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THE LAW REFORM ENTERPRISE IN  
NEW ZEALAND

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Zealand Law Society

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## **What is the Law Commission?**

- 1 The year 2006 marks the 20<sup>th</sup> birthday of the Law Commission in New Zealand. The Commission's aim is to "promote the systematic review, reform and development of the law of New Zealand".<sup>1</sup>
- 2 The Commission carries out that aim:
  - By making recommendations to the Minister of Justice for the reform and development of a particular aspect of the law, on a reference from the Minister or on its own initiative;
  - By advising Government departments and other public sector organisations on their own reviews of aspects of the law and on proposals made as a result of the review.
- 3 The Commission is required to advise on ways in which the law can be made more understandable and accessible. The emphasis on these features is well placed. As Lord Oliver put it "Edmund Burke observed that bad laws are the worst form of tyranny. But, equally, well intentioned laws that are badly drafted or not readily accessible are also a form of tyranny".<sup>2</sup> The Law Commission is obliged as well to take into account Te Ao Maori (the Maori dimension) and to give consideration to the multi-cultural character of New Zealand.
- 4 The Commission has a scholarly research culture. It produces reasoned reports with extensive research and analysis to back its recommendations. In short, the Law Commission is a law reform agency. In the new lingua franca of public administration, it is an independent Crown Entity. The independence is important – the Law Commission is not the same as a Department of State. It has the same sort of independence as Judges in formulating its recommendations. Yet it must be attentive to both the Executive Government and Parliament. These are the

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<sup>1</sup> Law Commission Act 1985, section 3. I am most grateful to George Tanner QC, Chief Parliamentary counsel and Andrew Bridgman, Deputy Secretary of Justice for their comments on an earlier version of this paper. Needless to say they cannot be held responsible for its content.

<sup>2</sup> Lord Oliver of Aylmerton "A Judicial View of Modern Legislation" (1993) 14 Stat. Law Review 1, 2.

bodies responsible for implementing any changes recommended by the Commission. No organisation that spends tax payers' money can engage in the design of utopian schemes that have no prospect of being adopted. The first purpose of the Law Commission is to suggest changes to the statute book for the betterment of all New Zealanders.

- 5 But remember statutes are often not required and should be avoided if possible. Legislation is not the answer to every problem. A fundamental threshold question that needs to be asked is whether legislation is required at all. Too often the question is not asked. More imagination is required to avoid cluttering up the statute book with unnecessary laws.
- 6 Law reform has to be a collaborative enterprise. Otherwise it will fail. There must be close collaboration throughout between the Law Commission, the Government and the Government's advisers. The independence of the Commission cannot become a recipe for isolation or non-engagement with relevant departments of state and officials. One aim I have in taking up the position of President is to ensure that co-operation becomes closer and the requisite relationships are developed.

### **History**

- 7 New Zealand's law reform agency was created relatively late compared to the rest of the common law world. England and Scotland received permanent Law Commissions by legislation in 1965. The Commonwealth of Australia passed legislation for the Australian Law Reform Commission in 1973 and it commenced operations on 1 January 1975. New South Wales set up its agency even earlier, in 1967. Canada has had the interesting experience of setting up a Federal Law Reform Agency, then in 1992 abolishing it, only to set up another in 1997. The State of Victoria did something similar to Canada.

- 8 The reason that New Zealand was late in setting up such an agency lies in the fact that it had already devoted serious effort to the topic and set up a Law Revision Committee in 1937. By the 1960s we had a series of part-time Law Reform Committees which, working with the large and extremely able law reform division in the old Department of Justice, produced a lot of worthwhile law changes. There was resistance to changing the structure but the open Government election manifesto commitments of the 4<sup>th</sup> Labour Government promised to establish a full-time Law Reform Commission. It was one of my most pleasant duties as a member of that Government not only to write that portion of the manifesto before the 1984 election, but also to design the legislation. Not surprisingly, therefore, I regard the legislation as satisfactory - the statute itself achieves both substance and readability. As Minister of Justice I was also responsible for recommending the appointments to the new Commission and providing references to it.<sup>3</sup>
- 9 Since the Law Commission was established, the policy making framework of the New Zealand government has changed and expanded. Most of the core government departments now promote legislation and have policy advisers. The issue becomes what is the comparative advantage of the Law Commission? What can it do that government departments cannot? What sort of projects should be referred to it? Where can the Commission add value most? These are not easy questions. Some think the Commission should concern itself only with lawyers' law. I think myself the emphasis needs to be on larger, and more profound projects that demand intensive research and break new ground. These are the projects the Commission is best equipped to handle and are consistent with its statutory mandate – departments have difficulty with such projects because they have so many other responsibilities and demands on their staff time. It is difficult for them to focus their resources on large, long-term projects that straddle electoral cycles.
- 10 The criteria used to select project topics for the Law Commission are where they:

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<sup>3</sup> Geoffrey Palmer "Systematic Development of the Law: the function of the Law Commission" [1986] NZLJ 104, and Owen Woodhouse "The new Law Commission" [1986] NZLJ 107.

- Involve issues that span the interests of a number of government agencies and professional groups;
- Require substantial long-term commitment and fundamental review;
- Involve extensive public or professional consultation;
- Need to be done independently of central government agencies because of the existence of vested interests, or a significant difference of views;
- Require independent consideration in order to promote informed public debate on future policy direction.

11 The New Zealand Law Commission has always attracted high quality people. Consider the previous Presidents:

- Sir Owen Woodhouse;
- Sir Kenneth Keith;
- Justice David Baragwanath;
- Justice J Bruce Robertson.

12 Some of the first Commissioners have gone on to outstanding careers as well – Sian Elias, Margaret Wilson, Jack Hodder and that was just the first crop. And Jim Cameron, a former Deputy Secretary for Justice was a foundation Commissioner. He is one of the greatest law reformers New Zealand ever had.

### **The Achievements**

13 What of the work of the Commission during the first 20 years? What has been achieved? The answer is quite a lot. There have been 72 final reports since the inception of the Law Commission. 53 of them have contributed or are contributing to the Government's policy and legislative programme.

14 Among those reports that have been adopted or are in the process of being adopted are a number that have made changes of the utmost importance to the entire legal system. Among those I include:

- Electronic Transactions Act 2000 and electronic commerce legislation;
- The Companies Act 1993;
- Coroners Bill (in front of Parliament);
- The Arbitration Act 1996;
- Reform of Juries (in front of Parliament as part of the Criminal Procedure Bill);
- Personal Property Securities Act 1999;
- The Interpretation Act 1999 and plain English drafting;
- Reports on the format, structure and style of legislation;
- The Evidence Bill (in front of Parliament).

15 In addition to legislative proposals, the Commission has produced many background papers and other reports intended to be used as resource in legal and departmental circles. Some of these have had a major impact: for example *A New Zealand Guide to International Law and its sources 1996*; *The Treaty Making Process Reform and the Role of Parliament 1997*. The Commission's report "Legislation Manual Structure and Style" largely the work of the late Dr Bill Sewell has to a considerable extent been adopted by the Parliamentary Counsel Office and influenced the style in which modern statutes are now drafted.<sup>4</sup>

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<sup>4</sup> As George Tanner QC puts it in his 2003 paper "Confronting the Process of Statute Making" (New Zealand Legal Method Seminar, Auckland, 16 May 2003) 23:

"Throughout the 1990s, the New Zealand Law Commission embarked on a series of initiatives designed to change the language and format of New Zealand legislation. It did so in line with one of the Commission's statutory functions of advising the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as practicable. The Commission published 3 reports relating to interpretation, format, and the structure and style of legislation.....  
*Report No 17 A New Interpretation Act To Avoid "Prolivity and Tautology" : NZLC R17 (1990), Report 27 The Format of Legislation: NZLC R27 (1993), Report No 35 Legislation Manual Structure and Style: NZLC R35 (1996)".*

## The Challenge

16 Despite the achievements, there remains in my view much more to be done in order to achieve the promise of the legislation and its objectives. There is no shortage of ambitious law reform proposals. Indeed policy analysis and development is a burgeoning industry, yet in my view the explicit commitment to law reform in New Zealand has lessened over the years. In the evaluation of the Law Commission that I conducted in 2000,<sup>5</sup> I said:

A fundamental change of attitude to law reform in New Zealand is required. Law reform has been neglected in recent years. New Zealand will suffer if proper repairs and renovations to its statute laws are not performed. The law needs to be kept up to date to reflect developments in new technology and business practices. New Zealand is probably falling behind its trading partners in this respect.

17 I went on to say there needs to be a renewed commitment to the values that underpin the law reform enterprise. I am still convinced that is the case, and there are encouraging signs that it will come to pass. The Review led to the following measure being adopted by Government:

- A Government response to Commission reports must be tabled in the House within six months of the publication of a report;
- The appointment of a separate Minister responsible for the Law Commission;
- Regular scrutiny by the Justice and Electoral Select Committee of the Government's uptake of Commission recommendations.

18 There are some 1096 principal public acts of Parliament now on the books in New Zealand; in 1978 there were 600 principal public acts.<sup>6</sup> Much of the law can neither be accessed nor understood by ordinary people. Many jurisdictions do much better. The American approach, both at State and Federal level, of producing a code of all State law passed by the legislature, but rearranged under

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<sup>5</sup> Geoffrey Palmer *Evaluation of the Law Commission: Report for the Associate Minister of Justice and Attorney-General Hon. Margaret Wilson* (Chen & Palmer, Wellington, 2000) 8.

<sup>6</sup> K.J Keith "A Lawyer Looks at Parliament" in John Marshall (ed) *The Reform of Parliament* (New Zealand Institute of Public Administration, Wellington 1978).

topic headings is helpful. It allows the public sector and the private sector alike to locate and read all the relevant law that may be important to a particular concern. All the law, for example, on “animals” can be found in one place, with full cross referencing.

- 19 Since MMP, it can no longer be said that New Zealand is the fastest law-maker in the west, but we are surely quite accomplished at making the law hard to find. This needs to be fixed. We have now in large measure due to the combined efforts of the Law Commission and Parliamentary Counsel Office, plain English drafting. What we do not have is adequately accessible statute law. It is easy to overlook statutory provisions unless you know all of the Acts of Parliament.
- 20 I find myself in complete agreement with the view of the Hon Justice Michael Kirby, now a Justice of the High Court of Australia and the first Chair of the Australian Law Reform Commission who has kept up his interests in this topic over the years. In 2005 he wrote the concluding chapter in a most interesting and helpful book: *The Promise of Law Reform*.<sup>7</sup> He remarks on the robustness of the institutional idea of law reform, and especially its recent spread beyond the common law countries. He says:<sup>8</sup>

“The most enduring polities and economies are those that have inbuilt methods of updating the law and removing the barnacles of injustice and inefficiency. Absent effective and timely procedures of law reform, the markets tend to solve legal problems by corruption or revolution. Law reform is part of the stable machinery of modernity.”

- 21 He points out however that there exists in many countries, and I would include New Zealand in this category, an institutional flaw. Justice Baragwanath, former President of the Law Commission, also drew attention to the “grave problem of

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<sup>7</sup> Brian Opeskin and David Weisbrot *The Promise of Law Reform* (The Federation Press, Sydney, 2005) 433.

<sup>8</sup> Michael Kirby “Are We There Yet?” in Brian Opeskin and David Weisbrot above n 2, 444.

implementation in every law commission state”.<sup>9</sup> The issue is how to secure governmental legislative and official attention once law reform reports are produced. Justice Kirby has said: “Nowhere has this issue been tackled institutionally and effectively”. He points out that all too often law reform proposals go to the bottom of the ministerial and legislative pile, where they secure less attention than the political ideas and personality and party schemes that dominate contemporary politics. His conclusion makes sombre reading:<sup>10</sup>

“In terms of this logjam in our institutions, we are certainly not ‘there’. In my view, we are not even on the way to ‘there’. We are no closer to ‘there’ than we were 30 years ago when I began my work with law reform agencies. No one is ‘there’. ‘There’ seems to be an illusion. Sometimes we think we see it. Thus, law reformers cultivate officials and look for the ‘triggers of activation’ that will gain an advocate in Cabinet who will initiate official consideration and action on a law reform report. But it seems amazing that our constitutional government should be so dependent on chance factors of that kind. If it could be explained by controversy and difficulty, the impediment would be more understandable and tolerable.”

### **The First Priority**

- 22 It is for these reasons that on becoming President of the New Zealand Law Commission my first priority was to make representations to the Government about projects completed by the Commission but upon which no governmental decision had been taken. In my view the 2005 election has produced a political situation ideal for law reform. The Government is in its third term and the legislation relating to most of its big ticket political programme has been dealt with.
- 23 I went through the Commission’s reports that hadn’t been dealt with. In particular I was struck by the Rt Hon Justice Blanchard’s report produced, when he was a Law Commissioner in 1994, on Property Law Reform. That was a reform that will make the law a lot cleaner, more certain and modern. Yet nothing had been done with it. It had not been rejected, it just had not been considered. This is not

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<sup>9</sup> Justice David Baragwanath “The Role of the New Zealand Law Commission” (New Zealand Centre for Public Law, Occasional Paper 2, Wellington, 2001) 7.

<sup>10</sup> Michael Kirby “Are We There Yet?” in Brian Opeskin and David Weisbrot above n 2, 433, 445.

the only report in that category. There are others where draft legislation was provided, but no action had been taken.

24 I am happy to report that these efforts have already borne fruit. In her statement to Parliament this week, the Rt Hon Helen Clark said that one of the initiatives in the justice and security area should be to “Give priority to law reform proposals already received from the Law Commission which update key statutes, for example in the property law area”.<sup>11</sup>

25 Law reform to be implemented, in my view, has to be as politically bipartisan as possible. Where there is widespread agreement for reforms within Parliament, all MPs can work together and produce legislation that has been carefully scrutinised and well thought through. The Select Committee process can contribute enormously to producing good legislation. That is when Parliament is at its best.

26 Now is the time, as I see it, for Parliamentary action on many of the Law Commission’s previous reports that have languished, not because no one likes them, but because they have no priority. We always have to remember that politics is the language of priorities; but politics also has to serve the public interest.

27 One feature of MMP with its minority Governments and need for confidence and supply agreements is that the Executive Government is no longer in control of the legislative output as once it was. The manner of dealing with law reform needs to be brought up to date with that fact and adjusted to it.

28 So my first priority has been to seek legislative action on previous Law Commission reports.

### **Legislation Advisory Committee**

29 Last year I was appointed Chair of the Legislation Advisory Committee. This is the successor to the old Public and Administrative Law Reform Committee. It has been kept in use to allow a group of academic lawyers, private practitioners and

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<sup>11</sup> Rt Hon Helen Clark “Prime Minister’s Statement to Parliament” (14 February 2006), 11.

Government lawyers to provide advice continually to the Government on good legislative practice. Its most important work product has been the Legislation Advisory Committee Guidelines, which are adopted by Cabinet as appropriate benchmarks for legislation to meet.<sup>12</sup>

- 30 Seminars conducted by the Committee on the guidelines last year attracted 400 public servants. The Guidelines themselves are under review. It has occurred to me in relation to this work that an early warning system would be helpful. Where agencies are planning legislation, the architecture of it needs to be settled early and in accordance with sound legal and constitutional principles.
- 31 At present, the Law Commission analyses all Bills introduced for the Legislation Advisory Committee and reports to the Committee on them. The Committee then takes the issues up with Parliamentary Counsel, the appropriate Minister, officials or itself makes submissions to a Select Committee. It all depends on what seems to be the most appropriate in the circumstances. Agencies and departments are also coming to consult with the LAC in advance of framing their legislative proposals, and there is considerable benefit in that practice. Watch this space for further developments.
- 32 Early discussion about the choice of legislative vehicles and the methods of complying with the Guidelines would improve the quality of legislation a great deal. It is often too late once the measure has been drafted.
- 33 Ongoing discussions about how this can be achieved have been commenced between the Law Commission and the Ministry of Justice and Department of Prime Minister and Cabinet. This is my second priority.

### **Projects**

- 34 At present the Law Commission has on its work programme a review on Access to Court Records which is really unfinished business left over from the Official Information Act. It has a project on Custom and Human Rights in the Pacific. It

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<sup>12</sup> Legislation Advisory Committee *Legislation Advisory Committee: Guidelines on Process and Content of Legislation* (Legislation Advisory Committee, Wellington, 2001) <<http://www.justice.govt.nz/lac/index.html>> (last accessed 13 February 2006).

has a long running project on reforming the law on Entry, Search and Seizure. It has another reference relating to Criminal Defences. It has recently completed a review of the Customs Act. And it has a project concerning a Maori Entities Bill to give Maori organisations the choice of a new legal framework for the purpose of managing communally owned assets, or giving effect to communal rights and responsibilities on behalf of the members of the group.

- 35 My third priority will be to develop a suite of possible Law Commission work projects and to discuss the final selection with the Government. This should assist in preventing too much spinning of the reform wheels and cut down the time spent on particular proposals that have little chance of legislative adoption. Law reform projects are like Bills. They are made to pass.
- 36 A three year electoral cycle makes things difficult. While it is necessary to respect the political process and politicians, there are many aspects in which our law needs to be kept up to date, to be developed and strengthened. Many of those measures revolve around good law meeting the needs of modern society. They do not have party political consequences or political fallout. It is this very quality that often makes it difficult to secure legislative priority for carefully worked out proposals. Yet the public interest can genuinely be served by advancing such measures and finding ways to make these legislative improvements, devoid as they may be of party political interest. We have to find better ways to make legal changes that are non-controversial but helpful, and to secure the necessary political support for them.
- 37 I believe the Law Commission has to be active in this area and explain its proposals and market them to the policy making community. In New Zealand we had a political commitment between the parties of that sort for many years. With MMP we are in danger of losing it. Now is the time to reclaim it.
- 38 In the annual talks with the Government over the next few months, the Commission will take on new references. A Cabinet Office Circular will be issued asking Ministers to forward proposals relating to their portfolios to the Minister Responsible for the Law Commission, Hon Mark Burton. It is particularly important for the Commission to have feedback from the Law Society also on what projects it thinks are important and what other projects could be

included. On the list that the Commission is presently considering for discussion with Government are the following:

- Education law;
- Review of Privacy Act;
- Report on the provision of legal advice to the New Zealand Government and organisation of its legal services;
- An examination of the law relating to the Royal prerogative, including the process for handling applications for the royal prerogative of mercy;
- Changing the way New Zealand statute law is presented so that it is easier to find all relevant statutory provisions;
- A Review of the Statute book to make recommendations on the repeal of unnecessary statutes and regulations;
- Review of the Official Information Act;
- Review of Delegated Legislation methods and control;
- Review of the Substantive Law of Trusts and Charitable Trusts;
- Commissions of Inquiry and other inquiries;
- Speeding up Maori claims settlement process;
- The law regulating Social Welfare entitlements;
- Franchising law;
- Prospective overruling of judicial decisions by the Courts
- Reviewing aspects of intellectual property law.

39 I do hope the Law Society will keep in close touch with the Law Commission about its views on where the law is going wrong. Practitioners are in an

unrivalled position to know where the statutory shoe is pinching. If the Society can make the knowledge available to the Law Commission, we may be able to do something about it.