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**WHAT IS DISTINCTIVE ABOUT NEW  
ZEALAND LAW AND THE NEW ZEALAND  
WAY OF DOING LAW -  
INNOVATION IN NEW ZEALAND STATUTE  
LAW**

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## **What is this paper about?**

- 1 The threshold question is to define what this paper is about.<sup>1</sup> Tests as to what is innovative tend to be subjective. What is meant by “innovative” in the first place? The Oxford English Dictionary makes it plain that innovation is the action of innovating; the introduction of novelties; the alteration of what is established by the introduction of new elements or forms. In one sense, every statute is an innovation. The term is also susceptible to a distinction between those statutes that are innovative as to form and those that are innovative as to policy. Some statutes are known for the novelty and boldness of their policy. Others for the use of intricate and novel legislative techniques, for example the claw back provisions of the Treaty of Waitangi (State Enterprises) Act 1988.<sup>2</sup> Some lawyers may admire particular legislative techniques that have no great impact except to implement faithfully the policy of the Act. And that policy may be of no great significance. On the other hand, statutes that are simple in drafting terms may raise enormous controversy leading to a difficult and long parliamentary passage.
  
- 2 Contemplating the difficulty of selection, I informally surveyed the Law Commission lawyers as to what they considered to be the three top innovative pieces of legislation in New Zealand. The results were remarkably uniform. Top qualifiers were:
  - the Accident Compensation legislation;
  - the Official Information Act;
  - Treaty of Waitangi legislation.

And none of these is particularly surprising when one is comparing New Zealand with other countries. And that raises another question – innovative compared to

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<sup>2</sup> These are now contained in the State-Owned Enterprises Act 1986, sections s 27A, 27B, 27C and 27D.

what? Innovative compared to other countries with whom we compare ourselves, such as the United Kingdom, Australia and Canada? These are certainly factors to be weighed in the equation.

- 3 How does one know what is innovative? Lawyers are not necessarily the appropriate judges of legislation. I found this out to my cost as the MP for Christchurch Central. There were thousands of unregistered dogs in Christchurch. I went on talkback radio to discuss the problem and offered a legislative solution. It was one of the most torrid debates I was involved in while I was in politics. The world is divided between those who love dogs and those who hate them. Both are vociferous. The Dog Control Act 1996, considerably amended as it has been, contains some novel features. Certain breeds of dog can be prohibited by regulation.<sup>3</sup> The public of New Zealand may regard this legislation as some of our most important – look at the furore that revolved around a proposal to place microchips in dogs.<sup>4</sup> What amounts to an innovative project legislation is not an easy issue to judge. Dogs generate a great deal more political heat than monetary policy. And heat tends to be a factor in judging innovation. On the other hand, measures of great technical excellence and practical importance like the Imperial Laws Application Act 1988 deserve credit, are innovative but are relegated to the category of lawyers' law and attract no interest.

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<sup>3</sup> The Dog Control Act 1996, schedule 4, lists breeds and types of dogs that are classified as being potentially dangerous, or “menacing” and therefore are prohibited from being imported and are required to be muzzled in public. Section 78A provides for schedule 4 to be amended by the Governor-General, by Order in Council, in accordance with a recommendation from the Minister.

<sup>4</sup> The Dog Control Act 1996, section 36A, was inserted as from 1 July 2006 by section 24 of the Dog Control Amendment Act 2003. Subsections 1 and 2 require that dangerous or menacing dogs must be microchipped as from 1 December 2003 and that all dogs registered for the first time on or after 1 July 2006 must be microchipped. Subsection 2A exempts working dogs and was inserted in response to much political controversy by the Dog Control Amendment Act 2006, section 17. The Dog Control Amendment Act 2004 also amended microchipping provisions in the principal Act.

The Dog Control (Cancellation of Microchipping Requirements) Amendment Bill 2006 (No 40-1) was a members Bill introduced by Jeanette Fitzsimons. It would have cancelled the requirement to implant microchip transponders in all dogs newly registered from 1 July 2006 unless they were classified as menacing or dangerous under the principal Act. It was narrowly defeated upon introduction and did not proceed to a first reading.

Refer also to the New Zealand Parliamentary Debates: (5 April 2006) 630 NZPD 2511; (17 May 2006) 631 NZPD 3168; (20 June 2006) 632 NZPD 3673 & 3729; (21 June 2006) 632 NZPD 3791; (22 June 2006) 632 NZPD 3845 & 3853.

- 4 It seems to me the criteria I have adopted for selection are innovation in the policy behind the legislation, including policy that is unusual by international standards. Second, there is innovation in how the legislation operationalises the policy. Third, perhaps are examples of failure and ineffectiveness of legislation. But I do feel somewhat unsatisfied about the criteria to be used.
- 5 New Zealanders who are interested in legislative issues, and they are few, have a tendency to pat the country on the back in a self-satisfied sort of way and suggest that New Zealand is an innovator and a bold law reformer, and that the New Zealand statute books reflects this sense of daring and reaching out. And that by the standards of other countries New Zealand has a tradition of bold legislative experimentation.
- 6 We seem to cherish the belief that our legislative solutions are home grown and we are nourished by a sense of our own unique geographical and social circumstances. We like to convince ourselves that we have struck out fearlessly along new legislative paths and stand like some sort of beacon of example to other less bold nations who legislate. This paper will show there is some slight element of truth in these beliefs but not much. Indeed, no sense of self-satisfaction is warranted. We could do a great deal better with our legislation and we have a number of endemic faults that need to be cured.
- 7 Legislative failure is as instructive as success. Indeed, failures can be innovative as well. New Zealand has a tendency not to dwell on its mistakes, but there is much that can be learned from them. This paper draws attention to a number of statutory experiments that have produced dubious results. Some things work, some don't.
- 8 Having introduced the paper with some important caveats I now come to saying what it will do. It will attempt to analyse those features of New Zealand statute law that are novel and innovative. It will do this by first looking at the history of legislation in New Zealand. Then there will be an attempt to analyse innovative features in particular areas of law, especially those not covered by other speakers at this seminar. These will include:
  - Environmental statutes;

- Constitutional statutes including statutes dealing with Local Government;
- Social Welfare statutes and other social legislation;
- Economic Regulation statutes;
- Family law;
- Commercial law;
- Tax law;
- Education.

9 First the question of whether statute law is derivative or original is discussed. That is followed by an attempt to look at statutory innovation in terms of waves of reform at various historic periods. Then comes a discussion arranged around legal topic headings.

### **Derivative or Original?**

10 Of course, there are some areas where New Zealand's legislative imprint is unique. Nowhere is this more evident than in relation to matters concerning the Treaty of Waitangi and legislation relating to matters Maori.<sup>5</sup> Indeed this material does comprise a rich body of material of Byzantine complexity reflecting the deep ambiguities that characterise the New Zealand response to its indigenous people. Every year the New Zealand Parliament passes a Maori Purposes Act dealing with Maori issues that require legislation. There are almost sixty of them on our statute book. There are thirty other statutes that deal exclusively with Maori matters and the Treaty of Waitangi, as well as nearly thirty others that refer to the Treaty. But this field is one that has been dealt with in this seminar by Justice Baragwanath so I shall not develop this topic further. Similarly, the statute book deals extensively with the criminal law and creates myriad offences but Justice Robertson has dealt with innovation in the New Zealand's criminal law so I will not go there.

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<sup>5</sup> For instance, the Treaty of Waitangi Act 1975 and Te Ture Whenua Maori Act 1993.

- 11 Even in matters relating to Maori we have been accused of copy cat legislation, the Maori language Act 1987 has been charged as being derivative of measures protecting Welsh and Erse elsewhere.<sup>6</sup> Indeed the serious charge has been made:<sup>7</sup>

Copycat legislation is something else [than simply referential legislation] and [is] far more insidious. A curious answer can be given to the question of where our legislation comes from when asked of the increasing legislative output of successive New Zealand governments. It is this – that very little of our own legislation originates in New Zealand. Most of it is imported from overseas. Some of it is imported already fully assembled, the rest broken down or in kitset form. ....Much of it, introduced and enacted as if it were unique to New Zealand, is actually borrowed for the most part unthinkingly from other often incomprehensibly different jurisdictions. If anyone wants to see academic plagiarism at its worse today, one has only to look at the state of our Statute Book.

- 12 This rather acid accusation has some truth in it but it is hard to see how all borrowing could be or should be avoided. A significant portion of the New Zealand statute book is driven by New Zealand's international obligations that our system obliges us to convert into domestic law by legislation to make them effective. To a degree unheard of 50 years ago, today New Zealand cannot please itself as to what policies it pursues. There are at least fifty-one Acts of Parliament in New Zealand implementing one hundred treaties.<sup>8</sup> These range from the Abolition of the Death Penalty Act 1989, that reflected ratification of the First Optional Protocol to the International Covenant on Civil and Political Rights, to the Trans-Tasman Mutual Recognition Act 1997 and many others.<sup>9</sup> In theory, we could decide not to assume some of these obligations and so to preserve our sovereignty. But in trade terms and in many other ways it would be a great

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<sup>6</sup> Nigel Jamieson "Legislation through the Millennial Looking Glass" (2000) 9 Otago LR 713, 723.

<sup>7</sup> Jamieson, above n 6, 721-722.

<sup>8</sup> Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (2001 ed, Wellington) para 6.1.1:

"New Zealand is party to around 900 multilateral and 1,400 bilateral treaties. It has about 700 Acts in force, of which 92 expressly refer to treaties, either specifically or generally. Fifty-one of these Acts refer to specified treaties, of which all but 4 are multilateral (see Appendix 3). These 51 Acts implement 99 different treaties, in whole or in part (20 deal with more than 1 treaty and several deal with an aspect of the same treaty). Fifty-three of these treaties are set out in schedules to their respective Acts and 2 are set out in schedules to their respective regulations. These treaties are not self-executing because they require the creation of operational machinery or the imposition of duties on individuals within New Zealand's jurisdiction to be effective".

<sup>9</sup> The Trans-Tasman Mutual Recognition Act has the effect, along with the companion legislation in Australian jurisdictions, of destroying regulatory legislation in Australasian jurisdictions without repealing it, a highly novel and imaginative arrangement.

mistake to do so. In the end that would lead to New Zealand waving goodbye to the modern world.

- 13 On the other hand, New Zealanders now have a much greater sense of self confidence in their sense of rational identity and capacity to devise their own legislation solutions than was the case in colonial times, and even for much of the 20<sup>th</sup> century. We are not spooked by the fact that no-one else has done what we want to do.
- 14 Furthermore, legislators, judges, policy makers and ministers in many countries are interested in what their counterparts in comparable countries are deciding to do. Often they study it closely and not infrequently they borrow from it. Indeed, journalists, judges and legislators all live to some degree by taking in one another's washing. Much of this is inevitable and it is hard to see the practice as insidious. Most modern democracies face common policy problems and often the solutions will work in more than one jurisdiction. Reinventing the legal wheel is neither necessary nor desirable if one can find a good ready made wheel that will work on the cart.
- 15 In New Zealand's case, policymakers, ministers and Judges always look hard at what is going on in the United Kingdom, Australia and Canada. Indeed, I well recall that when I was appointed to a chair in the Law Faculty at the Victoria University of Wellington in 1974. The position rejoiced in the title "Professor of English and New Zealand Law." The New Zealand legal system derives from the English one, and bears many heavy marks of it still both in common law and statute law. I remember borrowing shamelessly from a similar English law when designing as a Minister the Serious Fraud Office Act 1990. Indeed, the then Attorney-General for England and Wales, Sir Patrick Mayhew, gave me access to his officials in order to probe the policy and statute to see whether it fitted our needs. Comparative legislative analysis can be a most helpful analytical tool when designing legislation. Often one can learn what not to do as much as what to do.
- 16 In a country like New Zealand which is small and not a trend setter in international commerce there are probably areas where it is better for us to be

policy takers rather than new policy makers. For example, our law on intellectual property has been rather conservative and slow to innovate. The Copyright Act 1994, the Patents Act 1953 and the Designs Act 1953 are not exactly novel. Indeed, the last two appear to me to be in need of serious attention.

- 17 Despite the virtues of borrowing and adapting, however, New Zealand has designed some memorable home grown statutory solutions of some enduring interest. And it is with these that this paper will principally concern itself.
- 18 New Zealand has a lot of statutes, 1100 principal Acts – too many indeed. That number only includes public general acts – not local acts, of which there are hundreds, and not private Acts. We do not, however, pass statutes as quickly as we did when I argued we were the “the fastest lawmakers in the West.”<sup>10</sup> The new mixed-member proportional electoral system under which four Parliaments have now been elected has changed that. Indeed, we are now in some danger of not being able to renovate our statute book when it needs it. The MP and barrister, Christopher Finlayson said recently:<sup>11</sup>

I think we have gone from being the fastest lawmaker in the west, to the slowest.

- 19 Nonetheless, the bulk of New Zealand’s statute law has increased in exponential fashion. We are happy to add to it. What we do not do in any systematic way is go back weed out and repeal statute law that we no longer need. Is there anyone in the audience who can tell me why we still need the New Zealand Institute of Journalists Act 1895?<sup>12</sup> Or indeed the Music Teachers Act 1981?<sup>13</sup> What about the New Zealand Library Association Act 1939?<sup>14</sup> I could go on and on.

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<sup>10</sup> Geoffrey Palmer “The Fastest Law-Makers in the West” (28 May 1977) 13 *New Zealand Listener*. See also Geoffrey Palmer *Unbridled Power?: An Interpretation of New Zealand’s Constitution & Government* (Oxford University Press, Wellington, 1979) 77.

<sup>11</sup> Christopher Finlayson MP “Post Legislative Review” (Address to the Commonwealth Parliamentary Association Regional Conference, 15 August 2006).

<sup>12</sup> See Nadia Elsaka “The ‘Jekyll-Hyde Journalist’: New Zealand Journalists and the Pursuit of Professionalism” (New Zealand Journalism Online, Conference 2004: Professionalism in the Media, 1-2 December 2004) <<http://jeanz.org.nz>> (last accessed 11 August 2006). The New Zealand Institute of Journalists Act 1895 established the first journalists’ organisation in New Zealand, the New Zealand Institute of Journalists (NZIJ) which was modelled on the British Institute of Journalists. Its main concern was with the question of journalism’s professional status. Its membership was not confined to working journalists but also included editors and newspaper owners. However, the NZIJ fell out of favour as early as the turn of the twentieth century. Journalists felt that its wide membership meant that the professional interests of medial owners were being promoted at the expense of journalists’

- 20 Our statute book is not presented in any coherent or systematic way. It is not arranged in any order by topic headings. It is a collection of Acts of Parliament passed in different years. The closest we have to an index is the Tables of New Zealand Acts and Ordinances and Statutory Regulations in Force that is published annually. All that provides is an alphabetical list of Act titles.
- 21 The New Zealand statute book reflects, as it must, our particular concerns and obsessions as well as the engines of our economy. As was wryly observed nearly forty years ago:<sup>15</sup>

There is no popular demand for the reform of private law and it is improbable that New Zealand will ever reach the empyrean height of spending as much time on this type of reform as on legislation for the dairy industry.

It certainly is the case that primary production sits heavily upon the New Zealand statute book; there are about 50 New Zealand statutes concerned with agriculture, horticulture, forestry, fisheries, animals, agricultural marketing and related issues. We know in historical terms that the organization of some of these industries, particularly the dairy industry, has contained novel and innovative features,

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interests as employees. They created journalists-only bodies to deal with their industrial concerns. The first of these was the Canterbury Journalists' Union established in 1901 as a registered trade union. This was followed by the New Zealand Journalists' Association formed in 1912.

The NZIJ has not been an active body in New Zealand for some 100 years, yet the Act that established lingers on, cluttering up the Statute Book.

<sup>13</sup> See Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Auckland, 2004) 187. The Music Teachers Act 1981 is an example of unnecessary legislation resulting from pressures other than those that truly reflect the public interest, for instance, from pressure groups wanting to enhance their own status. For many occupational groups, it is not the public interest that requires legislation, but their own private interest. Music teachers had had an act since 1928. Because only about 1500 music teachers were registered while the rest were not, they wanted compulsory registration, but the government was not prepared to endorse that policy. It was not necessary from a public policy point of view. The music teachers' aims could have been achieved without passing the Act by forming an incorporated society under the Incorporated Societies Act 1908. They wanted legislation however because they had some already, they wanted it to confer status, and they wanted it because it might have been a step towards compulsory registration.

<sup>14</sup> The New Zealand Library Association Act 1939, section 2, constituted a body called the New Zealand Library Association (Incorporated) – this body had previously been known as the Libraries Association of New Zealand and had been constituted “at a meeting of representatives of public libraries that was held in Dunedin in the month of March, nineteen hundred and ten, pursuant to a resolution adopted by the Dunedin City Council on the seventh day of February, nineteen hundred and ten”. Section 3 provided that the Incorporated Societies Act 1908 was to apply to the Association.

<sup>15</sup> J L Robson (ed) *New Zealand: The Development of its Laws and Constitution* (2 ed, Stevens and Sons, London, 1967) 496.

particularly in relation to marketing arrangements.<sup>16</sup> Indeed, the Dairy Industry Restructuring Act 2001 is not without interest still. I expect that the Sharemilking Agreements Act 1937 contributed much to the economic efficiency of the industry. But I am not inclined to dwell further in this area, important though it is to the New Zealand economy.

### **Waves of Reform**

- 22 There is a tendency to think of New Zealand reforms as coming in waves during particular historical periods when quite radical legislative reforms are engaged in. These periods are punctuated by long periods of relative quiet when not too much by way of innovation occurs. Certainly there have been at least four periods in New Zealand's history when big programmes of legislative activity have been engaged in. At the beginning of European settlement obviously innovation in statute (or in the days of Crown Colony Government, ordinance) was called for. And considerable innovation was demonstrated. But these changes for the most part have receded into the realm of New Zealand's legal history and leave little imprint on the current New Zealand statute book. Between the promulgation of the New Zealand Constitution Act 1852 and the Liberal Government of the 1890s the biggest statutory change was undoubtedly the abolition of the provinces in 1876. From that day to this, federalism has remained uncongenial to New Zealanders' sense of what make appropriate arrangements for governance.

#### *The Liberal Government*

- 23 The period of the Liberal Government 1891 to 1912 is generally counted as one of bold and innovative statutes – the great land reforms of John McKenzie,<sup>17</sup> and William Pember Reeves' legislative masterpiece the Industrial Conciliation and Arbitration Act 1894,<sup>18</sup> a system that lasted with variations for more than sixty

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<sup>16</sup> Geoffrey Palmer "New Zealand's Overseas Trade" (1969) 3 J World Tr L 272, 287.

<sup>17</sup> Beginning with his first Land for Settlements Act 1892 and followed by the Land for Settlements Act 1894, the Land for Settlements Amendment Act 1896, the Land for Settlements Acts Amendment 1897 and the Land for Settlements Acts Amendment 1899. See "McKenzie, Sir John KCKG" in Encyclopaedia of New Zealand (1966) <<http://www.teara.govt.nz>> (last accessed 11 August 2006).

<sup>18</sup> "Masterpiece" is the sobriquet conferred in James Belich *Paradise Reforged: A History of New Zealanders from the 1880s to the Year 2000* (A Lane, Penguin, Auckland, 2001) 44.

years, but little trace of which now remains. Reeves was a legislator who as the first Minister of Labour was bold and radical by any standard. He believed in using the power of the state.<sup>19</sup> Too radical for the Cabinet, he became the Agent-General in London and later first Director of the London School of Economics. The Old-Age Pensions Act 1898 signalled that the state had some responsibility to relieve poverty. In 1893 New Zealand became the first country to give women the vote.<sup>20</sup> The Female Law Practitioners Act 1896 provided:

Notwithstanding anything to the contrary contained in “The Law Practitioners Act 1882” and the Acts amending the same, any woman of the age of twenty-one years and upwards may be enrolled as a barrister or solicitor on passing the examinations required to be passed by males, and on payment of the fees and compliance with the law in that behalf.

This was a wonderful innovation. Indeed the period was one that spawned considerable overseas interest in New Zealand’s state experiments.

#### *The First Labour Government*

- 24 The second period usually thought of as involving big reform was the time of the first Labour Government, elected in 1935. The legislative imprint of that Government that is left now stems largely from the planks of the welfare state in both health and income maintenance. The Social Security Act 1938 was undoubtedly a major measure. Some economic measures were also very important including nationalizing the Reserve Bank and in 1945 taking over the Bank of New Zealand, a trading bank.
- 25 The Economic Stabilisation Act 1948 lasted until 1987 and exerted a malign influence on the health of the New Zealand Parliament by allowing regulations to be made on prices, wages and other aspects of economic activity.<sup>21</sup> It rendered Acts of Parliament an unnecessary step in accomplishing the most draconian regulation of the economy. The Attorney-General and Minister of Justice, Rex Mason, in 1937 set up a Law Revision Committee, machinery that over a period

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<sup>19</sup> Keith Sinclair *A History of New Zealand* (Revised edition 1980, A Lane, Penguin, Harmondsworth, Middlesex) 175.

<sup>20</sup> Electoral Act 1893.

<sup>21</sup> It was repealed by the Economic Stabilisation Act Repeal Act 1987.

of some thirty years led to many important reforms reaching the statute book.<sup>22</sup> In 1966 the Committee was replaced by a so-called Law Revision Commission and four, later five, standing law reform committees.<sup>23</sup> The Commission was replaced in 1975 by a Law Reform Council.

### *The Hanan Years*

- 26 Indeed, in terms of statutes reforming what is sometimes known as lawyers' law there was a great deal of it in the 1960s particularly with the Hon Ralph Hanan who was Minister of Justice from 1960 until his death in 1969.<sup>24</sup> The death penalty went for murder in his time. He was eager to build a reputation as an innovator and reformer. He appeared to have little or no sentimental attachment to Britain.<sup>25</sup> His concern was to reform the law, not whether a proposed change had been made in England or elsewhere. In the 1960s of course, the view that New Zealand law reform and statutory change could diverge from English practice was highly innovative. He once wrote:<sup>26</sup>

A more fundamental cause (of the inadequacy of law reform) is the view that important changes in the common law should not normally be made except in accordance with changes that have taken place in England. This is not good enough and does not seem compatible with our needs, status or resources. The most fitting attitude, it may be suggested, is to retain the utmost respect for the principles of justice and wisdom that underlie the common law but no longer to test proposed changes by the measure of English law. Reforms in the content of the law ought not to have to await reform made in England, nor should English reforms necessarily be copied in New Zealand.

### *The Fourth Labour Government and the Bolger Government*

- 27 The fourth great era of innovation may be thought to be that of the Fourth Labour Government 1984-1990 and the first few years of the Bolger National Government. Certainly there was a lot of policy innovation by legislation but

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<sup>22</sup> Sir Kenneth Keith "Law Reform" in Ian Barker and Graham Wear (eds) *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis, Wellington, 2003) 353, 356; B J Cameron "Legal Change over Fifty Years" (1987) 3 *Canterbury L Rev* 198, 200.

<sup>23</sup> B J Cameron, above n 22, 201.

<sup>24</sup> B J Cameron, above n 22, 200.

<sup>25</sup> B J Cameron, above n 22, 207.

<sup>26</sup> J R Hanan *The Law in a Changing Society* (New Zealand Department of Justice, Wellington, 1965) 20.

much of the reform was of an economic character and not all of that is reflected in the statute book. In the economic areas there was the Reserve Bank of New Zealand Act 1989 that is a model that was influential in other countries – it recognised that by then day-to-day control of monetary policy had passed to the Reserve Bank. The Act establishes the primary goal of monetary policy and converts that goal into a mechanism to reach defined objectives. What was novel was the mechanism for determining the inflation target. The method by which that can be changed is also laid down. The relationship between exchange rate policy and monetary policy is dealt with and clear responsibility and accountabilities are allocated.<sup>27</sup>

- 28 The extent to which New Zealand’s public sector was re-shaped by the fourth Labour Government ought not to be underestimated. The State-Owned Enterprises Act 1986, the State Sector Act 1988, and the Public Finance Act 1989 changed the entire system. Some of the less general statutes were innovative as well. The Crown Forests Assets Act 1989 allowed state forests to be harvested without transferring ownership of the land. The driving need was a search for efficiency in the use of resources. This was particularly the case with the State-Owned Enterprises Act which preferred commercial imperatives for State trading organisations to those driven by the political expediencies of ministerial responsibility. It corporatised a large number of important state-owned businesses and was legislation that attracted a lot of overseas attention. There were other statutes that corporatised specific organisations: New Zealand Railways Restructuring Act 1990, State Insurance Act 1990, the Wellington Airport Act 1990, Auckland Airport Act 1987, and Bank of New Zealand Act 1988. The policy of privatisation that was followed for a number of corporatised organisations was highly controversial.
- 29 The Sector Act 1988 brought about large changes in public administration and the organization of the state sector and methods of operating in government departments. The somewhat cumbersome bureaucratic controls in the old Public Service were also swept away and substituted for them was a smaller results-

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<sup>27</sup> Bernard Robertson “The Currency and the Constitution: Lessons from a ‘Rather Small Place’”(1996) 16 Oxford Journal of Legal Studies 1.

oriented, cost and resource conscious core public service. Lawyers tend not to worry much about economic legislation but its influence ought not to be underestimated in importance.

- 30 There was also greater emphasis on value for money underpinning the changes in the Public Finance Act. The introduction of management systems which aimed to remove the ambiguities in the operations of Government agencies was important. The Public Finance Act 1989 was re-engineered and improved by the Public Finance Amendment Act 2004 which also incorporated the Fiscal Responsibility Act 1994 into the principal Act. New Zealand's method of organizing its public finances using accrual accounting certainly was novel and did attract a lot of attention and some emulation. The openness and transparency of the Budget process seems well accepted and established now. The sharpening of ministerial responsibility and the narrowing of its focus was also important as were the removal of administrative shackles on the capacity of state servants to manage. These changes were significant as well as being innovative and they have endured.
- 31 The Public Audit Act 2001 is advanced and effective legislation in respect to important constitutional watchdog functions. Bringing some order and consistency to public bodies was achieved in a most interesting statute, the Crown Entities Act 2004.
- 32 The waves of reform theory are only a partial explanation for the most novel examples of statutory innovation. Many important statutes that have endured were not the product of those eras. Every piece of legislation results from its own dance and the dances are never the same. Perhaps not much of analytical value can be learned by looking at things in eras, but it does seem to enjoy some explanatory power. The paper now passes on areas to examine New Zealand legislation in another way, in relation to legal topic headings.

### **Social Legislation**

- 33 The Old-Age Pensions Act 1898 was an elegant and self contained piece of legislation. It contained a number of features that would jar on modern

sensibilities such as a public examination before a Magistrate as to means.<sup>28</sup> Dr W B Sutch said it was not a measure “in which present-day New Zealanders can take much pride...”.<sup>29</sup> It contained tests for conventional morality to be satisfied, a stiff means test,<sup>30</sup> and provided that no Asiatic, even if naturalized, could receive a pension.<sup>31</sup> The Elizabethan Poor Law of 1601 remains legislatively instructive. It created a system to provide relief for the poor on a parish basis financed by rates. The statutory remnants of the grand provisions that heralded the welfare state in New Zealand are for the most part now contained in the Social Security Act 1964. This is an Act that has been so heavily amended and so messed about that it presents an incoherent system of discretions with no principles, no scheme and little indication of what a person might be entitled to or actually receive. If I had to nominate the worst statute in New Zealand this would be it. Fortunately, efforts are now being made to rewrite the Social Security Act 1964 from first principles.

- 34 Contrast that with the Income Tax Act 2004 that covers 2089 pages of the statute book and three of the seven volumes of the statutes passed in 2004. It is by far our longest statute and spells out in enormous detail how people will be taxed. I suppose the moral of the story is that where gathering the revenue is concerned detail is necessary, but where paying it out, detail is undesirable. I wonder why? It was this sort of feature that inspired Professor Charles Reich’s famous article “The New Property”.<sup>32</sup> He argued that government had become a major source of wealth and individual wealth was dependent on an individual’s relationship to government. He described the relationship as amounting to the new feudalism.<sup>33</sup>
- 35 Contrast to the approach is the Social Security Act with two other pieces of social legislation under which large sums are paid out – the New Zealand

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<sup>28</sup> Old-Age Pensions Act 1898, ss 18-27.

<sup>29</sup> WB Sutch *The Quest for Security in New Zealand, 1840-1966* (Oxford University Press, Wellington, 1966) 92.

<sup>30</sup> Old-Age Pensions Act 1898, ss 8(7)–8(9) and 9–13.

<sup>31</sup> Old-Age Pensions Act 1898, s 64(4).

<sup>32</sup> Charles Reich “The New Property” (1964) 73 Yale LJ 733.

<sup>33</sup> See also *Flemming v Nestor* 363 US603 (1960), in which a social security benefit was held not to be an accrued property right. Thus, a person otherwise qualified for social security who had been a member of the Communist party and had been deported because of it was not eligible. The constitutionality of the law depriving a deported person of social security benefits was upheld.

Superannuation Act 2004 and the Injury Prevention, Rehabilitation and Compensation Act 2001, that started life as the Accident Compensation Act 1972. Both these statutes spell out entitlements in detail and with considerable precision. The first because the Superannuation Schemes Act 1976 arrived on the statute book after formidable political and legal battles,<sup>34</sup> repealing and replacing the New Zealand Superannuation Act 1974.<sup>35</sup> Virtually ever since, the fiscal and political burdens of this legislation have laid heavily upon the country, although no doubt it has maintained the incomes of many older people.

36 Political efforts to come to grips with the issues inspired legislation that was extraordinarily innovative. During the 1975 general election, a political auction took place regarding retirement provision for New Zealanders. The result was the National Superannuation scheme – about as generous a state-funded retirement scheme as one would ever find anywhere and introduced at a time of economic stagnation.<sup>36</sup> Over the years it contributed substantially to government deficits – certainly, a huge chunk of the annual budget was tied up in funding the scheme. The fiscal consequences of the scheme became unsustainable, but the political consequences of addressing it were unbearable as well. Both National and Labour had made promises not to cut the benefits of the retirement programme in election campaigns, and then reneged on those promises when gaining office. This was politically very unpopular yet more cuts needed to be made.

37 A constitutionally and legislatively innovative solution was found in 1993. An inter-party agreement was negotiated between the parties represented in the New Zealand Parliament. The Accord on Retirement Income Policies was entered into by representatives of the Alliance, Labour and National parties on 25 August 1993, and the United Party signed in 1995.<sup>37</sup> The Parties agreed on a set of principles governing the design of retirement income policies, a number of specific policy details, and processes for managing any future modifications to these policies. The constraints agreed to, together with cuts that had already been

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<sup>34</sup> (25 June 1976) 403 NZPD 29-49; (20 July 1976) 404 NZPD 837-849; (22 July 1976) 404 NZPD 892-932.

<sup>35</sup> Superannuation Schemes Act 1976, s 11.

<sup>36</sup> Geoffrey Palmer “New Zealand’s Accident Compensation Scheme: Twenty Years On” (1994) 44 U Toronto LJ 223, 261.

<sup>37</sup> New Zealand Parliament “An Accord on Retirement Income Policies” (25 August 1993).

made by both the Labour and National governments, were supposed to make the National Superannuation scheme sustainable in the future and prevent it from depending on future political auctions.

38 Legislatively speaking, the Accord was innovative. It expressly stated that it was not intended to create legal rights, but “The parties intend to abide by this Accord in accordance with its purpose, spirit, and intent. In particular, each of the Parties intends – (a) to support the enactment of such legislation as is necessary to give effect to this Accord; and (b) to take any other steps reasonably necessary to give effect to this Accord”.<sup>38</sup> This was constitutionally innovative as well –the Accord amounted to Parliament fettering its own broad, law-making ability, not through law but by developing a new constitutional convention. The legislative way in which the Accord was dealt with was also ground-breaking. The Accord itself was set out in the first schedule of the Retirement Income Act 1993, which was passed just prior to the 1993 general election. Associated legislation comprising amendments to other Acts was also passed to implement provisions in the Accord.<sup>39</sup>

39 The Accord took these policies out of the political limelight during the 1993 and 1996 general elections. During that period there was stability in the retirement income policy environment. However, following the 1996 general election, the Accord became inoperative. The New Zealand First Party chose not to become a party to the Accord, which meant that following the 1996 election when National and New Zealand First formed a coalition, only one coalition member was a party to the Accord and the coalition agreement was inconsistent with the Accord itself. It may not have kept superannuation policy out of the political limelight forever – that would have been a very impressive feat. But the Accord was, in numerous respects, extremely innovative. In 1994 I wrote that:<sup>40</sup>

It provides a moral baseline for the political parties in dealing with this contentious subject and reduces the incentives for political auctions substantially by placing formidable political costs in their path. At the same time it accomplishes removal

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<sup>38</sup> New Zealand Parliament, above n 37, para 7.1.

<sup>39</sup> See Social Welfare (Transitional Provisions) Amendment Act 1993; Social Security Amendment Act 1993.

<sup>40</sup> Palmer, above n 36, 263.

of a highly visible item from the partisan political agenda. Nothing like it has occurred before in the history of income maintenance in New Zealand.

- 40 Now we have the New Zealand Superannuation Act 2001. The innovation here is the establishment in Part 2 of the New Zealand superannuation fund designed to use budget surpluses now to be invested to pay for benefits later when the fiscal pressure would otherwise be unsustainable. Section 36 provides as follows:

**Outline of Part**

This Part –

- (a) establishes the New Zealand Superannuation Fund:
  - (b) provides for payments into and out of the Fund:
  - (c) establishes the Guardians of New Zealand Superannuation to manage and administer the Fund:
  - (d) requires the Guardians to invest the Fund on a prudent, commercial basis:
  - (e) empowers the Minister to give direction to the Guardians regarding the Government's expectations as to the Fund's performance, and requires the Guardians to have regard to those directions:
  - (f) provides for other matters relating to the Fund and the Guardians.
- 41 The Accident compensation legislation had a different pedigree altogether. It must rate of one of the biggest reforms of the legal system to have been engaged in by New Zealanders. It swept away altogether the common law action for damages for personal injury by accident, a stunning development for the common law world and one that has yet to be replicated. In 1972, New Zealand's Accident Compensation Act was passed by Parliament and took effect on 1 April 1974. Since that time, despite many amendments, re-organisations and statutory reconstructions, it has been impossible to bring a tort action in New Zealand for most personal injuries. The candid abandonment of tort actions remains the legally most significant aspect of the scheme, and the policy of rejecting the tort system has been a constant feature of the New Zealand landscape since its enactment.

- 42 New Zealand's pioneering efforts in abolishing the system of tort law as a means of compensating personal injury has attracted a steady stream of overseas interest. Visiting analysts tend to extract from it what meaning their policy predilections suggest.
- 43 One thing is plain: 30 years after the New Zealand Accident Compensation revolution, no other country has copied it. Australia came close at the time of the Whitlam government.<sup>41</sup> The modifications have been made to the tort system in a number of jurisdictions – there have been no-fault automobile schemes implemented, caps placed on damages for the amount of non-economic loss which can be recovered and other statutory changes. Yet nothing matches the New Zealand change.
- 44 In the United States there has been a major crisis in tort litigation and liability systems. But nowhere in the common law world, not Australia, the United Kingdom, Canada, and certainly not the United States has any consensus developed which has led to political action to abolish the personal injury tort system root and branch. Tort law in personal injury has proved remarkably resistance to comprehensive reform. Tort law's flexibility has allowed it to adapt and evolve; legislatures have tinkered around the edges and removed some of its excesses, but the structure remains, to a substantial extent, everywhere except in New Zealand.<sup>42</sup>
- 45 Having taught the law of torts in the United States on 10 occasions, I have come to the conclusion that for the United States serious reform of the tort system is impossible and that the "tort system will continue to limp along, a discreditable social institution popped up by forces of privilege whose motives cannot survive scrutiny. Before anything good can happen, the beast must be slaughtered".<sup>43</sup>

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<sup>41</sup> Geoffrey Palmer *Compensation for Incapacity: A Study of Law and Social Change in Australia and New Zealand* (Oxford University Press, Wellington, 1979) 172.

<sup>42</sup> Palmer, above n 36, 223.

<sup>43</sup> Geoffrey Palmer "The Design of Compensation Systems: Tort Principles Rule, OK?" (1995) 29 Val UL Rev 1115, 1169.

## Environmental Legislation

- 46 New Zealanders like to take pride in their environment, although there is probably not nearly as much reason to do so as we would wish. Nonetheless there is some legislation on the books that was at least innovative in its time although it may not be as novel now. The Resource Management Act 1991 was ambitious in its sweep and its attempt to integrate all the statutes relating to resource management and to set up a system that promoted the sustainable management of natural and physical resources.<sup>44</sup> The Act had many innovative features – it swept away the law of standing, it incorporated into the law directly many Maori expressions and values, it removed a lot of other measures from the statute book and it set up a test to drive many processes for permission to use land, air, soil, water and ocean. It has its own special court, the Environment Court. It gave important powers to local authorities. The Act remains controversial although it has endured.
- 47 The Conservation Act 1987 was unusual in that it gave a department a statutory responsibility to advocate the values of conservation against the world, including Cabinet under whose control the Department serves.<sup>45</sup>

### 6 Functions of Department

The functions of the Department are to administer this Act and the enactments specified in Schedule 1 to this Act, and, subject to this Act and those enactments and to the directions (if any) of the Minister,—

- (a) To manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department:
- [(ab) To preserve so far as is practicable all indigenous freshwater fisheries, and protect recreational freshwater fisheries and freshwater fish habitats:]
- (b) To advocate the conservation of natural and historic resources generally:
- (c) To promote the benefits to present and future generations of—

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<sup>44</sup> Geoffrey Palmer “The Making of the Resources Management Act” in Geoffrey Palmer *Environment: The International Challenge: Essays* (Victoria University Press, Wellington, 1995) 145.

<sup>45</sup> Conservation Act 1987, s 6. Note that section 6(ab) was inserted on 10 April 1990 by section 4 of the Conservation Law Reform Act 1990.

- (i) The conservation of natural and historic resources generally and the natural and historic resources of New Zealand in particular; and
- (ii) The conservation of the natural and historic resources of New Zealand's sub-antarctic islands and, consistently with all relevant international agreements, of the Ross Dependency and Antarctica generally; and
- (iii) International co-operation on matters relating to conservation:
- (d) To prepare, provide, disseminate, promote, and publicise educational and promotional material relating to conservation:
- (e) To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism:
- (f) To advise the Minister on matters relating to any of those functions or to conservation generally:
- (g) Every other function conferred on it by any other enactment.

Indeed separating the conservation and environment policy functions and making conservation a different Ministry from the Ministry for the Environment as established by Environment Act 1986 was itself an interesting move,<sup>46</sup> although I am not sure anyone has assessed how successful it has been. The creation of a Parliamentary Commissioner for the Environment created in that Act has been a notable watchdog. The Marine Mammals Protection Act 1978, despite its age, remains a statute that offers comprehensive protection to marine mammals although it could do with an overhaul. I also confess a certain fondness for the Driftnet Prohibition Act 1991, although the effects of Convention that led to that measure were probably of greater importance around the rest of the Pacific than in New Zealand. The manner in which the Fish and Game Councils are set up in New Zealand under statute is the envy of many outdoors people around the world.<sup>47</sup> The Councils are authorised by statute but are not state run – they operate as a democratic system that is controlled by licence holders.

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<sup>46</sup> Conservation Act 1987, s 5; Environment Act 1986, s 28.

<sup>47</sup> Conservation Act 1987, ss 26A–26ZR, inserted by Conservation Law Reform Act 1990, s 17.

## Constitutional Legislation

- 48 Sir Kenneth Keith is dealing in this seminar with the qualities of the New Zealand Constitution, but here I will give a brief account of the some of more innovative constitutional legislation. Since the New Zealand Constitution is odd by international standards, indeed now completely isolated from any other, all of it could in one sense be counted as innovative.
- 49 In the adoption of the Mixed Member Proportional electoral system borrowed from Germany and contained in the Electoral Act 1993 New Zealand was innovative in the sense it was perhaps the first Westminster system to adopt proportional representation. And that did profoundly change the manner in which the New Zealand system of Government functions, so ranks as innovative in the sense it was in its effects the most important constitutional change for a century. It is important to note that it was preceded by a Royal Commission Report – important legislation requires a solid analytical base.<sup>48</sup>
- 50 The Constitution Act 1986 repatriated the Constitution finally from the United Kingdom but is far from a codified Constitution. Indeed, it is skeletal and tentative. The New Zealand Bill of Rights Act 1990 started something of a trend in countries like New Zealand, having an influence on the United Kingdom Human Rights Act 1998.<sup>49</sup> But it is far from being a full blown Bill of Rights with judicial review of legislative action that it was designed to be at the outset. Yet in the assessment of Professor Philip Joseph the effect of the Bill of Rights has been significant. Writing in 2001 he said, “Today, the Bill of Rights is an integral part of our jurisprudence and represents one of the major legal developments of the modern era.”<sup>50</sup> The Supreme Court Act 2003 was a constitutional milestone in the sense that it ended appeals to the Privy Council and

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<sup>48</sup> Royal Commission on the Electoral System “Report of the Royal Commission on the Electoral System: Towards a Better Democracy” [1986–1987] IX AJHR H 3.

<sup>49</sup> Anthony Lester QC “Parliamentary Scrutiny of Legislation under the Human Rights Act 1998” (2002) 33 VUWLR 1.

<sup>50</sup> Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 1018.

set up a final appellate Court in New Zealand. This must rank as innovation of the first rank.<sup>51</sup>

51 The importation of the Ombudsman to New Zealand from Scandinavia in 1962 was an innovation of some constitutional significance. In its present form as the Ombudsmen Act 1975 the institution of Ombudsmen remains significant, dealing with complaints about central, regional and local government. Indeed, the idea of a grievance person caught on in New Zealand in a big way and statutory bodies to whom people can complain have multiplied in a slightly alarming way: Police Complaints Authority Act 1988; Health and Disability Commissioner Act 1994; the Privacy Act 1993 and the complaints jurisdiction of the Commissioner; Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004; complaints to the Human Rights Commission under the Human Rights Act 1993; the Children's Commissioner under the Children, Young Persons and their Families Act 1989; the Broadcasting Standards Authority contained in the Broadcasting Act 1989. Then there are all the complaints that can be made to professional bodies. New Zealand has a big grievance industry and I sometimes wonder whether it does much good.

52 These complaints bodies suggest another and more profound tendency of New Zealand statute law. It discloses a pattern of removing disputes from the adversarial process of the ordinary courts. The reasons for this trend need deeper analysis than they can receive here. But the establishment of such bodies as the Human Rights Commission suggests a desire to develop principles in a non-litigious way that is more flexible and less confrontational, using the techniques of mediation and conciliation and non-court oriented methods of dispute resolution. The Waitangi Tribunal could be seen in the same light. Furthermore, New Zealand has 100 statutory tribunals of all shapes, sizes and purposes.<sup>52</sup> The high water mark of this approach can be seen in the Employment Relations Act 2000

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<sup>51</sup> I will be most interested to see how section 3(2) is judicially interpreted if it ever is "Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament".

<sup>52</sup> Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

that appears to have achieved the remarkable innovation of reducing the settling disputes by litigation by shifting to mediation.

- 53 But against this trend must be set legislation like the Judicature Amendment Act 1972 that swept away the undergrowth of the prerogative writs and open up executive decisions to judicial scrutiny on a greatly simplified basis.
- 54 Some of our constitutional legislation is truly innovative and performs the task better than comparable legislation overseas – the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 use a method that works well and yields more information than many other official information regimes found in the democratic world.<sup>53</sup> But there are weaknesses in it now that need to be remedied and there is no great official enthusiasm for extending the measure or even following it. But the Official Information Act was uniquely innovative and remains a powerful model. It remains a legislative monument to the Hon Jim McLay, Minister of Justice at the time.
- 55 In the area of Parliament, the Parliamentary Service Act 2000 and its predecessor gives Parliament considerable freedom from executive Government control as was in the case in the days of the old Legislative Department. The Regulations (Disallowance) Act 1989 gave Parliament power to disallow regulations, a power that it is yet to exercise. And the area of delegated legislation, especially with the development of rules, remains an area of a difficulty.
- 56 In this area the Interpretation Act 1999 based on an excellent report from the Law Commission should be mentioned and its significance, along with the successful efforts to introduce plain English drafting of New Zealand statutes, a big innovation driven in a substantial way by the Law Commission.<sup>54</sup>

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<sup>53</sup> Rick Snell “The Kiwi Paradox: A Comparison of Freedom of Information in Australia and New Zealand” (2000) 28 FL Rev 575.

<sup>54</sup> The catalyst for reform derives from the work of the Law Commission in three separate reports: *A New Interpretation Act: To Avoid “Prolivity and Tautology”* (NZLC R17, Wellington 1990) *The Format of Legislation* (NZLC R27, Wellington, 1993) *Legislation Manual: Structure and Style* (NZLC R35, Wellington, 1996). They are three limbs of a tripod of interrelated measures, each different, but each necessary to support a structured reform of language and design.

57 Local government makes a rather heavy imprint on the New Zealand Statute Book. The Local Government Act 1974 still survives to some degree, but effectively most of it has been superseded by the Local Government Act 2002 which provides a qualified right of general competence for local authorities to make laws that are not repugnant to the general law according to the Bylaws Act 1910.<sup>55</sup> Local government elections are governed by the Local Electoral Act 2001 and this law contains an innovation that allows for local authorities to adopt different forms of voting than first past the post if they wish to.<sup>56</sup> For example, single transferable vote can be used.

### Family Law

58 The Testator's Family Maintenance Act 1900 introduced the novel notion that the testator's estate was liable to maintain the testator's spouse or children. This interference with freedom of testamentary disposition was certainly new. No other country had tried it. New Zealand decided that the court could rewrite the testator's will and order that those named in the will take in different proportions to those stated by the testator or even vest it in a person or persons not named in the will. These provisions have been extended to allow the statutory provisions setting out how the estate will be distributed on intestacy to be similarly rewritten.<sup>57</sup> And since 2002 a claim can also be made by a *de facto* partner of the deceased.<sup>58</sup> In 1944 a measure now contained in Law Reform (Testamentary Promises) Act 1949 allowed the will to be challenged in court and altered if the claimant has rendered services to or performed work for the deceased, either expressly or by implication, to reward the claimant by making some provision in the will.<sup>59</sup>

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<sup>55</sup> Bylaws Act 1910, s 17; Local Government Act 2002, s 144.

<sup>56</sup> Local Electoral Act 2001, s 27.

<sup>57</sup> Family Protection Act 1955.

<sup>58</sup> The categories of claimants were expanded by the Family Protection Amendment Act 2001. De facto partners and the children of either partner are entitled to claim under this Act provided the partners were living together as a couple at the date of death and the death occurred after 1 February 2002: Family Protection Amendment Act 2001, ss 4 and 5(1). The Act was further amended by the Relationships (Statutory References) Act 2005 to include civil union partners: Relationships (Statutory References) Act 2005, s 7 and sch 1.

<sup>59</sup> *The Laws of New Zealand* (LexisNexis, Wellington, 2005) Family Protection and Other Property Arrangements para 2 (last updated 21 April 2005) <<http://www.lexisnexis.com>>.

- 59 In family law, New Zealand has not lacked innovation, but it certainly does not exhibit coherence. Yes as Professor Bill Atkin said in his inaugural lecture “When we unpack the law we discover a legal and policy jumble.”<sup>60</sup> New Zealand was early in trying to remove the stains of illegitimacy, passing a Legitimation Act in 1894 and later contained in a new and improved Legitimation Act 1939. And now the legal effects of illegitimacy have been abolished altogether.<sup>61</sup> Legislation that has improved the position of women, both inside and outside marriage, has been prevalent for some years – the Matrimonial Property Act 1976 and the Property (Relationships Act) 1976 are both such measures. And this latter Act can override a will. Indeed, in family law a professional lifetime of forty years has seen more dramatic changes, I would assert, than any other. Grounds for divorce, recognition of same sex relationships, property and many other features have been substantially liberalised.<sup>62</sup> Same-sex and opposite-sex couples can now obtain civil unions.<sup>63</sup>
- 60 Consider, for example, the Status of Children Amendment Act 2004 that amended the Status of Children Act 1969 to the effect that the female partner of a woman who conceives by artificial insemination, provided that she consented to the assisted human reproduction procedure, is for all purposes the legal parent of the child.<sup>64</sup> The result is that lesbian couples can be the legal parents of their children.<sup>65</sup>
- 61 When I started law practice the Destitute Persons Act 1910 was in force and the plight of women attempting to secure justice against husbands who mistreated

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<sup>60</sup> Professor Bill Atkin (25 July 2006, Inaugural Lecture as a Professor, Victoria University of Wellington) quoted in “Family Law ‘a Legal and Policy Jumble’” (14 August 2006) 264 *Law Talk* 16.

<sup>61</sup> The Legitimation Act 1939 was repealed by the Status of Children Act 1969, section 12. Section 12 also amended section 40 of the Births and Deaths Registration Act 1951, the section dealing with entries into the register of births of illegitimate children. The effect of the amendment was to remove the possibility for children to have the legal status of illegitimacy and to enable the removal of the word “illegitimate” from already issued birth certificates.

<sup>62</sup> The Matrimonial Property Act 1976 was substantially amended and renamed the Property (Relationships) Act 1976 by the Property (Relationships) Amendment Act 2001.

<sup>63</sup> Civil Union Act 2004.

<sup>64</sup> Status of Children Act 1969, s 18 as amended by the Status of Children Amendment Act 2004, s 14.

them or failed to support them was dire. I learned a lot doing those cases in the Magistrates' Courts but none of it was edifying or progressive. The Domestic Violence 1995 is legal light years away from that. The Family Courts we now have as a result of the Family Courts Act 1980 emphasising less formality and more conciliation have most certainly been a success whatever male protestors may say. Old and strange causes of action were abolished by the Domestic Actions Act 1973.<sup>66</sup>

- 62 Over the last fifty years, family law has moved through a series of reforms, reflecting changes in attitudes and social conditions. Professor Bill Atkin recently noted that the formal concept of marriage is no longer at the heart of family law – it is more concerned with the reality of people's relationships.<sup>67</sup> Family law today is concerned not just with the concept of marriage, but also with civil unions, de facto relationships and other relationships that fall outside these categories. But the law relating to these various relationships is not as harmonious as might appear at first glance.<sup>68</sup> The Property (Relationships) Act 1976 has become less consistent since the amendments in 2001 – the Act now confuses the division of property with the provision of ongoing income maintenance, that is, the distinction between income and capital.
- 63 But the law relating to children is “distinctly fraught”.<sup>69</sup> Lobby groups can make a lot of noise about family law provisions relating to children and it can be a tall order to try to reconcile conflicting ideologies in this area. Emotions run very high indeed. But if issues relating to children can be fraught for emotional or ideological reasons, it does not help matters if pieces of family law legislation pull in different directions. The Child Support Act 1991 dealt with financial support for children and focussed almost exclusively on parents. The Act does not refer to the welfare or best interests of the child. It is an Inland Revenue run scheme and is

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<sup>65</sup> This is the case regardless of whether the source of the semen, ovum or embryo involved in the assisted human reproduction procedure was the woman who is pregnant, her partner or someone other than her partner, Status of Children Act 1969, s 18(1)(b).

<sup>66</sup> Actions abolished by the Domestic Actions Act 1973 included actions in tort for enticement of a spouse (s 3) or enticement, seduction, or harbouring of children, servants and wives (s 4). Also abolished were actions for breach of promise of marriage (s 5).

<sup>67</sup> Atkin, above n 60.

<sup>68</sup> Property (Relationships) Act 1976.

<sup>69</sup> Atkin, above n 60.

a quite separate and discrete corner of family law. Contrast that with the Children, Young Persons, and Their Families Act 1989, dealing with children in need of care and protection. That Act focussed not on parents but on the wider family.<sup>70</sup> Just as in any other area of law, discrete pockets of innovation do not and cannot take us nearly far enough. When an innovative piece of legislation pulls in the opposite direction from other existing legislation, it is hard to feel very satisfied with the state of our Statute Book.<sup>71</sup>

- 64 While this may not be the place to mention it, the Homosexual Law Reform Act 1986 and the Prostitution Reform Act 2003 was not without novelty and interest. The first because it was relatively late in arriving and involved a heavy legislative battle;<sup>72</sup> the second because of the fascinating counterpoint it has set up with local authorities attempting to bend the policy by adopting by-laws.<sup>73</sup>

### **Economic Regulation**

- 65 New Zealand has a chequered history of economic regulation by statute and even more often by subordinate legislation that has already been referred to. Older accounts of our efforts in this area invariably referred to the Monopoly Prevention Act 1908 and the Commercial Trusts Act 1910 along with the decision of the Privy Council in *Crown Milling Company Ltd v R*.<sup>74</sup> Export controls and price controls were both features of economic regulation in the 1930s, the war years, and beyond. The tortured history is well covered in other work and will not be

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<sup>70</sup> Children, Young Persons, and Their Families Act 1989, s 13(b).

<sup>71</sup> What effect the Families Commission Act 2003 may have on all this cannot be predicted at this juncture.

<sup>72</sup> See (8 March 1985) 461 NZPD 3517-3534; (29 March 1985) 462 NZPD 4105-4106; (8 October 1985) 466 NZPD 7203-7213; (9 October 1985) 466 NZPD 7254-7279; (16 October 1985) 466 NZPD 7422-7254; (23 October 1985) 466 NZPD 7598-7623; (20 November 1985) 467 NZPD 8254-8257; (5 March 1986) 469 NZPD 70-72; (19 March 1986) 469 NZPD551-552; (26 March 1986) 469 NZPD 718-723; (9 April 1986) 470 NZPD 876-887; (16 April 1986) 470 NZPD 1050-1056; (23 April 1986) 470 NZPD 1219-1223; (4 June 1986) 471 NZPD 1926; (2 July 1986) 472 NZPD 2580-2603; (9 July 1986) 472 NZPD 2809-2923.

<sup>73</sup> *Willowford Family Trust v Christchurch City Council* (29 July 2005) HC CHCH CIV 2004-409-002299, Panckhurst J; *JB International Ltd v Auckland City Council* (14 March 2006) HC AK CIV-2005-404-002214 Heath J. See also Dean Knight “Brothels, Bylaws, Prostitutes and Proportionality” (2005) NZLJ 423.

<sup>74</sup> *Crown Milling Company Ltd v R* [1927] AC 394.

canvassed here.<sup>75</sup> In this brief account it is possible only to concentrate upon existing statutes.

66 The Commerce Act 1986 was passed at the high noon of free market policies and was conspicuous for two features. The first was the attempt to harmonise the law with the relevant Australian legislation. This was deliberate as it was envisaged that the Closer Economic Relations with Australia was likely to call for greater harmonisation in Trans-Tasman competition and commercial law. The second feature was the belief that emerged in the business community that the statute was adequate for all forms of industry and no industry specific regulation was necessary. So was born the light-handed regulatory model that took all before it until the passage of the Electricity Industry Reform Act 1998. But experience showed that it was not possible to secure optimum competition particularly with network industries under the Commerce Act 1986 alone and industry specific models followed quite quickly, once the dam broke. The Telecommunications Act 2001 was followed by further big changes to the electricity regime setting up the Electricity Commission.<sup>76</sup> And in 2006 a bill has been introduced to further promote competition in the telecommunications arena.<sup>77</sup>

67 The general competition law in the Commerce Act seems to work well enough. Certainly, the economy as a whole is more competitive particularly when one considers the lower tariffs and abolition of import licensing. It is hard to resist the conclusion, however, that New Zealand's legislative efforts to promote specific competition in particular industry areas have not been a great success. Some of the models, especially in electricity, look grotesque and bear no relationship to any model on offer anywhere else. Here is an example where innovation did not help.

68 Other areas of economic regulation, for example in the areas covered by the Securities Act 1978 and the associated Securities Markets Act 1988 have been characterised by continually expanded powers to the regulator. How effective the

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<sup>75</sup> Robson, above n 15, 280-318.

<sup>76</sup> Electricity Amendment Act 2001; Electricity Governance Regulations 2003; Electricity Governance Rules.

<sup>77</sup> Telecommunications Amendment Bill 2006, no 62-1.

regime has been to consumers and to protect the public is not easy to say. But certainly New Zealand securities law is not the Wild West show it was in 1980s.

### **Commercial law**

- 69 New Zealand for many years was famous overseas for that remarkable piece of legislation, the Chattels Transfer Act 1924. Now fortunately it has gone and we have in its place a rather better piece of legislation, the Personal Properties Securities Act 1999.<sup>78</sup> New Zealand contract law is characterised by a common law system that has a heavy overlay of statute law, the Frustrated Contracts Act 1944, the Contracts Enforcements Act 1956, the Contractual Mistakes Act 1977, the Illegal Contracts Act 1970, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1982. Despite this rather odd mixture, there appears to be no great pressure to codify and consolidate the law of contract. Surely, that must come in due course. The classical Sale of Goods Act 1908, the work of Sir MacKenzie Chalmers, marches on still. So does the Mercantile Law Act 1908.
- 70 New Zealand's company law was the result of a Law Commission report that finally entered the statute book as the Companies Act 1993. It has proved a rather innovative and useful improvement on its predecessor and used many ideas developed in other countries as well. This was followed by the Financial Reporting Act 1993, the Receiverships Act 1993 and the Takeovers Code.<sup>79</sup> This last was a substantial innovation and it seems to work.
- 71 The Fair Trading Act 1986 deals with misleading or deceptive conduct and false or misleading representations. The Consumer Guarantees Act 1993 resulted from a 1987 report by the Professor David Vernon of the University of Iowa,<sup>80</sup> and made substantial changes to post-supply warranty law. These statutes seem to

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<sup>78</sup> The Chattels Transfer Act 1924 was repealed, as from 1 May 2002, by s 192(1) Personal Property Securities Act 1999 (1999 No 126). The Motor Vehicle Securities Act 1989 was repealed by the same section.

<sup>79</sup> See the Takeovers Code Approval Order 2000, S R 2000/210.

<sup>80</sup> David Vernon *An Outline for Post-Sale Consumer Legislation in New Zealand: A Report to the Minister of Justice* (Iowa City, 1987) ("the Vernon Report"). The report said that interference with the functioning of the free market should be minimal, and only to the extent necessary to provide consumer protection. Therefore the legislation should give suppliers incentives to provide goods or services that meet the consumer's reasonable

protect consumers in a reasonable flexible but effective manner, along with the Credit Contracts Act 1981 and the Credit Contracts and Consumer Finance Act 2003. The Corporations (Investigation and Management) Act 1989 provides a way to put companies in statutory receivership if the Government thinks that would be in the public interest.

- 72 If equity is to be regarded as a part of commercial law, then it must be said that there is nothing very innovative in the Trustee Act 1956, nor the Charitable Trusts Act 1957. Indeed both are in need of statutory renovation and updating. The Auctioneers Act 1928 probably needs an overhaul as well. The Electronic Transactions Act 2002 was certainly an innovation, and one that was clearly needed.
- 73 Employment law in New Zealand has been a see-sawing clash of views in the last 20 years. The Labour Relations Act 1987 gave way to the Employment Contracts Act 1991. This has been described as “the most single and dramatic reform of New Zealand’s labour law since the introduction of the compulsory arbitration system in 1894”.<sup>81</sup> The same author describes the Employment Relations Act 2000 as another shift that “may be best characterised as a move back towards the centre of the spectrum”. The Health and Safety in Employment Act probably deserves high marks.
- 74 Indeed, there are probably no more than about 60 statutes on the books that bear heavily on commercial matters. This may be regarded as a somewhat light statutory burden by the standards of many countries.

### **Tax Legislation**

- 75 The most innovative accomplishment in New Zealand tax law has been the re-writing of the tax legislation in user-friendly language and an easy to use format. This sounds a simple enough process, but it was so difficult that Australia gave up on it. New Zealand has accomplished it and the first half of the job is contained in

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expectations. Failing that, the legislation should provide consumers with practical low-cost remedies.

<sup>81</sup> Gordon Anderson and others (eds) *Employment Law Guide* (7<sup>th</sup> ed, LexisNexis NZ, Wellington, 2005) 11.

the Income Tax Act 2004 which, as I have already remarked, is the longest statute on the books. The intellectual problems associated with tax law are formidable. As Professor John Prebble has observed “tax law is dislocated from its subject matter”.<sup>82</sup> Furthermore, it depends “on the concept of income, which is an artificial construct”.<sup>83</sup>

- 76 The remainder is expected to be ready for introducing into Parliament this November. This whole process has been accomplished in New Zealand without much fuss and with modest expense. It is a considerable achievement.
- 77 The Re-Write Advisory Panel was established in 1995 to consider and advise on issues arising following the writing of the Income Tax Act 1994.<sup>84</sup> The Panel consists of the Chairman, the Rt Hon Sir Ivor Richardson, representatives from the Inland Revenue, the Treasury, the Institute of Chartered Accountants and the New Zealand Law Society. In 2004 the Minister of Finance invited the Panel to take on an additional role to consider the potential unintended changes arising under the Income Tax 2004, but where that occurs correcting legislation follows the Panel’s website records progress and outcomes. It was anticipated that such issues may arise from the re-drafted and re-structured parts of the Act. So far there have only been 49 suggested unintended consequences and by no means all of them have been accepted.
- 78 This co-operative policy process, over more than a decade, has led to a fundamental restructuring of our law. It seems to have been supported strongly by the members of the legal and accounting communities who deal in tax law all the time and it appears to have been a most successful process. The Panel’s website has now had nearly sixty thousand hits.<sup>85</sup>

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<sup>82</sup> John Prebble ‘Should Tax Legislation be Written from a Principles and Purpose Point of View or a Precise and Detailed Point of View?’ (2001) *New Zealand Journal of Taxation Law and Policy*, 235, 236.

<sup>83</sup> Prebble, above n 82, 237.

<sup>84</sup> Rt Hon Bill Birch and Hon Wyatt Creech *Rewriting the Income Tax Act, Objectives, Process, Guidelines: A Discussion Document* (New Zealand Government, Wellington, 1995).

<sup>85</sup> Re-write Advisory Panel Income Tax Act <<http://www.rewriteadvisory.govt.nz/>> (last accessed 16 August 2006). As at 16 August 2006, there have been 59,650 hits on this site. See also J Prebble “Valuation of the New Zealand Income Tax Law Rewrite Project from a Compliance Cost Perspective” in Chris Evans, John Hasseldine, Jeff Pope (eds) *Taxation*

## **Education Law**

- 79 The law is contained in the Education Act 1964 which has been much amended, as well as the Education Act 1989, which similarly has been extensively amended. There are other statutes that bear upon education as well, including the various Acts constituting Universities. In addition, there is the Private Schools Conditional Integration Act 1975, an innovative measure that fascinates people in foreign jurisdictions – how does it fit with the separation between church and state? The Industry Training Act 1992 is also relevant to the current state of education law. The New Zealand Council for Educational Research Act 1972, the Student Loans Scheme Act 1992 and the Education Standards Act 2001 deal with different aspects of the topic. The law cannot be said to be in a happy state and it has remained unsystematised for years.
- 80 Quite a lot of case law has developed in respect of certain aspects of the existing statute law. In particular, the control of students, suspension, expulsion and standing down has been a fertile area for litigation. There are also difficult questions about the application of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 to schools. As well as the statute law there are extensive sets of statutory regulations. Here is an area where there would be considerable advantages in restating the law in an orderly and systematic fashion, making it simpler than it now is, and making the lines of controls clearer.

## **Conclusion**

- 81 We should recall that the contents of the New Zealand statute book are not known to New Zealanders. They have not the slightest chance of finding their way around it. They know its consequences but not its features. Much of it never affects their lives. Some of it does so vitally. Statutes come into fashion and slide out of it. But rarely do they leave the statute book. They remain like sentinels half ignored, relics of a by-gone parliamentary age. I recall Sir Ivor Richardson saying that many judicial decisions do not have a long shelf life. Neither do statutes, and

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*Compliance Costs: A Festschrift for Cedric Sandford* (Prospect Media, St Leonards, 2001) 389.

their shelf life is getting shorter. Time destroys many fighting faiths and in our system of statute law that is so.

- 82 One conclusion that arises from this survey is the realisation that perhaps our mixed success with statutes stems not so much from the law and our methods of drafting it, as our inability to identify properly the need for change, assembling the case for it and then securing the requisite majorities to support it. When one surveys the statutes of long ago, one wonders “what were they on about then”. Our collective political memories are short. Each generation of both people and politicians have to learn and relearn the same lessons. Our efforts to research the need for legislation before we enact it is poor; our efforts measure its effects once enacted nonexistent.
- 83 This gallop on horse back across the New Zealand statute book leads me to the view that our statute book reeks of the common law method. Our statute book is unsystematic, incomplete, sporadic and episodic. We pass highly elaborate statutes to deal with particular policy issues without really considering the profile of the statute book as a whole. It is as if we do not really want to take statute law very seriously. But today the rapid rate at which statute law is overhauling the common law as a source of legal principles cannot be denied. Statute is not so much King as Emperor. That being the case, we need to take more seriously the purposes of the Law Commission set out in its statute in New Zealand. This is “to take and keep under review in a systematic way the law of New Zealand”.<sup>86</sup> There is something of a whiff of codification in the New Zealand statute. Certainly that was what drove the English Law Commission at its inception and was stated as one of its objects. But little has been done even in the criminal law there and codification has been virtually abandoned as utopian.<sup>87</sup> The time may have come to think again.
- 84 I am forced to wonder now whether Jeremy Bentham had a better point than we have been prepared to concede. Codification is essentially a rational activity trying to produce order out of chaos. The achievements of the Code Napoleon published in 1804 and the other codes in France were a formidable achievement.

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<sup>86</sup> Law Commission Act 1985, s 5(1)(a).

While I am not suggesting our civil law can be reduced to a single document, I think we have to have a better intellectual method for arranging the body of our law in a coherent pattern and we should consider departing from the common law method of enacting and arranging statutes.<sup>88</sup>

- 85 I was much taken by an application for a Legal and Policy Adviser position at the Law Commission from a law student. The law student started with a quotation from Professor Peter Birks:<sup>89</sup>

“If the common law cannot install new mechanisms against intellectual disorder, it will come under increasing criticism and, if it then manages to escape a radical politicisation, it will not be able to resist the next wave of enthusiasm for codification.”

The student then went on to give his own opinion:

“My position is to the contrary. Codification should not be resisted but *nurtured* to reflect the demands of our modern reality. Thus, an understanding of a non-legal world cannot be disregarded. A sound legal reform, in my view, is one of clarity: one that allows judicial discretion to fill in gaps the rules give way; and one that draws people closer to the law, not as blind but active participants”.

- 86 In a sense we speak only of what we know. And in one lifetime it is not given to us to know much. For my part I would say that the biggest reform, the most far reaching and the best that I was engaged in was the first: accident compensation. It remains a legislative monument of some proportions in the common law world. It did away with pressure group influences and gave a better deal to the injured people. It was fuelled with a sense of community responsibility that remains with me still as a beacon of hope and inspiration. No other country has achieved that in my time and it remains for me the best thing I was ever involved with. Innovative legislation indeed. Perhaps not all legislation can be preceded by a Royal

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<sup>87</sup> David Feldman *English Public Law* (Oxford University Press, Oxford, 2004) 1212.

<sup>88</sup> For a more developed account of this view, see Geoffrey Palmer, “Law Reform and the Law Commission in New Zealand after 20 Years: We Need to Try a Little Harder” (Address to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006). The result of that speech was a reference in the following terms to reconsider the shape and presentation of the statute book:

The Commission, in conjunction with the Parliamentary Counsel Office, will investigate and recommend methods of making the laws of New Zealand more accessible by more systematic classifying and/or indexing of the Acts of Parliament. This will include:

1. Carrying out preliminary research.
2. Investigating statutory classification or indexing initiatives in other jurisdictions; and
3. Developing a discussion paper to be subject to public consultation.
4. Reviewing electronic subject based indexing and searching methods.

Commission, but getting good statutes depends on high quality policy analysis before they are enacted. In New Zealand we could lift our legislative game by learning from the methods by which our own successes were achieved and repeating them.

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<sup>89</sup> Peter Birks "Equity in Modern Law: An Exercise in Taxonomy" (1996) 26 U WALR 1, 5.