

LAW COMMISSION 20TH ANNIVERSARY SEMINAR

WHAT IS DISTINCTIVE ABOUT NEW ZEALAND LAW AND THE NEW ZEALAND WAY OF DOING LAW

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INNOVATION IN NEW ZEALAND CRIMINAL LAW

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Introduction

It is trite to observe that for many in our community, what happens in the Courts is often perceived as synonymous with “the law”, especially sentencing in criminal cases.

Within the legal establishment, on the other hand, criminal law is frequently the cinderella, with criminal cases viewed as an unavoidable chore for superior courts, and sometimes treated as the area in which those who couldn't make the grade with real law are able to practise.

Either perspective is extreme and unbalanced, but each sheds some light on how the New Zealand Law Commission (and in this it is not markedly different to comparable institutions abroad) has dealt with questions of criminal law and process over the past two decades.

The Commission's track record

I first summarise the Law Commission's involvement with criminal law in New Zealand since 1986.

The 1989 *Structure of the Courts Report*¹ and its predecessor *The Structure of the Courts*² (a discussion paper published in 1987) obviously had some reference to criminal law, but it was not a major focus.

The first dedicated consideration of the topic was *Criminal Procedure: Part One: Disclosure and Committal Report*³. This report focused on pre-trial disclosure. Recommendations made sought to ensure complete disclosure of all relevant information on the prosecution files with the main exemptions identified being where a substantial risk of harm to the investigation, officers, national security or personal safety exists and where there may be a breach of privilege.

The report also suggested that disclosure rights and correlative obligations ought not to expire with the trial or subsequent appeal. Subsequent information which appears to be significant enough to raise a real doubt about the correctness of the verdict ought to be disclosed.

In terms of the committal process, the report recommended that prosecution witnesses should not give evidence in person or be cross-examined at the committal stage except by leave of a District Court Judge. Leave should be granted only if the witness is an alleged accomplice and has been given a prior inconsistent statement, or where the witness is to give evidence regarding identification or of a confession.

I will return to issues of implementation later.

The next report of significance was *Police Questioning*⁴ issued in 1994. It recommended the enactment of legislation which would both give the police the right to detain people and question them for a limited and clearly defined period of time, and provide express and detailed questioning safeguards for the person arrested. The report also proposed a new section for the Evidence Act 1908 providing that all improperly obtained evidence is presumptively inadmissible, with special attention being drawn to breaches of the New Zealand Bill of Rights Act 1990, but giving the courts the ability to admit the evidence if required in the interests of justice.

1 NZLC R7
2 NZLC PP4
3 NZLC R14
4 NZLC R31

These issues were not immediately responded to. The last recommendation has become redundant in the post *Shaheed* environment.⁵

Because of the public controversy which flowed from the 3 to 2 decision of the Court of Appeal in *R v Hines*⁶, the *Evidence Law: Witness Anonymity Report*⁷ in 1997 (which followed *Witness Anonymity*)⁸ dealt with the position of risk of harm to witnesses and the procedures for safeguarding the interests of a party against whom anonymous evidence might be given. This was subject to a swift legislative response with the Evidence (Witness Anonymity) Amendment Act 1997 which inserted ss 13B-J into the Evidence Act 1908.

A similar stand-alone issue was the Report *Habeas Corpus (Procedure)*⁹ issued in 1997. This proposed statutory enactment of the common law remedy and a new simplified procedure for seeking habeas corpus. The Report recommended urgent disposal of matters. It did not seek to define or alter the availability of the remedy although it recommended the abolition of the right of an unsuccessful applicant to renew the application before another Judge. It also conferred a general right of appeal.

Although its maturing period took a little longer, the thrust of the Report was substantially encapsulated in the Habeas Corpus Act 2001. For the judiciary it has been a mixed blessing. Many of us are not convinced that it has necessarily been a change for the better. The Act has increased the possibilities for this important and fundamental safeguard to be seriously diluted by it being used quite inappropriately in cases which do not merit or require its unique protection.

In 1998, the Commission published a discussion paper *Compensation for Wrongful Conviction or Prosecution*¹⁰ and, following consultation, a final report *Compensating The Wrongly Convicted*¹¹ which proposed a new scheme for compensating those who had been wrongly convicted. This was intended to replace the somewhat ad hoc arrangements which had previously existed having regard to regimes from overseas jurisdictions and the provisions of international covenants. The topicality of this issue has been to the fore this month with the Court of Appeal decision in *R v Haig*.¹²

⁵ *R v Shaheed* [2002] 2 NZLR 377 (CA)

⁶ [1997] 3 NZLR 529

⁷ NZLC R42

⁸ NZLC PP29

⁹ NZLC R44

¹⁰ NZLC PP31

¹¹ NZLC R49

¹² CA267/04 23 August 2006

Meantime the Commission had been heavily involved with (some might say almost swamped by) its monumental two volume *Evidence Report*¹³ which emerged in 1999. Much work in the area had been published prior to this.

In 1991, the Commission had issued four important discussion papers – *Evidence Law: Principles for Reform*¹⁴; *Evidence Law: Codification*¹⁵; *Evidence Law: Hearsay*¹⁶; and, *Evidence Law: Expert Evidence and Opinion Evidence*¹⁷. Each continued the raising of awareness as to issues in this subject of fundamental importance, particularly in criminal cases.

This educative process continued over the next few years with *Criminal Evidence: Police Questioning*¹⁸ in 1992; *Evidence Law: Documentary Evidence and Judicial Notice*¹⁹ in 1994; *Evidence Law: Privilege*²⁰ also in 1994; *The Privilege Against Self-Incrimination*²¹ in 1996; *The Evidence of Children and Other Vulnerable Witnesses*²² in 1996; *Evidence Law: Character and Credibility*²³ in 1997; and, *Witness Anonymity*²⁴ also in 1997.

Although it was feared for a number of years that the report was going to join the doorstep collection, to the delight of those who worked so hard for so long, the Evidence Bill of 2005 emerged. The Commission's Code had been substantially influential in its approach.

That legislation is still before a select committee which is being advised by former High Court Judge Robert Fisher QC. One waits with interest to see what will emerge and how quickly. The defence bar is innately conservative and is likely to be vigorous in opposing any change. This is a strange phenomenon, as no-one would seriously suggest that the way we currently do things is perfect, but there is a reluctance to consider improvement and the advantages which could emerge for the whole community.

13 NZLC R55
14 NZLC PP13
15 NZLC PP14
16 NZLC PP15
17 NZLC PP18
18 NZLC PP21
19 NZLC PP22
20 NZLC PP23
21 NZLC PP25
22 NZLC PP26
23 NZLC PP27
24 NZLC PP29

In 2000, the Commission issued three reports of relevance to this presentation. *Costs in Criminal Cases*²⁵ found that the 1967 legislation on the topic was essentially sound but identified problems including:

- Infrequency of updating the scale of payments;
- Inability of the Legal Services Board to recover costs; and
- Lack of criteria defining circumstances in which awards may be made against defendants.

Secondly, *Criminal Prosecution*²⁶ which concluded that the current criminal justice system was effective and respectful of human rights. The changes it recommended were not radical but aimed to modify existing structures to make the system fairer and more efficient. The report sought to improve control over the prosecution system by promoting accountability for prosecution decisions and increasing the power of oversight. Specific recommendations addressed:

- The discretion to prosecute, and how it should be exercised;
- Court control and review of prosecution decisions through s 347 of the Crimes Act 1961. In relation to Crown appeals the report recommended that an appeal right on specified grounds should be introduced;
- The role of Crown Solicitors as independent prosecutors and how it could be enhanced. It also reviewed the new police prosecution service, and looked again at governmental prosecuting agencies;
- The existing practice of charge negotiation recommending that this should be promoted, strengthened and regulated through publicly available guidelines;
- Preliminary hearings and how they could be streamlined to promote the efficient use of court and police resources; and

²⁵ NZLC R60

²⁶ NZLC R66

- A comprehensive criminal disclosure regime as an essential corollary of the proposed reforms to preliminary hearings.

That Report had been preceded by an issues paper *The Prosecution of Offences*²⁷ published in November 1990.

During the late 1990's there was the far reaching and heavily influential work undertaken on the jury system. The first discussion paper was issued in 1998 – *Juries in Criminal Trials: Part One*²⁸ and a second in 1999 – *Juries in Criminal Trials: Part Two*²⁹. The research and assessment culminated in the report – *Juries in Criminal Trials*³⁰ in 2001.

The empirical research conducted for this report established that, in the great majority of cases, jurors were conscientious and their decisions were sound. The virtual absence of criticism of the conduct of juries, in even the most controversial cases, was striking. The essentially anonymous verdict of ordinary citizens chosen at random gave to the process the legitimacy of total independence. The major lesson of the research was the validity of the system of trial by jury. There were exceptions, for example, of “rogue jurors” and of unduly burdensome cases. In response, the report recommended that 11:1 majority verdicts be introduced. The report also suggested that there be a limited extension to the existing power to order trial by judge alone (e.g. in cases where the trial will be too long or too complex).

The report recommended that, as lay judges of all issues of fact, coming to an unfamiliar environment, jurors should receive every assistance that would allow them to perform their task effectively. Strategies recommended included making a sustained effort to see the trial through the eyes of jurors and implementing techniques like a greater use of written and other illustrative materials.

Issues identified included:

- The extension of the radius within which jury summonses were issued, to meet concerns by rural New Zealanders, many of them Maori, that they were excluded from jury service; and

²⁷ NZLC PP12
²⁸ NZLC PP32
²⁹ NZLC PP37
³⁰ NZLC R69

- Methods to accommodate both those who had unavoidable commitments and those who failed to appear.

Just a month after the Juries Report, the Commission issued *Acquittal Following Perversion of the Course of Justice*³¹. This subject had been covered by a discussion paper in 2000³² as a quick response to *R v Moore*³³. This report confirmed as fundamental, the rule of law that no person acquitted of a crime should be prosecuted again for the same offence. It concluded however, that, in a narrow class of case, public confidence in the rule of law justified a limited exception to that rule. That is, where the accused had secured an unmerited acquittal on a serious charge by perjury or other conduct that has perverted the course of justice.

The Commission touched upon a high profile area with the report in 2001 *Some Criminal Defences with Particular Reference to Battered Defendants*³⁴. This looked at battered women syndrome and made some recommendations in terms of (partial) defences to murder (e.g. self-defence, provocation, duress) and murder sentencing. Recommendations included:

- Section 48 should be amended to include as reasonable the use of force (in self defence) against a danger that was not imminent but inevitable. The aim was to cover the fact situation where a defendant had been subject to ongoing physical abuse within a coercive intimate relationship and knew that further assaults were inevitable, even if help was sought and the immediate danger avoided;
- That provocation be abolished and that matters of provocation be taken into account in the exercise of a sentencing discretion for murder; and
- That the mandatory life sentence for murder be replaced with a sentencing discretion so that the court was able to take account of mitigating factors. On 30 June 2002 s 172 was amended so that a person convicted of murder would be sentenced to life imprisonment unless such a sentence would be manifestly unjust.

³¹ NZLC R70
³² NZLC PP42
³³ [1999] 3 NZLR 385 (CA)
³⁴ NZLC R73

A new statutory regime followed the 2001 Report, *Proof of Disputed Facts on Sentence*³⁵. This report sought the codification of the law relating to proof of disputed aggravating and mitigating facts on sentence. The aim of the recommendations was to ensure the protection of the offender at sentencing to the same extent as he or she is protected at trial. In response s 24 was inserted into the Sentencing Act 2002. This section provides that the prosecution must prove any disputed aggravating fact or negate any mitigating fact beyond reasonable doubt.

In March 2004 the Commission issued *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*³⁶. This had been preceded by *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System*³⁷ and *Seeking Solutions: Options for Change to the New Zealand Court System*³⁸. All three dealt with a vision for New Zealand Courts and Tribunals.

The immediate response was, to say the least, disappointing. The timing of its release was perhaps unfortunate in that the final report emerged at a time when the Ministry of Justice was struggling to cope with maintaining its statutory and administrative functions, having been submerged for years by IT proposals which had failed to deliver their promise.

But the Report was always bound to face a rough passage to implementation. The heart of *Delivering Justice for All* was the premise that in the design and operation of a justice system, ordinary people, with their problems and needs, should be the starting point for reform and not the comfort of the legal establishment.

There are critical aspects of that report which could have far-reaching effects on the operation of criminal courts, but budging entrenched interests and altering hierarchical status positions are substantial hurdles. Maybe its approach and philosophy will, over the years, inform decisions about the rationalisation of, and response to, the critical question of access to justice.

Most troublesome is that everyone consulted (and all who have commented) accept that access to justice is a serious problem. Rejecting the options advocated by the Commission is just one part of the story. Unarguably other solutions must be found for problems which will not go away.

³⁵ NZLC R76
³⁶ NZLC R85
³⁷ NZLC PP51
³⁸ NZLC PP52

The introduction of the Criminal Procedure Bill in 2004 was a matter of real significance to the Commission and its work. The Bill picked up recommendations from the Law Commission made in *Juries in Criminal Trials, Acquittal Following Perversion of the Course of Justice* and *Criminal Prosecution*.

The Criminal Procedure Bill is an omnibus Bill that may amend the Crimes, Summary Proceedings, District Courts, Juries, and Victims' Rights Acts, and also provide for a new Criminal Disclosure Act. This Bill as a whole has a single policy goal: to maximise both efficiency and fairness in the criminal justice system.

The Bill would significantly reform criminal procedure in New Zealand by providing for:

- Trial by Judge alone in exceptional circumstances
 - When the case was likely to be long and complex; or
 - When there was evidence of intimidation of jurors.
- Two exceptions to the rule against double jeopardy
 - Where the accused has committed an administration of justice offence resulting in a "tainted acquittal"; or
 - Where there is "new and compelling evidence" not available at the time of the first trial, which indicated with a high degree of probability that the accused was guilty of the offence acquitted.
- Majority verdicts (11:1 majority)
- Codification of criminal disclosure. A new Criminal Disclosure Act is part of the Bill which established a four-fold regime requiring:
 - Initial disclosure by prosecution
 - Full disclosure by prosecution
 - Disclosure of certain information by the defence

- Disclosure in certain circumstances by third parties.
- A partial abolition of preliminary hearings
 - Abolition of oral preliminary hearings for indictable offences
 - Indictable criminal cases will go to trial on the basis of formal written statements
 - Aim of this change is to free up valuable court time and make it so that witnesses only have to testify once.

The Criminal Procedure Bill had its second reading on 9 May 2006.

For completeness, reference should also be made to the report *Criminal Pre-Trial Processes: Justice Through Efficiency*³⁹ published in 2005.

This report looked at how pre-trial processes as a whole could function either in resolving cases or in preparing them for trial. The report made far-reaching recommendations that in effect would overhaul the way criminal cases are handled from first appearance through to trial. The Law Commission put forward 70 recommendations. Key proposals included:

- Statutory recognition of alternative disposition options, broadly comprising a police caution scheme. This would replace the current diversion scheme;
- A range of steps taken to encourage meaningful discussion between defendants and their counsel, and defence and prosecution, at an early stage;
- Formalised case management processes that would involve a case memorandum, as well as status hearings and sentence indications. As part of this process, defendants proceeding to trial would be required to disclose pre-trial the issues in dispute, in order to facilitate case progression; and
- A range of sanctions for procedural non-compliance by prosecutors and defence counsel.

There could also be some consequences for criminal law arising from *Access to Court Records*⁴⁰ published in June of this year.

³⁹ NZLC R89

⁴⁰ NZLC R92

The Commission's direct contribution

Although one can be negative about the Law Commission's contribution to criminal law and point to suggested reforms which have not been immediately implemented, that is to ignore part of the reality of a Law Commission's task. Well-researched and analysed reports have an influence on Courts, on the profession, on civil servants and on the community even when there is not a complete acceptance and legislative response.

Apart from one notable exception⁴¹ during my period as President I chose not to exercise the self-referral power⁴². I always thought it was better to talk to our Minister and ascertain if there would be an interest in a report on a subject, rather than diverting the time, resource and energy into producing something which was not of interest. But even bridging communication of that type is not a guarantee that the Government will have an interest in a report when it is produced.

The Commission received from its Minister a specific referral to consider forfeiture under Part XIV of the Customs and Excise Act 1996. It had been specifically recognised there was a need to assess the appropriateness of the forfeiture and seizure regime when New Zealand was strengthening other powers of the New Zealand Customs Service as part of a world wide response to the events of 11 September 2001.

We undertook a very far-reaching consultative process. Every affected and interested entity and organisation (apart from some officials of the Customs Service) were persuaded that the existing powers and discretions were, in contemporary terms, inappropriate. Without limiting or curtailing Customs ability to carry out its work, a more structured, transparent and responsive regime could exist.

Since the 2000 review of the Law Commission by Sir Geoffrey Palmer,⁴³ Governments are expected to provide a response to reports within six months of their being tabled. In my

⁴¹ Following the creation of a New Zealand Supreme Court, an anomaly arose as to who becomes the Administrator of the Government in the absence of the Governor-General. The Letters Patent of 28 October 1983 had provided that the office would devolve to the President of the Court of Appeal and then down the Judges of that Court. The Commission suggested this was inappropriate in that it by-passed the other Judges of the Supreme Court who had priority, precedence and seniority. The issue has recently been remedied in the Letters Patent (2006) Amending Letters Patent Constituting the Office of the Governor-General of New Zealand SR 2006/219 7 August 2006. This substitutes a new clause 12 providing that the Office of Administrator devolves upon the next most senior Judge of the New Zealand judiciary who is able to act.

⁴² Law Commission Act 1985, s 6.

⁴³ *Evaluation of the Law Commission* Report for the Associate Minister of Justice and Attorney-General Hon Margaret Wilson, 28 April 2000.

experience, this second-guessing exercise, often undertaken by not very senior officials within the Department and as well as duplicating (in a cursory manner) the indepth work which has been done, has the potential for the reviewers to be among those who were just one of the stakeholders to the original exercise.

The Customs Service advised their Minister on the Report. It was no surprise to those of us who had worked on it that the Government announced no action would be taken as what was occurring was satisfactory. Bearing in mind that that was the position the Departmental reviewers had taken in our exercise (contrary to everybody else consulted) it was unsurprising but it demonstrates a somewhat flawed process for assessment.

I certainly do not suggest that those involved in law reform projects should not hope for, or even lobby for, wholesale acceptance, but good work well done will eventually surface. As the catalogue indicates, many of the reports are not about the sort of thing that grabs headlines, but they are matters which nonetheless require attention.

There is also a need for ongoing scrutiny of the law so there is a consistent reconsideration of the statute book. Like 19th century Englishmen who were said to take a bath once a week - whether they needed it or not – this would ensure disciplined reassessment of the law in all areas on a regular basis. Accretion and accumulation without pruning is counter-productive.

Other significant reforms

During the last 20 years, there have been three significant innovations in New Zealand criminal law with some far-reaching consequences.⁴⁴

- (a) Family Group Conferences and the Youth Court;
- (b) Restorative Justice; and
- (c) Sentencing Act 2002.

⁴⁴ There was also a Crimes Bill in 1989 which was subject to sustained consideration by a committee chaired by Rt Hon Sir Maurice Casey, a former Judge of the Court of Appeal. The Bill was never enacted.

(a) Family Group Conferences and Youth Court

In 1989, New Zealand enacted the Children, Young Persons and Their Families Act which established new objects and principles for Youth Justice and set up an innovative system for responding to the young people who offend.⁴⁵

The new system emphasises diversion from courts and custody, and, while holding young persons accountable, facilitates the construction of responses that aim to provide for the rehabilitation and reintegration of young people, support for their families, and that take into account the needs of victims.⁴⁶

When a young person offends the Police can respond by, (in reverse order of severity):

- issuing a warning not to reoffend;
- arranging informal diversionary responses after consultation with victims, families and young people;
- where intending to charge, making referrals to Child Youth and Family Services for a family group conference; or
- arresting and laying charges in the Youth Court.

The Youth Court will refer matters to a family group conference (FGC) before making a decision and will prefer decisions that respond to victims, and keep the young person in the community (where public safety does not require otherwise) and enhance their wellbeing.

At the heart of the youth justice system is the FGC. The FGC was created in response to Maori criticisms of the mono-cultural approach taken to dealing with youth crime and child welfare and as a result of new models of social work practice which viewed the removal of children from their families as harmful.⁴⁷ The FGC has been described as a “foundation stone” and as a New Zealand invention and “gift to the world”.⁴⁸

⁴⁵ Children, Young Persons & Their Families Act 1989, s 208.

⁴⁶ Maxwell "Alternatives to Prosecution for Young Offenders in New Zealand" Lo and Wong (eds) *Child Protection and Measures Alternative to Prosecution* (2003), 229.

⁴⁷ Hudson, Morris, Maxwell and Galaway (eds) *Family Group Conferences: Perspectives on Policy and Practice* (1996) at 20-22.

⁴⁸ Chief District Court Judge David Carruthers, Wellesley Club Luncheon, Wellington, 6 June 2001.

(b) Restorative Justice

Restorative justice is a system whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.⁴⁹

Restorative justice is a parallel sentencing option that, after a guilty plea has been entered, allows a mediated session between the victim and the offender with the aim of negotiating mutually agreed solutions/reparations. Restorative justice is based on the idea that crime is more than an action against the state.⁵⁰ It recognises that criminal acts have an adverse effect not only on the victims, but also on offenders and the wider community. As such, the aim is to address the harm caused at each of the different levels by allowing frank dialogue between the parties. The hope is that this process will restore the social balance between victim-offender-community.

The youth justice practices discussed above were adapted and extended so as to offer restorative justice processes to adult offenders in New Zealand. In 2000-2001 four court referred restorative justice pilot programs were established in Auckland, Waitakere, Hamilton and Dunedin.⁵¹ The criteria for referral were that:

- There was a direct victim;
- The offence had a maximum sentence of at least two years imprisonment;
- The offender had admitted guilt;
- There was essential agreement about the facts underlying the case.

Through the passage of the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002 restorative justice processes have been given explicit statutory recognition in the formal criminal justice system. There are now 31 community based provider groups facilitating restorative justice conferences throughout New Zealand.⁵²

⁴⁹ Marshall "Restorative Justice: An Overview" (1999) Home Office Research Development and Statistics Directorate at 5.

⁵⁰ Ashworth "Is Restorative Justice the way Forward for Criminal Justice?" (2001) 54 CLP 347 at 347-8.

⁵¹ Schmid "Restorative Justice: a new paradigm for criminal justice policy" (2003) 34 VUWLR 91 at 105.

⁵² Ministry of Justice, Crime Prevention Unit.

(c) Sentencing Act 2002

The Sentencing Act 2002 reformed sentencing in New Zealand.⁵³ The Act provided statutory guidance as to the exercise of judicial discretion in sentencing. In particular the Act elucidated express purposes of sentencing and underlying principles to be applied by Courts.⁵⁴

The Act also expanded the use of reparation to recompense victims in a greater range of circumstances and legitimated restorative justice processes.

Since then the Law Commission has undertaken a comprehensive review of sentencing and parole structures. The Commission investigated the establishment of a New Zealand Sentencing Council with the aim of providing comprehensive guidance to Judges in the exercise of their sentencing discretion and to markedly alter parole provisions.

A final report was issued earlier this month.⁵⁵ There was some change of emphasis from the original document but its overall thrust advocates a radical change in sentencing patterns and the consequences which flow from sentences.

This exercise has been interesting because it has been perceived by some as a collaborative exercise between the Commission and the Department of the Prime Minister and Cabinet. At another time and in another place the opportunity might arise for an analysis of the consequences of the Law Commission being seen as aligned with Executive Government.

There will always be tension between the Commission maintaining its independence and objectivity but nonetheless being sufficiently engaged with Government to ensure that its recommendations are at least treated seriously and hopefully given legislative effect. In an area which appears likely to see party political divisions, the credibility of the Law Commission will be heavily scrutinised if it appears there has been a tandem arrangement.

Of significance also is the fact that this reform has been at least in part driven by economic considerations. New Zealand has the unenviable distinction of imprisoning more people per head of population than countries of similar size to ourselves and with similar diversity of population.⁵⁶ The financial drain of building more and more prisons (which are becoming

⁵³ Hall *Sentencing Law and Practice* (1ed 2004) at 272.

⁵⁴ Sentencing Act 2002, ss 7 and 8.

⁵⁵ *Sentencing Guidelines and Parole Reform* NZLC R94.

⁵⁶ Ministry of Justice *The Use of Imprisonment in New Zealand* (1998). New Zealand's gross imprisonment rate is second only to the United States in a comparison of western countries.

more and more expensive) together with the ongoing costs of maintaining people in them, is articulated as a factor to be weighed in determining the shape of the sentencing regime.

This can be contrasted with what for decades has been at least implicit that to be tough on law and order it didn't matter how much the process cost. Whatever the price, the money would be found. Adding prudent economic considerations into the equation is commendable.

Possibilities for reform

The criminal law is not perfect. It has always amazed me that there is frequently resistance to even discuss, let alone contemplate or implement, change in the criminal law.

Anyone who is prepared to look with an open and inquiring mind at the criminal area with any degree of objectivity or detachment will see it littered with inconsistency, if not irrationality. What do I speak of?

I remember, in the early 1970's, being involved as defence counsel in what was known as the "Green Island Riot Case". Thirty odd young men were charged with unlawful assembly and other anti-social offences because of what today would be described as 'turf war' in a quiet Dunedin suburb. Sir John White, who presided at the eventual Supreme Court trial, described it as the most profound moment in Green Island since the railway went in. Out of those thirty odd people charged, many ringleaders were acquitted because they had been smart enough to be unco-operative. Police who tried to interview were simply deflected or ignored. Without confessions, critical findings could not be made. It was the somewhat hapless peripheral players, who were thoroughly co-operative and open-handed, who found themselves with convictions. It was the system operating perfectly, but was it justice?

We solemnly declare that, when a police interview is recorded in writing, the statement becomes an exhibit if the person happened to say 'yes' to the invitation to sign it and will go into the hands of the jury when they are deliberating. However, if it is merely acknowledged to be true and correct (but not signed) the jury will not get it as an exhibit. Correct in terms of the existing law, but is it rational?

Whether a person has waived rights which they enjoy under statute, the Judge's rules, the Bill of Rights, or common law is determined by a body of law which has been built up. To accommodate the pragmatic reality of ensuring that those who commit criminal offences are brought to account, a somewhat open textured approach has been adopted. One can find a

similar approach towards questions of suspects consenting to police requests and requirements.

What is needed is a regime patently transparent, which actually includes placing responsibilities on all in the community and avoids the current gymnastics necessary to get rational decisions. Public disquiet when the Courts actually uphold the letter and the spirit of the law are revealing.⁵⁷

I question whether it is good law to have a credo of what I call “Anzac Day rhetoric” which has to be rejigged by the judiciary in order to achieve a sensible and acceptable working arrangement.

Issues which we are reluctant to even talk about in this country, such as the consequences of accused people not providing timely explanations, were legislated for in the United Kingdom in 1994.⁵⁸ The sky did not fall in when the balance became more attuned to sensible operational needs.

Day by day law reform and development goes on in Courts. But there are limits to what can be achieved in that manner. Would anyone seriously suggest that we have done the best that can be done on the divide between probative similar fact evidence and mere propensity⁵⁹ or on what constitutes provocation in the homicide context.⁶⁰ We perhaps have academically defensible positions, but I invite a look at the glazed eyed bewilderment of women and men on juries as they listen to Judges (in fear and defence) repeating mantra which many of them confess to having difficulty in understanding. For any lay person, the matter is simply another example of the law doing its own thing in a manner which is unnecessarily excluding.

I am not questioning a jury’s ability to comprehend and respond. The Commission’s research under Warren Young (which is so widely acclaimed abroad even if in some quarters in this country it suffers a little from a prophet in his own land) demonstrates that if behaviours and processes are intelligent and inclusive, juries can make the vital contribution which the community expects of them.

⁵⁷ See the public and police disquiet about the Court of Appeal decision in *R v Rogers* [2006] 2 NZLR 156.

⁵⁸ Criminal Justice and Public Order Act 1994, s 34. See also the comments of Young P and Chambers J in *R v Haig* CA267/04 23 August 2006.

⁵⁹ *R v M* [1999] 1 NZLR 315, 324 (CA).

⁶⁰ *R v Rongonui* [2000] 2 NZLR 385 [235] (CA)

You could each identify issues which cannot be considered the best that can be devised in seeking to accommodate the interests of accused, victims of crime and the wider community.

What the appropriate standard or approach should be will be arguable. As things stand I have a degree of disquiet that there is too much potential for a lack of uniformity and inconsistency. Accused persons who have been around the traps are smart enough to know how to play the system and side-step responsibility. Others whose degree of culpability is often lower, are frequently naïve and/or incapable of assessing consequences. They end up being more accountable than people whose acts and omissions have been more reprehensible.

There are areas which require calm analysis. Simply repeating purple phrases does not engage with the reality of what the community requires and expects. Where there are legitimate police demands and requirements, they should be recognised upfront. If we are to talk the talk we must walk the walk with integrity.

There are many other areas within the criminal justice system that could benefit from rational and lively debate. The Law Commission can be a critical vehicle for stimulating discussion and advocating reform.

Where is it all heading?

I have observed in the past, and do so again, that most people (and certainly New Zealanders) are quite schizophrenic about their response to criminal behaviour. If someone is personally associated with the person who is the victim of crime, the reaction is that those who have perpetrated the wrong are to be detected, processed and dealt to in the most summary, forceful and restrictive way possible. Don't fuss about their rights, their sensitivities, their disadvantages. "Justice" (by which is meant harsh, retributive reaction) is essential.

On the other hand, if someone is close to those who are alleged to have done wrong, there is an impassioned plea that every right which has been articulated locally and internationally is to be afforded. Police methods are to be minutely scrutinised and constantly moderated. Sentencing responses are to be sensitive and humane, centred on reformation and giving full weight to the disadvantages and deprivations which the wrongdoer so often has endured.

There is nothing surprising about that dichotomy. It is a predictable and understandable reflection of human nature and human reaction. Those who legislate and those who apply

the law must be cautious when they are harangued about being responsive to the public. The public is not a large cohesive mass which holds the same view at all times and in all circumstances with any consistency.

Once Parliament provides clear direction and guidance as to where sentencing is to go, then whatever model applies there must be discretion for individual Judges in particular cases to make reasonable and sensible assessments of these competing reactions.

A second factor (too often overlooked) is that but for an infinitesimal fraction, all people who are sentenced to terms of imprisonment will one day return to the community. Locking people up and throwing away the key (to use the vernacular) without regard to that inevitable reality is imprudent. It makes no sense to ignore the statistical data about re-offending rates for those who have been in prison.

Because crime and the consequences of it are a large part of our daily diet of news, community concern, reaction and revulsion are potent and persistent forces.⁶¹ Politicians will inevitably respond. Bidding wars on law and order are a predictable part of every election campaign. Criminal law and evidence issues are not the preserve of the legal establishment. Witness the public reaction to the death of the Kahui twins and the legal perspectives on assistance and co-operation with the police by those who would be expected to know what happened.⁶²

The Law Commission still has a unique opportunity to operate in this area. The problems which we face are not unique to New Zealand. Research and assessment of what has been tried and both failed and succeeded abroad, deserve careful consideration. Cost benefit analysis of sentencing and criminal procedure approaches should not be seen as unnecessary or unhelpful. The interplay between more effective and efficient policing, rates of detection, procedural responses and sentencing outcomes are part of a continuum. They cannot be evaluated in isolation and need to be part of a co-ordinated whole.

A Law Commission, by its nature (and particularly by the consultative aspect of its mission) is ideally suited to provide fair, reliable and productive options into an area which, from a public perspective, is as controversial as any.

⁶¹ In *R v Rogers* it was considered important that the Court of Appeal was not seen to be limiting legitimate public criticism of its decisions.

⁶² For example, see Dominion Post 29 June and 1 July 2006 for ongoing public debate between Auckland criminal lawyers including Lorraine Smith and Gary Gotlieb with MP Russell Fairbrother, himself a former criminal lawyer.

It would be naive and unhelpful to assume that what the Commission will come up with will not be used (or some may cynically say abused) for political gain. But so long as we live in communities which are in fear, and which are revolted at man's inhumanity to man, the shape and direction of criminal law will not be driven by a purely analytical response. It will be reactive to the various community concerns which are expressed. But the public debate needs to be informed and rational.

The potential for the Commission is without bounds.