



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 85

**DELIVERING
JUSTICE FOR ALL**

A Vision for New Zealand Courts and Tribunals

March 2004

Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body, established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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1 March 2004

Dear Minister

I am pleased to present Report 85 of the Law Commission *Delivering Justice for All – A Vision for New Zealand Courts and Tribunals*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J Bruce Robertson', is positioned above the printed name.

J Bruce Robertson
President

The Hon Lianne Dalziel
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON



About this Review

The Law Commission was invited by the Government to undertake a review of the structure and operation of all state-based adjudicative bodies in New Zealand, including all courts and tribunals except the top tier of the appellate system (where another process was in train which resulted in the new Supreme Court. See Appendix A for Terms of Reference).

The commission was directed to “have particular regard to its statutory obligations to take account of te ao Māori (the Māori dimension) and the multi-cultural character of New Zealand society in this exercise”.


We saw our task as being to offer the best possible arrangements for the future, not to act as inspectors or auditors of what has happened in the past or is happening now.

As well as legal research looking at both domestic and international sources, the project has involved extensive consultation. The commission sought the views of past and potential litigants for whom the courts exist, and of those who work in or close to the system, to find out where they thought change would be of benefit. This included the heads of the various courts and tribunals, representatives of the Law Society and Bar Association, the Royal Federation of Justices of the Peace, government agencies, particularly the Ministry of Justice and the Department for Courts (now part of the Ministry of Justice), lawyers, community groups and individual citizens.

The commission also undertook a specific dialogue with Māori. One of our commissioners, Ngatata Love, attended nine hui early in the project and later four further hui were organised by Te Puni Kokiri. The commission greatly benefited from the major hui hosted by Ngati Tuwharetoa at Taupo in July 2003. The commission has been assisted by its Māori Advisory Committee whose members have national leadership stature and links to a variety of organisations.

Two discussion papers were published: *Striking the Balance: Your Opportunity to have your say on the New Zealand Court System* in April 2002, and *Seeking Solutions: Options for Change to the New Zealand Court System* in December 2002. More than 400 submissions were received. The breadth and depth of responses demonstrated the importance people place on the court system and how it is functioning.

The commission held meetings with representatives of community organisations and employed a market research organisation to hold focus groups with members of the general public, at least half of whom had had some experience of the New Zealand courts in the previous year or so. We visited prisoners both on remand and serving sentences. Fono were organised in Auckland, Manukau and Porirua by the Ministry of Pacific Island Affairs.



The commission held 15 workshops on key topics. For each topic, a background paper outlined options, current preferences, and arguments for and against. A range of people attended from public service agencies, community law centres, professional bodies and community organisations. Workshops lasted two to five hours with 15 to 20 participants at each.

The Law Commission is enormously grateful to everyone who has contributed to this exercise.

Bruce Robertson and Patrick Keane (until October 2003) were the commissioners responsible for progressing this review. Neville Trendle contributed significantly. The work was heavily dependent on Margaret Thompson as project manager, Vivienne Smith, Rachel Hayward, Susan Hall and Patricia Sarr. Most people connected with the commission from June 2001 to January 2004 have had a hand in this work. It has necessarily been a team effort.

Three stage review

Striking the Balance – a general raising of issues relating to the structure and operation of the court system seeking widespread public and professional response as to the problems encountered and any suggested improvements. Published in May 2002.

Seeking Solutions – a detailed offering of alternatives for reform, following submissions and consultation meetings on *Striking the Balance*, and an assessment of national and international issues and trends in court reform. Further public and professional response was invited before this was published in December 2002.

Delivering Justice For All – A Vision for New Zealand Courts and Tribunals – includes recommendations for reform from the Law Commission to the Government in light of submissions, consultations and research.



Delivering Justice for All: A Vision for the New Zealand Court System

New Zealanders must be confident that the court system delivers justice for all through fair and timely processes if courts are to fulfil their role as part of the fundamental infrastructure of our modern democratic society. The core lesson we have learned from the people who offered their views in the course of this review is that the court system has to do better in winning and retaining the confidence of New Zealanders from all our many communities.


To understand the need for enhanced public confidence we need to consider the role of courts in society. Courts uphold the rule of law. They act as a bulwark against the arbitrary abuse of power. Everyone, including the Head of State and the elected members of Parliament – who make the laws – is subject to the law through the courts. The counterbalancing of the executive, the legislature and the judiciary accords the courts a place in our constitutional arrangements as ‘the third arm of government’.

Courts are the ‘backstop’ available to resolve disputes between citizens, and between citizens and the state. Courts do not initiate action themselves. Courts decide cases. They resolve controversies. They can only respond to disputes which litigants place before them. The function of all judges – despite variations of hierarchy or process – is fundamentally the same: to deliver justice by determining the factual or legal issues relating to the particular cases in front of them. Their decisions have influence beyond the individuals and groups who come before them: they underpin the way the economy and society functions and citizens interact. In this way, courts make a vital contribution to a stable and civil society.

Saying that courts perform a backstop role in our society is not to suggest they can be passive in the way they carry out their role. Courts must be responsible for their own effectiveness. They should be constantly vigilant to ensure they operate for citizens and they must take it upon themselves to deliver justice through procedures that are relevant and responsive to the needs and expectations of the people who use the courts. In this way public confidence in the courts will be maintained.

The degree of confidence people have in the court system will influence their belief in the rule of law. If people cease to see courts as relevant, effective and accessible, they are less likely to believe that the rule of law means everyone is entitled to the benefit and protection of the law, including them and people like them. They are less likely to believe that courts will fairly and impartially resolve disputes between citizens and the state.

At another level, the rule of law provides certainty as to the law and confidence that it will be properly applied to all. This certainty and confidence assists social and economic development. Courts not only have to work well – but must be seen to do so – for our democracy to work well.



Part of the fabric that holds civil society together is the common adherence to social institutions. Those institutions, including the courts, need to build and sustain this adherence. The feedback we have received reminds us that the courts cannot take their mandate for granted.

Guiding principles for an effective court system

The objective of our review has been to create an effective court system in which the public has confidence. In seeking to do this, we have identified criteria that contribute to this objective. These form the principles against which we have developed and tested our proposals.

The ***constitutional position of courts*** – the independence of the judiciary is essential so that courts can both supervise their own activities and the legality of other branches of government. This ensures that courts have the confidence and respect of all that justice is being delivered equally and fairly.

Quality decision-making – judges should know the law and should be able to apply it correctly to particular cases. Courts’ decisions should be clear as to what is to be done and by whom. Decisions must be consistent and legally authoritative but responsive to the uniqueness of specific situations. This involves the qualification, training and experience of those who adjudicate, fair processes in the way cases are presented and ensuring judges have sufficient time to deliver quality decisions.

Proportionality – the use of judicial talent and procedures should bear a sensible relationship to the nature of the dispute.

Principled appeal rights – every person who has their rights or obligations determined by a court should have a general right of appeal on fact and law. In general, subsequent appeals should be by leave, and will often be restricted to questions of law.

Accessibility – it is essential that everyone in the country is able to use courts and tribunals to assert or defend their rights. This raises issues of adequate information and advice, cost barriers, understandable processes and cultural responsiveness.

Respect for all - when people come to court they should be treated with respect, which may mean that the court makes allowances for their particular needs, cultural or otherwise. As far as possible they should come away feeling that what happened in court has relevance for them. They should know what happened and why.

Efficiency – the resources involved in supporting the court system must be managed so as to achieve timeliness and cost-effectiveness for both the parties and taxpayers.



We expect that the balance between these basic principles will fall differently in the various parts of the court system, but always within the parameters of preserving equality before the law and enhancing public confidence in the courts.

Enhancing the court system

It is clear that cohesion or coherence have not featured in the creation of our existing arrangements for courts and tribunals. Reform of the law often proceeds without regard to the downstream effects on the overall structure of the courts. We do not consider that symmetry for the sake of uniformity is either necessary or desirable, but variance with no benefit is not useful either.

We can generally be proud of our court system and so we are not proposing wholesale change. The system has processes to determine all issues of legality in a principled, independent and objective way. That does not mean, however, that we need not strive to make it better. If significant sectors of society continue to feel that they have no place in the system then the courts will have increasing difficulty in responding to the society they were established to serve.

We do not advocate changing the fundamental principles on which the courts operate and which have guided our review. We reaffirm the basic premise of equality before the law. We do not seek to move the courts from their backstop position: most disputes of most citizens should continue to be sorted out away from the courts. But ordinary citizens must know that the courts are within reach should they need their intervention, and feel that the experience has protected or empowered them should they get there.


The most critical areas for reform relate to the unnecessarily difficult experiences people have when they go to court. We recommend a new Community Court as the place where most people will encounter the court system in the future. We propose new ways to resolve the high volume of work they bring to the system and call for this new court to be free to develop a working style (just as the Family and Youth Courts have done) that will re-establish “People’s Courts”ⁱ – meaningful and relevant institutions in the communities they serve.

The proposals for sorting issues in civil litigation will no longer see disputes of \$20,000 subjected to the same demanding procedures as disputes of \$200,000. The streamlined processes we propose will promote proportionality in the use of available resources and give value for money from the time spent in court.

The alignment of first instance courts as Primary Courts will simplify the system and make it more understandable and responsive to users. The arrangement will accommodate the level of specialisation in decision-making our society requires within one framework and without isolating particular courts. It will affirm the fundamental role of the High Court in supervising decision-making for legality. It will also create efficiencies by allowing for more flexibility in judicial allocation.

A coherent, rational and all-embracing appeal structure will ensure the consistent maintenance of legal integrity.

ⁱ A concept called for in Sir David Beattie’s report of the 1978 Royal Commission on the Courts.



A new structure for tribunals led by the judiciary will bring an integrated and unambiguously neutral framework to our system of administrative justice. Such a system will have an obvious entry point making it easier for the public.

The proposals for better provision of information and advice will enhance the transparency and accessibility of the system. They will enable the state to better match the contemporary reality of uneven representation and of increased self-representation with its responsibility to ensure people are equal before the law.

In essence, we need to find principled ways of doing the courts' work more effectively rather than simply increasing the number of judges and courts – the trend of recent decades.

What people told us about the court system

The responses, which came from all sectors, were that courts too often exclude people rather than provide an environment in which they can comfortably and naturally seek redress or assistance. It is self-evident that those who are involved in the court system will almost inevitably be under a degree of strain or pressure, so it is never going to be a happy or desirable experience. That, however, is not a reason why people should find the involvement demeaning or so intimidating as to render them unable to participate in it fully. Such a reaction could have been anticipated from people at the social or economic margins of society. But the message of alienation and discomfort came from across the board – as much from big business and corporate entities as from ordinary New Zealanders.

The problems identified in submissions can be broadly summarised as:

- a lack of information or understanding about what the system is, how it can be used to initiate action, and what possibilities exist when someone is drawn into it against their will
- the high legal costs and filing fees, coupled with the economic consequences of the distraction from other productive activities which inevitably arises
- the time and delay involved and the exhaustion of being caught in the system
- people feeling as though they are not able to tell their story, to be understood or be responded to in a way which is meaningful to them.

In our consultations and in submissions, people frequently expressed the belief that delay and disadvantage could be swept away if we moved from an adversarial system to an inquisitorial system. We do not agree and consider that there is, in fact, a continuum both internationally and in New Zealand as to how disputes are determined in courts. In different places at different times and at different levels of courts, there is more or less emphasis on so-called adversarial or inquisitorial approaches, but neither is totally exclusive of the other. The mix needs to be constantly reviewed. We do propose that judges in the Community Court take a more active role – as the judges in the Family and Youth Courts do now – but find no justification for a wholesale shift in emphasis across the system.

A particular issue, which is not new, is the feedback that the eurocentric culture of the courts provides particular difficulties for Māori, and for people from minority cultures.



Māori and the court system

Our court system was founded at a time when the dominant theory of the state was that nations are built on a homogenous national culture and our institutions were created accordingly. It was never a good reflection of reality in most countries and, in New Zealand, it failed to acknowledge the place of Māori as affirmed in the Treaty of Waitangi. As the position of Māori as tangata whenua has gained greater recognition, the assumption of cultural homogeneity has become increasingly out of kilter. In seeking to enhance public confidence we cannot ignore the relationship between the Government and Māori.

After generations of uncertainty as to what this relationship is – including times when there was a total neglect of the issue – there is now a commitment to honouring it. We were asked to consider the nature and operation of all courts and tribunals and this necessarily raises the sensitive issues of whether the system as a whole is responsive to the history and position of Māori and the consequences which flow from that. We cannot ignore the sustained challenges to the court system and its operation from many Māori, particularly with their over representation in the criminal courts.

Although Māori views are no more homogeneous than those of any other large group, there is a widespread belief that the current court system is externally imposed and heavily weighted toward the culture of only one Treaty partner. Many Māori feel that the very structure of the court system pays inadequate respect to Māori tradition and is insensitive to their needs. Too many Māori do not feel the justice system can be relied on to deliver justice to them. There were strong calls for constitutional change at many of the hui we attended, or at least for a major constitutional debate about the significance of the Treaty and all the ramifications of partnership.

Such a debate is beyond our task. We do, however, respectfully disagree with those who argue that nothing should be done to alter the existing courts until that debate has occurred. There are things that can and should be done now to create a system that is more responsive to, and effective for, all New Zealanders.

Many of the concerns of Māori were not dissimilar to those of other groups in our society: the system is mysterious and often unfriendly; basic information is hard to get; legal representation is expensive and often not satisfactory; and the mode of operation is almost exclusively monocultural and alienating to those whose cultures are not derived directly and relatively recently from the United Kingdom.

Feedback from Māori included a wish to incorporate key Māori cultural practices in the courts, such as the ability of whānau to speak in court and to support victims and defendants in culturally appropriate ways, and the capacity to put culturally relevant factors before the court. There was a strong desire to move the court experience away from a process focus towards making court appearances meaningful and resolution-based, including community involvement.

Respecting diversity

The court system does not appear to have responded fully to what it means to serve a diverse society. There are basic values of minority cultures that come into direct conflict with some of the processes and rules of our courts. These include respect for elders, not individualising blame, the need for communal support, and the expectation of prayer to sanctify important proceedings. A constant theme from submitters from other cultures was that the current system tends to isolate the accused from family and context. This is distressing for many people.

We are confident that virtually all New Zealanders would agree that the enjoyment of full citizenship, including access to the courts, should not depend on one's ethnic descent, culture, gender, or physical ability. The process of adaptation must be reciprocal. As immigrants learn new languages and new cultural norms, so our institutions must have processes to accommodate the increasingly diverse nature of New Zealand's communities in ways that respect differences and treat people as equal citizens.

Fundamental and immutable principles must be preserved, but the need for that is too often an excuse for resisting any flexibility or change. Process must not be confused with substance – there is room for respecting values of other cultures while maintaining the crucial principles of equality before the law, adherence to the rule of law, fair and proper process, and independent adjudication.

The challenge for courts

We recognise that change for the sake of change is unsettling and counterproductive, particularly when dealing with an institutional structure that goes to the heart of our constitutional and governmental process. For this reason our approach in this review has been to assess whether things could sensibly be done better. Our proposals focus on adaptations to help the court system work better for the dynamic and diverse society of twenty-first century New Zealand.

Those of us who are inside the system are inclined to confidently say that all people are equal before the law, that this is fundamental to our system, and we all believe in it. But for those who find the courts alien and alienating places, those who cannot understand the processes, have no idea where to start, or even if they can start; it is not hard to understand that they have difficulty believing they are equal before the law. The stark reality is that we have to question whether indeed they are. The feedback we received made it clear that this was our challenge.



J Bruce Robertson
President