developed as discussed above, including an explanation of the meaning and significance of naming Ngara in Gadi. Interactive learning activities that address Ngara are also being developed. Such activities are expected to lead to discussions about the language history of Sydney, which will in turn deepen an understanding that our city-based campus is on Country.

IV CONCLUSION

This article has provided an overview of the work being undertaken at Sydney Law School to embed Aboriginal and Torres Strait Islander knowledges and perspectives into the core law curriculum. This is the story of how the Law School has reached the current position, a consensus to vertically integrate Ngara in the LLB and JD programs through the course learning outcome named in the Gadi language. The impact of institutional initiatives supporting grassroots work is significant. The key strategies, documents and regulatory requirements that were crucial in institutionalising support for School-wide curricula reform and change in 2024 have been outlined. There has been a shift in framing from cultural competence to truth-telling, a move that has invited productive conversations about educators' responsibilities. 2025 is the first year of this new embedded curriculum. There is much yet to be done which will require development of relationships with Indigenous community and authority holders, educator commitment and effort, and further financial support. The design work engaged in prior to teaching first year units embedding Ngara concerns the development of unit learning outcomes, learning activities and aligned assessment. That first iteration will then be reviewed and adjusted to continually improve the embedding of Aboriginal and Torres Strait Islander knowledges and perspectives in the Sydney Law School programs. Beyond the unit-specific work, broader aspirations include continuing to attract and support Aboriginal and Torres Strait Islander colleagues and students, and expanding the number of units embedding Ngara, thereby transforming legal education and legal practice into the future. Alongside these aspirations is

[49] Roseanne Quinnell, Jakelin Troy and Matthew Poll, 'The Sydney Language on Our Campuses and in Our Curriculum' in Jack Frawley, Gabrielle Russell and Juanita Sherwood (eds), *Cultural Competence and the Higher Education Sector Australian Perspectives, Policies and Practice* (Springer, 2020) 216.

the trajectory of expanding the implementation of the CLO towards the appropriate, and not appropriative, teaching of First Law.

ARE HISTORICAL PERPETUAL LEASES ON MĀORI OWNED LAND (NATIVE RESERVES) A BASIS FOR CURRENTLY ENFORCEABLE FIDUCIARY OBLIGATIONS?

DARA DIMITROV*

ABSTRACT

Colonial perpetual leases over what were once native reserves continue to trouble the New Zealand government. The colonial Public Trust Office was tasked with managing and administering Māori property affairs, with a focus on the administration of the native reserves. However, if the perpetual leases continue to be viewed through the contractual lens, relief for the Māori landowners will not be forthcoming. Therefore, examining the rationale for imposing fiduciary duties upon the colonial Public Trust Office is essential. Where traditional legal fiduciary literature explores the onerous proscriptive duties that bind persons occupying a fiduciary position, this article establishes that the extensive statutory role assigned to colonial Public Trust officers in managing the native reserves for their Māori beneficiaries created a fiduciary relationship. Moreover, this article shows that, when the colonial Public Trust Office exercised its powers, this often led to conflicts of interest with their Māori beneficiaries.

I INTRODUCTION

The issue of whether the colonial Public Trust Office owed a fiduciary obligation to Māori arising from the colonial perpetual leases held over Māori-owned native reserves remains mostly unanswered. While several judgements explore fiduciary obligations owed to Māori by the Crown, these mainly consider fiduciary obligations arising from specific Acts,[1] directly from the Treaty of Waitangi (the Crown-indigenous relationship[2]) or from the legal perspective of attempting to make the Crown a trustee of either a constructive trust or an express trust.[3] This article proposes that the duty arises from the colonial Public Trustee's conduct in administering the native reserves, an argument that has yet to be judicially considered.

II BACKGROUND

New Zealand has a significant number of historical perpetual leases, most of which were established during the colonial settlement in the 1800s. These leases, primarily related to

* Te Piringa, Faculty of Law, University of Waikato
Email: ddimitro@waikato.ac.nz
ORCID: 0000-0002-7324-7528

[1] See eg, *Paki (No 2) v Attorney-General* [2014] NZSC 118, where the Supreme Court rejected fiduciary obligations.
[2] These judgements are found mainly in Waitangi Tribunal records.
[3] See eg, *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17.

farming areas, also exist in many of New Zealand's major townships and cities. The connection between the perpetual leases and the colonial settlement policy of establishing native reserves is less well-known.[4] The Public Trust Office had legal authority over the native reserves from 1882 and played a crucial role in developing the perpetual leases over those reserves. For the most part, the Public Trust Office administered the native reserves without the consent of the Māori landowners.

Historical perpetual leases continue to exist in modern New Zealand mainly because the Torrens land registration system and contract law protect them. Furthermore, it is unlikely that New Zealand's government will undertake a statutory law change anytime soon to address the issues of perpetual leases and the harm caused to Māori landowners. Thus, the equitable remedy of breach of fiduciary duty should be available to the Māori landowners against the Crown.

The creation of the perpetual leases served the interests of colonial settlement to the detriment of the Māori landowners. This article will show that the British colonial office and subsequent colonial (New Zealand) governments considered Māori, the indigenous people of New Zealand, incapable of managing their affairs. Ultimately, the Public Trust Office became guardians (trustees) of the native reserves. Through the lens of equity, this article explores whether imposing a fiduciary duty upon the Public Trust Office is appropriate, given the long-term impact the colonial perpetual leases have had and continue to have on the Māori landowners.

Implicit in the original formation of the perpetual leases was the fiduciary obligation owed to Māori, firstly by the colonial governors and later by the colonial Public Trust Office. This was reiterated when the relationship between the Public Trust Office and Māori was acknowledged as a fiduciary relationship where the Public Trust Office was required to deal with all native reserves on the 'principles of sincerity, justice and good faith'.[5] The Public Trust Office was responsible for ensuring that the native reserves provided the best possible financial return for Māori. The Public Trust Office duties were partly imposed by statute but derived principally from the New Zealand colonial government and British settlement policies. However, the Public Trust Office's decision to use perpetual leases means that Māori landowners may never reclaim their land for occupation or use, as the land is leased to tenants on a permanent basis. To date, many Māori landowners receive peppercorn rents despite the numerous government enquiries into the leases.[6] None has resulted in any meaningful remedy for the Māori landowners.

It is noted that courts have often criticised a government's conduct in its relationships with its indigenous peoples; however, they are reluctant to find that a fiduciary relationship exists. This has undoubtedly been the case in New Zealand. To date, only one *iwi* (tribe) has managed to

[4] This article is limited to a consideration of the native reserves.
[5] This was an established tenet set out by Lord Normandy in his instructions to Captain Hobson (the co-author of the Treaty of Waitangi) in 1839, immediately before the Treaty was signed.
[6] Commissions of inquiry occurred in 1890, 1891, 1906, 1912, 1913, 1927, 1934, 1948, 1965, and 1975.

establish a fiduciary relationship,[7] and while considered a landmark case at the time in 2017, there is no likelihood of that case creating a general-purpose fiduciary application to all historical Crown-Māori interactions. Instead, it emphasised that a fiduciary relationship is case-by-case and situation-specific.[8]

The courts have been more likely to settle on 'higher trust' which could not be enforced by the courts.[9] Often termed a 'political trust', indigenous peoples find themselves without a legal remedy to right historical wrongs. However, it is argued that when examining the historical dealings between the Crown and Māori from an equity perspective, the Crown's position can only be seen as that of a fiduciary.

It is noted that The Waitangi Tribunal has explored the appropriateness of imposing fiduciary duties on the colonial government in several claims.[10] It is also noted that formal administration of the native reserves by the Public Trust Office was the most beneficial option available at that time, despite the existence of other forms of administration.[11] However, this article deals specifically with the perpetual leases on native reserves administered by the Public Trust Office. Thus, it examines the fiduciary relationship between the Public Trust Office and Māori.

III NATIVE RESERVES AND SETTLERS

Māori already had a pre-colonial land tenure system. However, it was quite different from the traditional legal system of the colonisers and had little relevance to the general doctrines of English common law. Māori land tenure was based on collective ownership and strongly linked to their familial connections, the land's generational occupation, and usage of the resources found on the land. The *rangatira* (leaders) of the *iwi* had the authority to allocate the resources among the tribal members, and so it was not unusual for one *hapu* (family group) to access the land for their gardens while another hapu had access to the rivers and streams. Moreover, Māori's link to the land was more than a property right. For Māori, the land is integral to their culture, social fabric, and spiritual well-being. Therefore, parts of the land were sacred for Māori (for example, their *urupa* (burial grounds), and they had rules about how the land was managed and used.[12]

Often, Māori were actively involved in the sale and purchase of their land prior to colonisation.[13] However, after the arrival of the settlers, land transactions escalated.[14] Indeed, the settlers' desire for land was both insatiable and difficult to manage. Edward Said's

[7] See *Wakatū* (n 3).
[8] See Alex Frame, 'The fiduciary duties of the Crown to Māori: Will the Canadian remedy travel?' (2005) 13 *Waikato Law Review* 70; Leonard Rotman, *Parallel Paths: Fiduciary doctrine and the crown-native relationships in Canada* (University of Toronto Press, 1996) 155.
[9] See eg, *Tito v Waddell (No 2)* [1977] I Ch 106.
[10] See eg, 'Muriwhenua Land Report – WAI 45' (Waitangi Tribunal, 1997).
[11] Ralph Johnson, 'The trust administration of Māori reserves, 1840-1913' (Waitangi Tribunal, 1997) 100-101.
[12] Roland L Jellicoe, *The New Zealand Company's Native Reserves* (Wellington, 1930) 15.
[13] Paul Moon, 'Thomas Shepherd and the first New Zealand Company' (2013) 47(1) *New Zealand Journal of History* 22.
[14] Bruce Kercher, 'Informal Land Titles: "Snowden v Baker" (1844)' (2010) 41(3) *Victoria University of Wellington Law Review* 605.

observations of the British settlers were that 'to think about distant places, to colonise them, to populate or depopulate them: all of this occurs on, about, or because of land.' *The actual geographical possession of land is what the empire, in the final analysis, is all about.*[15] Thus, the efficacy of taking Māori land was critical to the colony's success. However, Māori believed, as *tangata whenua* (people of the land), they would never be permanently separated from their lands. Instead, they thought they were providing the settlers the right to live on the land and use the land.[16]

The creation of New Zealand's native reserves began with the New Zealand Company (and its various incarnations).[17] Without Crown or colonial support, the New Zealand Company began selling land to settlers before the settlers had even left Britain. Without a formal land registration system to record the property transactions, the New Zealand Company created the land titles themselves. (Years later, the Company claimed it owned 20 million acres of land but subsequent land commission investigations found this claim to be incorrect.) Regardless, the New Zealand Company had a native policy, which meant that every township settlement would have land set aside for the local Māori. Once the land was purchased from Māori, the New Zealand Company sold parcel land lots to settlers – each lot usually consisted of one acre in the new settlement town and 100 acres of agricultural land (both sections were undeveloped).[18] Māori received a parcel lot for every ten parcel lots sold. These parcels became widely known as the tenths but were also considered the native reserves. All marae, traditional gardens and burial grounds were automatically excluded from the tenths, although this did not always occur. The native reserves were vested in the colonial government when New Zealand became a British colony in 1840. Māori often surrendered the native reserves to the colonial government of the day for administration and management. Before 1882, various colonial entities, such as Commissioners of Land and management boards, had oversight over the native reserves.

It is important to note that in some cases, the boundaries of native reserves were unclear or inaccurately marked on maps, leading to discrepancies with the colonial maps and planning documents.[19] Furthermore, subsequent case law has established that in some instances, while the documentation indicates the native reserves would be set aside for Māori, in practice, the native reserves were not identified nor set aside.[20] It remains unclear how many native reserves were established by the New Zealand Company and how many were withdrawn from the tenths scheme for endowments, Crown land grants, or to meet the obligations owed to arriving

[15] Edward W Said, *Culture and Imperialism* (Vintage, 1993) 78.
[16] Stuart Banner, 'Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand' (2000-01) 34(1) *Law & Society Review* 47.
[17] With the commercial success of the East India Company still fresh in the minds of business-minded men, a group of ambitious men in London established the New Zealand Company. There were three prior incarnations of the New Zealand Company – the first was the New Zealand Company (1825), the second was the New Zealand Association (1837), and the third was the New Zealand Colonisation Company (1838). The New Zealand Company was a joint stock company formed in 1839. By 1850, the New Zealand Company closed its doors.
[18] This was not always the case; some districts had one acre of township land, an accommodation block for Māori (50 acres – often called occupation reserves) and a rural section of 150 acres. This occurred in the Nelson settlement.
[19] Rosemarie Tonk. 'The first New Zealand land commissions, 1840-1845' (MA Thesis, University of Canterbury, 1996) 302.
[20] This was established in *Wakatū* (n 3).

settlers.[21] Consequently, the colonial government struggled to identify native reserves, whether the settler occupants had legal title to the land and whether a native reserve was set aside for Māori occupation. For example, the Land Commissioner, in his report about the native reserves in Southland to the Lands Commissioner of Otago, said 'the state of the records in the Land Office relation to the Native Reserves is so defective that I have been at great difficulty in ascertaining the actual state of the legal position of many Reserves, and my Report is therefore not so entirely satisfactory as I could desire'.[22] Regardless, despite the introduction of the Torrens Land System (the initial property land registry in New Zealand was based on the English deed system) in 1870, many of the native reserves failed to be entered into the land registry and were also commonly omitted from the previous deed system.

It is also important to note that the creation of the native reserves continued after the New Zealand Company was liquidated as a matter of colonial government policy. The colonial government, acting under Acting Governor Shortland, pledged to Māori to fulfil the tenths policy of the New Zealand Company and continue to create native reserves for Māori.[23]

Initially, the colonial government attempted to manage the native reserves on a regional basis.[24] However, this occurred ad hoc. Any attempts to identify and follow the chains of titles for the native reserves were frustrated by a lack of consistent record-keeping.[25] In some cases, there were no records kept at all, and the native reserves found in Auckland are an example of this. Disputes over land transactions with Māori were not uncommon, and many of them continue to cause significant challenges even to this day. For example, as noted earlier, land of particular significance to Māori was not meant to be included in the native reserves. However, the land commissioners often ignored this when awarding land to the settlers.[26]

Furthermore, there was the issue of who legally 'owned' the native reserves. This was challenged in *R v Fitzherbert*,[27] a contentious case that determined the native reserves were demesne lands of the colonial government. Although this case focuses on the tribes of Te Ātiawa/Taranaki's legal action to have a Crown land grant returned to them, the ruling from this case had long-lasting implications for the native reserves and Māori.[28]

To complicate matters further, subsequent colonial governments were tasked with trying to provide a legal definition of a 'native reserve'. This was important because only land legally defined as a native reserve could come under the authority of the colonial Public Trust Office. So, while the first attempt at a definition is found in the *Native Reserves Act 1873* (NZ), this Act was never implemented. A definition was subsequently included in the amended *Native*

[21] See *Tito v Waddell* (n 9)
[22] William H Cutten, 'Chief Commissioner (1858)', *Parliamentary Papers* (Report, 2024) <https://paperspast.natlib.govt.nz/parliamentary/appendix-to-the-journals-of-the-house-of-representatives/1858/I/432>.
[23] 'Te Whanganui a Tara me ona takiwa; Report on the Wellington District (WAI 145)' (Waitangi Tribunal, 2003) 137.
[24] See *Tito v Waddell* (n 9)
[25] See Johnson (n 11) 10.
[26] Stephen Quinn, 'Report on: The Wellington Tenths Reserve Lands' (Waitangi Tribunal, 1995).
[27] *R v Fitzherbert* (1872) 2 NZCAR 143.
[28] See Quinn (n 26).

Reserves Act 1882 (NZ). The amendment meant that the definition could capture any land deemed native-reserved land.[29]

The idea of the native reserves may have initially been attractive to the colonial government as a way of providing protections for Māori, especially because the British colonisers assumed that Māori were incapable of managing their lands. This resulted in a series of administrative bodies that had oversight of the native reserves. However, this did not always result in an equitable outcome for either the settlers or Māori, so the land commissioners and other administrative bodies were abolished and replaced with the Public Trust Office. The prevailing belief at the time was that the Public Trust Office would be better placed to administer Māori land, and Māori would have a reliable income that would grow over time.[30] In reality, these beliefs were never fulfilled because the growing land law legislation favoured the lessees and consequently restricted any income that could go to Māori.[31]

IV THE COLONIAL PUBLIC TRUST OFFICE

Established by the *Public Trust Office Act 1872* (NZ), the Public Trust Office was a government department for over 125 years.[32] The colonial Public Trustee duties initially focused on providing trusteeship protections for minors, wives (women had few legal rights in colonial New Zealand) and those who were mentally incapable of looking after themselves.[33] The Board of Advice, otherwise more widely known as the Public Trust Office Board, determined whether a Public Trust officer was the most suitable person to deal with an estate. In practice, the first Public Trust Office had regional officers (Public Trust officers) across the country – with the intention that a local officer would be better able to handle property due to familiarity with the area. On the enactment of the *Public Trust Act 1872* (NZ), there was never any intention for the Public Trust to manage Māori affairs. However, this changed within the following years. In the case of the native reserves, the reserves were vested in the Public Trust Office by the colonial government by the 1882 Act. The Māori landowners of each reserve were named as the beneficiaries.

However, identifying the Māori landowners of each native reserve was not always straightforward, and thus, the Public Trust officer would apply to the Native Land Court to determine who the landowners were. Nevertheless, each legislative introduction or amendment defined the nature and extent of the powers the colonial Public Trust officers could exercise over the native reserves. Consequently, the colonial Public Trust Office was tasked with the historic responsibility of protecting Māori's private property rights by guarding the interests of Māori against the incursion of voracious colonial settlers seeking land.

[29] See Jellicoe (n 12) 79.
[30] See Johnson (n 11) 104.
[31] Hilary Mitchell and John Mitchell, 'The native tenth reserves', *The Prow* (Web Page, 2020) <https://www.theprow.org.nz/maori/the-native-tenths-reserves/>.
[32] The Public Trust Office became an autonomous Crown Entity in 2002.
[33] EJ Trevelyan et al, 'The Public Trustee in India, New Zealand, Australia, and England' (1916) 16(2) *Journal of the Society of Comparative Legislation* 110.

However, the colonial government's primary focus was on the development of New Zealand so that townships would be established while, at the same time, productive farms were established. To this end, the *Native Reserves Act* (and its subsequent amendments) gave the colonial Public Trust Office the authority to exchange, lease or sell the native reserves without consultation with the Māori landowners.[34]

By the 1880s, it was clear that the colonial government controlled the colonial Public Trust Office, as the decisions of the Public Board closely mirrored those of the Executive.[35] An example of this is the *West Coast Settlement Reserves Act 1881* (NZ) which demonstrated that the colonial Public Trust officer acted to benefit Māori beneficiaries but simultaneously promoted land settlement. Moreover, the colonial Public Trust officers had the authority to determine and assess whether the native reserve lands were suitable for resettlement [by settlers] based on whether Māori had left the land vacant or unimproved. Based on that assessment, the colonial Public Trust officers often granted perpetual leases for the native reserves based on their evaluations.

From this perspective, the role and functions of the colonial Public Trust Office make it easier to establish a fiduciary relationship between Māori and the colonial government compared to other jurisdictions, such as Canada and Australia. This is mainly because it was explicitly expressed in documents published by the colonial Public Trust Office, colonial politicians (both British and New Zealanders) and historical [policy] documents. Justice Glazebrook reiterated this finding in the *Wakatū* case. However, where traditional legal literature explores the onerous proscriptive duties that bind persons occupying a fiduciary position of the 'profit' rule (the fiduciary must not make personally profit by virtue of the position) and the 'conflict' rule (the fiduciary must not place themselves in a position where the duty to the principal is in conflict with the other interests of the fiduciary)[36]; the profit rule does apply in this case. Notably, this article will establish that the broad statutory role imposed on the colonial Public Trust officers to promote the development of colonial New Zealand led to conflicts with the interests of the Māori beneficiaries when they exercised their powers.

So, while traditional legal literature and case law have imposed strict, onerous proscriptive fiduciary duties on other colonial governments, few, if any, have explored the notion of conflict of interest the colonial Public Trust Office found itself in. Therefore, examining the rationale for imposing fiduciary duties upon the colonial Public Trust Office is essential.

V FIDUCIARY RELATIONSHIP

Traditionally, parties in a fiduciary relationship are based on trust and confidence.[37] Founded in common law, it imposes duties on individuals who have agreed to act for another, whether

[34] This was initially established by the *Native Land Act 1873* (NZ) but was consolidated under the *Public Revenues Act 1877* (NZ).
[35] See Johnson (n 11) 90.
[36] John McCamus, 'Prometheus unbound: Fiduciary obligation in the Supreme Court of Canada' (1997) 28(1) *Canadian Business Law Journal* 104.
[37] Tamar Frankel, 'Toward Universal Fiduciary Principles' (2013) 39(2) *Queen's Law Journal* 391.

explicitly or implicitly.[38] The fiduciary has agreed to undertakings [responsibilities] that require the fiduciary to act in a particular way.[39] It is also an arrangement rooted in equity rather than a proprietary right. Lord Millet said: 'A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.'[40]

In its broadest sense, fiduciary relationships are identified by the beneficiary's vulnerability to the fiduciary's power.[41] Thus, the fundamental core fiduciary duty is always acting in the beneficiary's best interests, which demands a duty of care from the fiduciary. More importantly, the duty of care is not derived from the fiduciary's position; rather, it arises from the fiduciary's undertakings.[42] Furthermore, a fiduciary's undertakings are distinct from those found in a contract, even if contractual duties may overlap with fiduciary duties.[43] Notably, it is worth emphasising that the courts have found limits on the reach of fiduciary duties by typically examining the nature of the fiduciary's undertakings.[44] In *Goldcorp,* the Privy Council emphasised that being party to a contract does not necessarily imply that fiduciary duties are also owed; the parties are already obliged to honestly and conscientiously so as to perform the contract as promised. Instead, 'the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself'.[45]

The legal literature also recognises that holding a government, or its agents, to fiduciary standards analogous to those found in private law, such as trusts, has been the subject of much scholarly debate, which has notably focused on the conflict and incompatibility between private-law fiduciary norms with the structure of public law norms.[46] Government officials have always had legal powers (authority) that impact the public when used. From this perspective, many scholars argue that creating and using statutory powers, while resulting in the public's vulnerability, does not establish a fiduciary relationship.

In addition, case law establishes that the judiciary is reluctant to act as a constraint on political discretion when fiduciary doctrine is used as a workaround for political morality.[47] Political discretion usually sits within the public law instrument of judicial review (and, by default, constitutional law) and is beyond this article's scope. Furthermore, determining whether politics are grounded in moral considerations is also beyond the scope of this article, even

[38] See McCamus (n 36).
[39] Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Mon-fiduciary Duties* (Hart Publishing, 2010) 33.
[40] *Mothew v Bristol & West Building Society* [1998] Ch 1 at 18 per Lord Millett.
[41] Consideration of the rules against making a profit is beyond the scope of this article.
[42] James Edelman, 'The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21.
[43] Tamar Frankel, *Fiduciary Law* (Oxford University Press, 2011) 212.
[44] See McCamus (n 36).
[45] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98.
[46] Seth Davis, 'The false promise of fiduciary government' (2014) 89(3) *Notre Dame Law Review* 1145.
[47] See Conaglen (n 39).

though it is acknowledged that political power determines how a nation's resources are distributed (or not).[48]

In contrast, other scholars argue that a fiduciary relationship is a good fit despite the public law norms because government officeholders owe obligations that are analogous to those fiduciary obligations found in private law.[49] Galoob and Leib determined that if one focuses on the substance of fiduciary norms in the government space, three structural features are apparent.[50] These are adapted and discussed next.

Firstly, a public officeholder's deliberation should be shaped by pursuing the objects which ground the authority wielded. To do anything else is to fail to live up to the fiduciary norm of duty of care and loyalty. In this context, deliberation-sensitive thinking forms the attitude required of the public law norm and governs the behaviour of the public officer. This requires the public officer to be aware of their authority's objectives and carefully exercise the authority within the constraints of those objectives. Therefore, the success or breach of a public officer's exercise of power is based on whether the practical deliberations were appropriate and, by default, conformed with the fiduciary norm of duty of care.

Secondly, Galoob and Leib argue that conscientiousness is necessary to live up to the norm of 'good faith' and fits well with compliance. Therefore, although performance motivation may drive decision-making, the public officer's actions must meet the standards of correctness, and thus, any actions must be for the right reasons. At the same time, the authors argue that conscientiousness is also subject to the 'wrong kinds of reasons' problem.[51] A public officer is vulnerable to the wrong kinds of reasons problem when illicit or irrelevant reasons motivate the officer to act or deliberate in a certain way. Therefore, although the public officer deliberated and acted as required, their resultant actions are outside the reasonable fiduciary norm of acting in good faith.

Finally, Galoob and Lieb argue that public officers must be robust in all ways, as fiduciary norms demand. This is especially true because situations can change, and as a result, responsibilities change (the authors call this an updating requirement*).* This requires the public officer to monitor changes and modify their actions to align with the fiduciary norm of loyalty. For example, following a customary practice at odds with a statutory objective, even if considered a public good.

To summarise the above analysis, there is good reason to establish a fiduciary relationship between the colonial Public Trust Office and its Māori beneficiaries. The *Public Trust Office Act 1872* (NZ) established the Public Trust Office and its authority. However, it is

[48] Dorothy Emmet. 'Political Morality' in Dorothy Emmet (ed), *The Moral Prism* (Palgrave Macmillan, 1979). 18.
[49] David Guerrero, 'Looking for democracy in fiduciary government. Historical notes on an unsettled relationship (ca. 1520-1650)' (2020) 81 *Daimon: Revista Internacional de Filosofía* 19.
[50] Ethan J Leib and Stephen R Galoob, 'Fiduciary Political Theory: A Critique' (2015-2016) 125(7) *Yale Law Journal* 1820.
[51] For an argument that engaging in a negative activity remains detrimental even if a reward is received for doing so, see Mark Schroeder, 'Value and the Right Kind of Reason' (2010) 5 *Oxford Studies of Metaethics* 25.

acknowledged that the Public Trust officers had to be aware of many other acts and subsequent amendments while in their roles.

Regardless of the many Acts and amendments that applied, the Public Trust officers had a traditional guardianship role, which included the affairs of Māori. As an autonomous entity of the Crown, it was empowered to make decisions that impacted its beneficiaries independent of any government policy or interference. Therefore, any decision-making concerning the affairs of Māori, particularly the native reserves, should have been deliberate because the statute required the officers to be aware of the statute's objectives. Moreover, the decisions should have met the standard of correctness, and therefore, the Public Trust officers should have been making decisions for the right kind of reasons. This tasked the Public Trust officers to ignore irrelevant considerations when deciding on the property affairs of Māori (especially the native reserves). The Public Trust officers should not have been taking into consideration the objectives of the colonial Executive. Finally, the Public Trust officers used the perpetual leases over the native reserves as part of their customary practices, which was at odds with the statute's objectives and the best interest of their Māori beneficiaries.

This perspective of fiduciary norms focuses on how the decision-making power was used by the Public Trust Office rather than focusing on institutional arrangements (which arguably tend to muddy the waters). However, it is also noted that where no explicit fiduciary relationship exists, the courts have often undertaken a judicial examination of the relationship to find fiduciary obligations owed (frequently termed as a judicial expansion of the principles of fiduciary.[52] For example, the Canadian case of *LAC Minerals v International Corona Resources Ltd* determined that fiduciary obligations could be imposed on a relationship if:

> (1) the fiduciary has scope for the exercise of some discretion or power;
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[53]

The Māori landowners of the native reserves had no authority to overrule the decisions made by the colonial Public Trust Office, yet the decisions made by the colonial Public Trustee officers had an immediate impact on Māori legal interests and standing. This was established in the Sheehan Report,[54] which identified the contracting parties to the perpetual leases on the native reserves as the colonial settlers as lessees and the colonial Public Trust as the lessor. Māori (as beneficiaries) were excluded from the contracts. The Sheehan Report found that although Māori were the legally beneficial owners of the native reserves, they had no legal standing as parties to the perpetual lease contracts. As a result, they had no legal remedies available to them when they wanted to contest the perpetual leases.

[52] Marianna Valverde and Adriel Weaver, *The Crown Wears Many Hats: Canadian Aboriginal Law and the Black-boxing of Empire* (Edinburgh University Press, 2015).
[53] *LAC Minerals v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 27.
[54] Bartholomew Sheehan (Chairman), 'Report of Commission of Inquiry into Māori Reserved Land' (Government Printer, 1975).

Moreover, the colonial Public Trust Office had regional officers across the country, making it an attractive agency for managing and administering the native reserves. This could also explain why the colonial government eventually offloaded all the native reserves to the colonial Public Trust Office with the *Public Revenues Act 1877* (NZ). This Act not only gave the Public Trust officers the authority to legally convey the native reserves, but it also provided the officers with financial management over them. Moreover, the *Native Reserves Act* (NZ) (and its subsequent amendments) gave the Public Trust officers the authority to exchange, lease or sell the native reserves without consulting with the Māori landowners. Section 7 of the Act provides for this sole authority. From this perspective, few checks and balances were ever implemented on how the Public Trust Office exercised its authority despite the protests from the Māori landowners.

Despite the Public Trust Office's statutory requirements to consider the interests of Māori, the Executive pressured it to retain the settlers.[55] The initial 21 or 30-year lease periods offered over the native reserves by the Public Trust Office were considered too short by the settlers; they argued they would be unable to reap the benefits of their labour, so unsurprisingly, many settlers wanted to return to Great Britain. Therefore, the offering of perpetual leases by the Public Trust Office provided a guarantee of tenure for the settlers while, at the same time, it was an effective land law mechanism to attain the objectives of the Executive: to develop New Zealand's townships and agricultural farms. This also demonstrates that the extraneous interests (those of the Executive) interfered with the Public Trust Office's decision-making, a clear breach of the fiduciary norm of the no-conflict rule.

So, while it is generally accepted that a fiduciary has the authority to determine how to promote the best interests of a beneficiary – it is also accepted that the fiduciary is bound to consider relevant considerations over irrelevant ones.[56] However, the interference of conflicting duties or interests is much less discussed or acknowledged in fiduciary literature, especially from a colonial public service perspective.

The modern Public Trust is an autonomous Crown entity and publicises its independence.[57] However, it is doubtful that this was the case during colonial settlement. In several historical reports and land commissions, it is evident that the Public Trust Office did not consult with Māori over the administration of their native reserves. This was established in the Sheehan Report but is also evident in other land commission enquiries. The Public Trust officer's decision-making was primarily based on securing the settlers to New Zealand's regions, which aligned with the objectives of the colonial Executive. These facts alone prove that the Public Trust failed to oversee and protect Māori's property interests (the native reserves) effectively.

[55] Terry Boyd, 'Compensation Model for Leasehold Property Rights of Māori Reserve Land' (Queensland University, 2001) <https://dlc.dlib.indiana.edu/dlcrest/api/core/bitstreams/ed36d551-d511-4c85-82ed-79f1e35be8e3/content>.
[56] Remus Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62(1) *McGill Law Journal* 1.
[57] *Public Trust Act 2001* (NZ).

Colonial Public Trust officers also faced enduring conflicting roles when they exercised their authority. They were supposed to protect Māori's property interests while, at the same time, they acted in the colonial Executive's best interests when the native reserves were placed into perpetual leases; this dual role demonstrates a lack of good faith and shows that the Public Trust's exercise of its powers is relevant and sufficient to illustrate its breach of fiduciary norms.

In cases like *Tito v Waddell*, the Court ruled that when the Crown, as the Executive of the day, administers property as part of its governmental functions, no trust exists. Consequently, there are no fiduciary obligations imposed on the Crown. However, this is not the situation in New Zealand.[58] Whether the colonial Public Trust officers equated the creation of the perpetual leases on the native reserves as an opportunity to exploit Māori's vulnerability is not in question here. Rather, it is evident that the Public Office encountered a conflict of interest while trying to balance the interests of Māori and the Executive.

Furthermore, while traditional fiduciary literature refers to conflict of interest situations where the fiduciary's personal interest and those of the beneficiary usually point in opposite directions.[59] This also does not apply here. The Executive passed legislation that proscribed the creation of perpetual leases, even if the statute was unclear as to whether perpetual leases could or should be used.[60] The failure to properly understand the long-term impact of the Public Trust Office using perpetual leases over native reserve land as a legal model that ultimately informed property law developments in settler New Zealand is notable. Namely, because the use of the perpetual leases over the native reserves met the needs of the Executive of the day rather than those of the Māori landowners. For the most part, the Public Trust Office appears to have held no intention or motivation to defraud Māori of their land when they used the perpetual leases. Instead, the rationale for using perpetual leases was aligned with the Executive's wishes to keep settlers anchored in New Zealand with the lure of land, which degraded the Public Trusts office's fiduciary duty of loyalty to Māori as beneficiaries.

From this perspective, this article has shown that the court should be able to extend the reach and scope of the traditional fiduciary to impose a fiduciary relationship between the colonial Public Trust Office (and, by inference, the Executive) and obligations owed to Māori. So, while many commentators focus on whether the colonial government should or could be a fiduciary because of its political power,[61] this article argues that the colonial government incurred fiduciary obligations when it passed legislation allowing the Public Trust Office to manage the native reserves for the Māori landowners.

[58] Alex Frame, 'Fiduciary duty – A few remarks on the Proprietors of Wakatū v AG [2017] NZSC 17' *Māori Law Review* (April 2017) <https://maorilawreview.co.nz/2017/04/fiduciary-duty-a-few-remarks-on-proprietors-of-wakatu-v-attorney-general-2017-nzsc-17/>.
[59] See Valsan (n 56).
[60] This was mainly discussed in the Sheehan Report (n 55), but it was also discussed in other Land Commission Inquiries.
[61] See eg, Robert Blowes, 'Governments: Can You Trust Them with Traditional title, Mabo and Fiduciary Obligations of Governments' (1993) 15(2) *Sydney Law Review* 254.

VI EXAMPLES OF FIDUCIARY OBLIGATIONS BY THE BRITISH COLONIAL OFFICE IN NEW ZEALAND

While it is beyond the scope of this article to include the appropriateness of introducing British institutions for the sole purpose of civilising Māori, it is noted that the British government considered that the Māori needed protections during colonial settlement. Yeo [62] argues that this position arose from the impact of the British's prior colonisation efforts in other parts of the British Empire on those indigenous peoples. It is also discussed in Wai 145,[63] where considerable numbers of settlers were already in New Zealand, and substantial numbers were following; the British government urgently needed to protect Māori from the adverse consequences of this incursion.

While it was deemed acceptable by the colonial British government to colonise territories beyond Britain's borders, a report in 1837 determined that the British nation should 'take upon itself the task of defending those who are too weak and too ignorant to defend themselves'.[64] Thus, in 1840, George Clarke was appointed the first chief protector of Aborigines and became the guardian of Māori welfare. The government department for the Protectorate of Aborigines existed for six years in New Zealand.[65] The sole purpose of the Protectorate was to introduce and accustom Māori to British law, to protect Māori land rights against claims made by settlers and to mediate disputes between the settlers and Māori.[66] This issue of whether the Protectorate did its job well has been discussed in many Waitangi Tribunal investigations.

As a result, the Protector (the officeholder) or sub-protector would often attend judicial proceedings (like the land commission enquiries) 'in order to protect the rights and interests of the natives'.[67] Sub-protectors such as Edward Shortland are recognised for their work to protect Māori land, as settlers continually attempted to dismiss Māori land tenure.[68] Therefore, the express appointment of the Protectorate of Aborigines is the first instance in which the colonial government entered a fiduciary relationship with Māori, where the latter were the beneficiaries.

The British government also recognised that before colonisation could begin, Māori customary title (Aboriginal customary title) had to be extinguished. Māori customary title was considered a burden on the colonial government due to its governance by Māori customary law,[69] but it

---

[62] Carol Yeo, 'Ideals, Policy & Practice: The New Zealand Protectorate of Aborigines 1840-1846' (MA Thesis, Massey University, 2001).
[63] 'Te Whanganui a Tara me ona takiwa; Report on the Wellington District (WAI 145)' (Waitangi Tribunal, 2003) 76.
[64] 1837 Select Committee on Aborigines identified the disastrous impact of colonisation on Indigenous peoples throughout the British Empire. See Parliamentary Select Committee (Great Britain), 'Report from the Select Committee on Aborigines (British Settlements)' (House of Commons,1837).
[65] Ray Grover, 'George Clarke' in *Dictionary of New Zealand Biography* (Web Page, 2020) <https://teara.govt.nz/en/biographies/1c18/clarke-george>.
[66] Marjan Lousberg, 'Edward Shortland and the Protection of Aborigines in New Zealand, 1840–1846' in Marjan Lousberg, Samuel Furphy and Amanda Nettleback (eds), *Aboriginal Protection and its Intermediaries in Britain's Antipodean Colonies* (Routledge, 2020).
[67] 'Muriwhenua Land Report – WAI 45' (n 10) 79.
[68] See Lousberg et al (n 66) 128.
[69] Mere Whaanga, 'Rata, the Effect of Māori Land Law on Ahikāroa' (PhD Thesis, University of Waikato, 2012) 130.

was also a recognition that all land belonged to Māori before it could be owned by either the settlers or the Crown. Article 2 of the Treaty of Waitangi provided pre-emption rights to the colonial government, so Māori land could only be sold to the colonial government. Māori had been persuaded that pre-emption was necessary to protect them and should be applied to all land dealings.

Pre-emption, where the alienation of native land was limited to the colonial government, was not new to the British. It had been used in other colonies, such as Australia, India and North America, and was considered a settled practice with indigenous tribes.[70] The Waitangi Tribunal determined that the fiduciary obligation was substantially significant because the colonial government declared itself the 'the protector of the Māori people and as a guardian of their interests'.[71] Therefore, pre-emption is the second instance where the colonial government expressly declared their fiduciary obligations to Māori.

It is also noted that the colonial New Zealand government enacted several statutes, taking Māori land with the intention of protecting its 'Māori beneficiaries'. An example of this can be found in the *Native Townships Act 1895* (NZ), which focused on promoting settlement in the North Island while at the same time providing native allotments. Expressly, the native allotments were vested in the Crown for 'the use and enjoyment of the Native owners'.[72] Lawfully taken, the Crown made clear its intention to hold the lands in favour of the Māori landowners and, thus, to whom the Crown owed a fiduciary obligation.

The power of the colonial government to extinguish Māori customary title to the land and then take possession of the land was likened to that of a constructive trustee in the Australian *Mabo v Queensland (No 2)*,[73] especially because the aboriginal customary rights had been destroyed. Furthermore, the colonial government wanted to avoid a double land tenure system, where Māori retained native titles subject to *tikanga* Māori (customary law), and settlers held a colonial government-derived title subject to British law. Pre-emption was a method of extinguishing the native title so the land could be freed up for settlement while at the same time removing the need for courts to rule in land disputes.

However, in the 1880s, legislation was enacted assigning the responsibility and guardianship of the native reserves to the Public Trust Office. This was done to ensure the welfare of the Māori. Thus, it could be argued that the Public Trust Office had a duty to prioritise the interests of Māori as beneficiaries and make decisions regarding native reserves based on the duties of loyalty and care because the decision-making directly affected Māori interests. Thus, the Public Trust Office is another example of where the colonial government entered into a fiduciary relationship with the Māori.

[70] Rose Daamen, 'Rangahaua Whanui national theme. D, The Crown's right of pre-emption and FitzRoy's waiver purchase*s'* (Waitangi Tribunal, 1998) 1-2.
[71] See 'Muriwhenua Land Report - WAI 45)' (n 10).
[72] *Native Townships Act 1895* (NZ) s 12(3).
[73] *Mabo* (n 37).

Arguably, the concept of protecting Māori and the governance challenges faced by the Public Trust Office led to the perpetual leases. Successive colonial governments wanted to protect Māori landowners from selling large tracts to land speculators but also allow Māori to benefit from colonial settlement by making land leases available.[74] The rental income of the leases was considered to be beneficial for Māori. However, there was, at that time, no suggestion that the leases should be perpetually renewable. More importantly, Māori thought that if they were to be alienated from their land to receive an income, it should be through leasehold instruments rather than an outright sale.[75] Perpetual leases are arguably tantamount to freehold ownership of the Māori land, for without statutory intervention, Māori will never be able to benefit from their land that is subject to perpetual leases.

The colonial Public Trust officers in each region were tasked with allocating land to Māori as they thought necessary for their occupation and leasing the remainder to settlers.[76] While the initial legislation was restricted to certain regions, subsequent amendments provided the Public Trust Office with the authority to lease the lands across the country (eg, the *Public Trust Office Amendment Act (1876)* (NZ)) and, in 1882, provided full administration and management of the lands for the Māori beneficial landowners.

Therefore, there is little doubt that a fiduciary relationship existed between the Public Trust Office and the Māori, but furthermore, the Public Trust Office held the superior position because of its ability to make decisions that the Māori were powerless to overturn. As a result of that superiority, the Public Trust Office was bound by equity to protect the beneficial interests of Māori, especially since the Māori beneficiaries were treated 'as children'.

VII CASE LAW AND FINDINGS OF HISTORICAL FIDUCIARY OBLIGATIONS

The application of fiduciary obligations to historical colonial governments is something that has been addressed in other jurisdictions. In the case of Canada, cases such as the *Haida Nation*,[77] the court found that the honour of the colonial government gives rise to a fiduciary obligation to Aboriginal interests. Chief Justice Lamer said: 'The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.'[78]

Case law in the United States has also identified a fiduciary obligation owed by its government to groups of indigenous groups. Examples include *Cherokee Nation v Georgia* 30 US 1 (1831) and *Worcester v Georgia* 31 US 350 (1832).

[74] Janine Ford, 'Title histories of the native reserves made in the Fitzroy, Grey and Omata purchases in Taranaki (1844-1848)' (Waitangi Tribunal, 1991).
[75] Cathy Marr, 'The alienation of Māori land in the Rohe Potae (Aotea Block). Part 2, 1900-1960' (Waitangi Tribunal, 1999).
[76] See Johnson (n 11) 106.
[77] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 2004 SCC 73.
[78] Ibid [18C].

In *Mabo*, the plaintiffs sought a declaration from the High Court of Australia establishing that the colonial government owed a 'fiduciary duty or alternatively bound as a trustee to the Meriam people, including the plaintiffs, to recognise and protect their rights and interests in the Murray Islands'.[79]

However, it is also acknowledged that courts in many jurisdictions have struggled in two basic ways. In the first instance, difficulties arose in defining the relationship between an Aboriginal people and its colonial government, mainly because its role encompassed a wide range of activities, not all giving rise to fiduciary obligations. The hurdle of establishing a fiduciary relationship between Aboriginal peoples and colonial governments has, at times, appeared to be insurmountable in some jurisdictions. Arguably, courts have imposed a fiduciary relationship where none has previously existed.[80] Secondly, the extent and content of such obligations are important, especially because the courts have been asked to adapt the fiduciary principle to a broader range of circumstances.[81] This need has been primarily driven by plaintiffs who have no other option but to seek a remedy in equity.[82]

In the *Wakatū* case, the Supreme Court ruled that the Crown (New Zealand government) owed the customary Māori landowners' fiduciary duties. This was a landmark decision, but, referring to the Canadian *Guerin* case,[83] the court made it clear that the nature of the relationship was founded in the private law of fiduciary duty. So, while the courts determined a fiduciary relationship existed, it was predicated on being either a trust or a trust-like relationship. The court also emphasised that the case was situation-specific and limited the finding of a fiduciary relationship between the Crown and Māori. There have been no further rulings on the matter since the *Wakatū* decision.

Moreover, while any statutory limitations have not been discussed in this article, it is noted that until this case, the only resolution Māori could achieve for historical land losses could be found in the Waitangi Tribunal – where the findings are not binding on the government. This is an important consideration for Māori because the *Treaty of Waitangi Act 1975* (NZ) s 6 allows the Tribunal to investigate claims against the colonial Crown dating back to 1840. Thus, the conventional statutory bar of limitations, which prevents legal action, does not apply. However, as noted, the findings of the Waitangi Tribunal are not binding, therefore there has been little legal relief with regard to perpetual leases.

[79] See *Mabo* (n 37).
[80] Gerald Lanning, 'The Crown-Māori relationship: the spectre of a fiduciary relationship' (1997) 8(2) *Auckland University Law Review* 445.
[81] See Blowes (n 61).
[82] Michael Lang, 'The fiduciary principle in the commercial domain: Implications for syndicate loans' (1999) 6(4) *Auckland University Law Review* 1147.
[83] *Guerin v The Queen* [1984] 2 SCR 335.

VIII CONCLUSION

The Public Trust Office has been in existence in New Zealand since 1873 and is considered to be the first of its kind in the developed world[84]. However, this article has established that the Public Trust Office failed in its obligations to protect the interests of Māori. While others have attempted to use the traditional fiduciary legal doctrine to establish a fiduciary relationship between the Crown and Māori to find a legal remedy for the taking and administering of the native reserves, most have failed.

In contrast, this article argues that the Public Trust Office was primarily and statutorily tasked with protecting Māori interests, and thus a fiduciary relationship already existed. There is no need to try to establish whether the native reserves were held in trust; instead, adapting and using the legal framework provided by Galoob and Lieb, this article showed that the fiduciary relationship between the Public Trust Office and Māori was already there.

Furthermore, while this framework's utility successfully explains and justifies the fiduciary norms for the Public Trust Office, it also accepts that the framework is probably not compatible with making the Crown liable for all its functions. Finally, this article shows that if the perpetual leases over the native reserves continue to be viewed through the contractual lens, the Māori landowners will fail to receive a legal remedy for a historical wrong.

[84] '150 years – First in the world', *The Public Trust* (Web Page, 2023). <https://www.publictrust.co.nz/resources/150-years-first-in-the-world/>.