

**ADDRESS TO THE  
ALREASA CONFERENCE  
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**by**

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PRESIDENT  
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***LAW REFORM  
WHAT IS OUR KNITTING?  
HOW DO WE STICK TO IT?***

**The Development of Law Commissions**

In 1597, Sir Francis Bacon urged the appointment of six Commissioners to investigate obsolete and contradictory laws in England and to report to Parliament regularly<sup>1</sup>. He noted –

“heaping up of laws without digesting them maketh but a chaos and confusion and turneth the laws many times to become but snares for the people.”<sup>2</sup>

In the ensuing 400 years, this refrain has been returned to both in England and in the colonies it spawned around the world and which eventually became independent and self-governing countries.

Jeremy Bentham, in the early 19<sup>th</sup> Century, demanded a permanent full-time body charged with the duty of revising the whole body of the law in England and reducing it

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<sup>1</sup> Australian Law Reform Commission *Annual Report 1975* (Australian Government Publishing Services, Canberra, 1975) 5

<sup>2</sup> Francis Bacon *The Philosophical works of Francis Bacon, Baron of Verulam, viscount St. Albans ... methodized, and made English, from the originals. With occasional notes, to explain what is obscure ... by Peter Shaw* (Printed for J.J. and P. Knapton, London, 1733) Vol. 1 of 3, 346

to an accessible code<sup>3</sup>. From that emerged the Reports of the Common Law Commissioners, the Real Property Commissioners and the Ecclesiastical Law Commissioners<sup>4</sup>, but the underlying problems remained.

Various further claims were made for continuing reform agencies, but it was the crusading zeal of Gerald Gardiner QC who, with A Martin in 1963, wrote the challenging book *Law Reform Now*<sup>5</sup> which really made a difference. The great advantage for law reform was that Gerald Gardiner soon became the Rt Hon Lord Gardiner, Lord High Chancellor of Great Britain<sup>6</sup>. The first Bill he introduced into the House of Lords was for the Constitution of the permanent Law Commission for England and a smaller Law Commission for Scotland<sup>7</sup>.

This was a case where the 'old countries' were not the leaders of the pack. As can so often be the case, the initiatives had previously occurred with the Indian Commission (in 1955)<sup>8</sup> and Hong Kong (in 1956)<sup>9</sup>. Within a very short time agencies arose in various parts of Asia, Africa and the Caribbean. Their formats were not identical. Some were truly independent bodies while others were more closely aligned to parts of the Governmental machinery. All of them, however, were concerned with a thorough, systematic reform of the law, responding to anomalies and seeking better legal arrangements.

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<sup>3</sup> Sir Leslie Scarman "Law Reform - Lessons from English Experience" (1967) 3 Manitoba Law Journal, 48

<sup>4</sup> Australian Law Reform Commission *Annual Report 1975* (Australian Government Publishing Services, Canberra, 1975) 5

<sup>5</sup> Gerald Gardiner and Andrew Martin (eds) *Law Reform Now* (Victor Gollancz, London, 1963)

<sup>6</sup> Gerald Gardiner was Lord High Chancellor of Great Britain, 1964-70 (from *International Who's Who*, 51<sup>st</sup> ed, 1987-1988, (Europa Publications limited, London, 1987) 501)

<sup>7</sup> Proposals for English and Scottish Law Commissions (Cmnd 2753) 1965; Law Commissions Act 1965, c.22

<sup>8</sup> The first Law Commission of Independent India was established in 1955 with the then Attorney-General of India, Mr M. C. Setalvad, as its Chairman (Law Commission of India : *The Fifteenth Law Commission 1997-2000* (1999) 2)

<sup>9</sup> Australian Law Reform Commission *20 Years of Law Reform : Volume 1 : The History* (ALRC, Sydney, 1996) 8

Since 1892 there has been a National Conference of Commissioners of Uniform State Laws in the United States that meets annually<sup>10</sup>. It has had a substantial impact, particularly in moving to consistency of approach between the various States with codification and unification being touchstones of operation.

Judge Benjamin Cardozo, writing in 1921 in the Harvard Law Review, advocated an agency to mediate between the Courts and Congress that he described as a “Ministry of Justice”<sup>11</sup>. Following this initiative, various State entities were created although no over-arching government sponsored federal body. However, that country has had the very considerable advantage of the impressive work of the American Law Institute for more than 80 years<sup>12</sup>. This is a private organisation made up of distinguished Judges, lawyers and academics, which is dedicated to law reform and has had a critical influence in many areas. Their charter is simplification, clarification and adaption of the law to better meet social needs and improved judicial administration. It is probably best recognised for its “Restatements” in many areas of the law<sup>13</sup>. It has an international flavour through a hundred or so members from outside the USA, among whom both Lord Steyn and I are honoured to be included.

The Canadian antecedents in law reform are similar to those of its southern neighbour. The Canadian Conference on Uniform State Laws was established in 1918 and continues to be an influential body<sup>14</sup>. During the 1950’s and 60’s there were a number of provincial law reform bodies created and one at a national level<sup>15</sup>. Perhaps indicative of the problems that can arise with law reform and its interface with other bodies interested in changes in the law, some of those bodies were subsequently abolished and

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<sup>10</sup> Australian Law Reform Commission *Annual Report 1975* (Australian Government Publishing Services, Canberra, 1975) 8

<sup>11</sup> Cardozo, Justice Benjamin N. “A Ministry of Justice” (1921) 35 Harv.L.Rev.113

<sup>12</sup> The American Law Institute was organised in 1923

<sup>13</sup> The 2004 Checklist of American Law Institute’s Restatements of the Law, is available at: [http://www.ali.org/ali/checklist\\_ali.htm](http://www.ali.org/ali/checklist_ali.htm) (last accessed 1 February 2005)

<sup>14</sup> William H. Hurlburt, Q.C. *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber Limited, Edmonton, 1986) 173

<sup>15</sup> The Law Reform Commission of Canada was established in 1970, for a history of the provincial and federal law reform bodies go to: Gavin Murphy *Law Reform Agencies* (International Corporation Group, 2003)

in some cases, after a gap of some years, new entities have been established in their place.<sup>16</sup>

In Australia there was vigorous advocacy in the late 19<sup>th</sup> Century for action to deal with the complex, ponderous and isolating nature of the law although nothing concrete was established at a national level until the Law Reform Commission in 1975 under the visionary and potent Chairmanship of Justice Michael Kirby. He has continued in the ensuing 30 years to be a major voice for law reform in his own country and abroad. There had been various entities in some States and many of the States in Australia continue to have law reform bodies<sup>17</sup>.

The history of law reform in your own country is interesting. Your Commission in its current form was established in 1973 as the South African Law Commission (changed to its present name in 2002)<sup>18</sup>, but for a couple of decades prior to that time there was a Law Revision Committee of about 20 members<sup>19</sup>. As well as producing reports which lead to specific legislative enactments in areas as diverse as the apportionment of damages, presumption and suretyship, there was valuable work undertaken in making the common law more accessible by translations from Latin and Dutch. With only very busy part-timers and no permanent secretarial base, progress was inevitably limited.

My country frequently claims to be a place of innovation and experiment. Whether the reality at all periods in our history is as impressive as the rhetoric may be open to debate, but there are matters which we can point to with pride some movements including Family Protection legislation at the beginning of the 20<sup>th</sup> Century<sup>20</sup>, the first

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<sup>16</sup> The Law Reform Commission of Canada was abolished in 1992. The current Law Commission of Canada was established on 1 July 1997.

<sup>17</sup> Australian Law Reform Commission "20 Years of Law Reform" (ALRC, Sydney, 1996)

<sup>18</sup> South African Law Reform Commission Thirtieth Annual Report 2002/2003

<sup>19</sup> William Henegan, Chief Director of the Law Reform Commission, South Africa, to the author, January 2005, Email

<sup>20</sup> Family Homes Protection Act 1895, to become the Joint Family Homes Acts 1908, 1950 and 1964 (Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2 ed, Brookers, Wellington, 2001) 89)

Ombudsman in the common law world in the early 1960's<sup>21</sup> and major reforming Acts in the area of contract law in the 70's and 80's<sup>22</sup>.

Law reform tended all to be very ad hoc in New Zealand until 1937 when a part-time Law Reform Committee was inaugurated, chaired by the Attorney-General and including departmental and academic members<sup>23</sup>. The judiciary declined to participate.

A major leap occurred in the early 1960's with the creation of a number of part-time law reform committees made up of lawyers, academics and civil servants<sup>24</sup>. They had an extraordinary record of producing reports that actually became law, a problem to which I return at a later stage.

It was the crusading zeal of Rt Hon Sir Geoffrey Palmer, our Attorney-General in the mid 1980's, which led to the New Zealand Law Commission Act 1985 and the creation of a permanent body with statutory independence. It continues to operate 20 years later in that form.

### **Who should be Commissioners?**

The membership of the New Zealand Commission is not unlike those in other common law countries. The Act provides:

The Law Commission shall consist of no fewer than 3, and no more than 6 members....The Governor-General must, on the recommendation of the responsible Minister, appoint 1 member of the Commission, who must be a Judge or retired Judge of the Court of Appeal or

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<sup>21</sup> Sir Guy Powles was appointed as the first New Zealand Ombudsman on 7 September 1962

<sup>22</sup> Illegal Contracts Act 1970, Contractual Mistakes Act 1977, Contractual Remedies Act 1979, Contracts (Privity) Act 1982 (from Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2 ed, Brookers, Wellington, 2001))

<sup>23</sup> In 1937 the Hon HGR Mason, then Attorney -General, established the Law Revision Committee (from David B Collins "Law Reform : A New Procedure for New Zealand" [1976] NZLJ 441, 442

<sup>24</sup> The Law Revision Commission was established in 1965, followed by four standing committees in 1966 each responsible for one specific area of law (Contracts and Commercial; Property Law and Equity; Torts and General Law Reform; Public and Administrative Law) – (from David B Collins "Law Reform : A New Procedure for New Zealand" [1976] NZLJ 441, 443) Administrative Law) – (from David B Collins "Law Reform : A New Procedure for New Zealand" [1976] NZLJ 441, 443)

the High Court, or a barrister or solicitor of the High Court of not less than 7 years' practice, as the president of the Commission<sup>25</sup>

Law Commissioners are appointed for a term not exceeding 5 years by the Governor-General on the recommendation of the relevant Minister and the appointment of a Judge does not affect that Judge's title, status, precedents or other rights or privileges as a Judge. This is a pattern very similar to that in both England and Scotland. It is interesting to note that Canada has moved the thrust of its appointments away from the judiciary and there has not been a full-time judicial member of the Australian Commission for some time<sup>26</sup>. There continues to be major contributions from part-time judicial Commissioners however.

In reviewing or assessing reform agencies, it is instructive to consider who is or should be appointed as Law Commissioners. The English Law Commission has always been chaired by a "Judge on secondment from the High Court" who has returned to the Courts at the promoted rank of "Lord Justice of Appeal".<sup>27</sup> Similarly in Scotland there has been judicial leadership and in your country the distinguished President of the South African Law Reform Commission is a member of the Constitutional Court of South Africa.

The judicial influence in New Zealand has been substantial. Our first President retired from the Presidency of the Court of Appeal on taking the position<sup>28</sup>. My predecessor and myself were both High Court Judges at the time of our appointments.<sup>29</sup>

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<sup>25</sup> Law Commission Act 1985, s9(1), 9(3) as amended by the Crown Entities Act 2004.

<sup>26</sup> Justice Elizabeth Evatt was full-time president of the ALRC from 1988 to 1994 (from *ALRC Annual Reports 1994 – 2002/2003*)

<sup>27</sup> Professor Graham Zellick's "The Legislative Implementation of the Law Reform Proposals" lecture delivered at Drapers Hall, May 14 1986

<sup>28</sup> Rt. Hon. Sir Owen Woodhouse, president of the NZ Law Commission 1986-1991

<sup>29</sup> Predecessor was Hon Justice David Baragwanath, President of the Law Commission 1996-2001

In our recently constituted Supreme Court of 5 members, the Chief Justice is a former Law Commissioner, Sir Kenneth Keith is a former President and Justice Peter Blanchard is also a former Commissioner. Margaret Wilson, until earlier this month Attorney-General of New Zealand and now Speaker of the New Zealand House of Representatives, is a former Law Commissioner. In my almost 4 years as President, two of the Commissioners have been appointed as High Court Judges<sup>30</sup> and one as a District Court Judge<sup>31</sup>. This pattern is certainly not unusual. Presidents of the English Law Commission have almost invariably gone to the Court of Appeal and some later to the House of Lords. In Australia about 10 Commissioners have become Judges, including a Chief Justice of Australia<sup>32</sup> and a Chief Justice of New South Wales<sup>33</sup>.

Notwithstanding this pattern, and the specific legislative provisions in New Zealand anticipating and permitting judicial involvement, there was an interesting challenge last year to me as President of the Law Commission sitting as a member of our Court of Appeal. The issue was raised as an appeal point only in the Privy Council and was on the basis that it was a derogation from the doctrine of separation of powers. The Privy Council was insufficiently troubled by the argument that it did not grant leave for the point to be argued<sup>34</sup>. The issue has been raised again in civil proceedings which are currently pending before the New Zealand Courts.

Questions arise as to whether all Commissioners should or need to be legally qualified. Currently one of the New Zealand Commissioners does not have a law degree – he is a retired university academic and was appointed, at least in part, because he was of Maori descent<sup>35</sup>.

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<sup>30</sup> Hon Justice Patrick Keane and Hon Justice Paul Heath

<sup>31</sup> Judge Vivienne Ullrich

<sup>32</sup> Sir Gerard Brennan, Chief Justice 1995-98

<sup>33</sup> The Honourable James Jacob Spigelman, Chief Justice of New South Wales from 1998

<sup>34</sup> The appeal was heard and determined on 15 January 2004 by Lord Hoffman, Baroness Hale of Richmond and Lord Steyn

<sup>35</sup> Professor Ngatata Love QSO, Commissioner 2001-

Our Law Commission Act specifically provides that in making recommendations the Commission shall take into account te ao Maori (the Maori dimension) and shall also give consideration to the multi-cultural character of New Zealand society<sup>36</sup>. When there was a review of the Law Commission undertaken in 2000 by Sir Geoffrey Palmer<sup>37</sup>, consideration was given as to whether there should be a separate Maori Law Commission. This was not recommended but the importance of this statutory obligation to Maori was reiterated.

From our inception there has been a keen awareness of the need to have regard to this dimension in all its work (and there have been a number of Commissioners who were of Maori descent) and there has also been a Maori Committee (which includes many eminent Maori leaders) that is available to advise and consult with the Commission in the course of our work.

Currently we have two members of Maori descent<sup>38</sup> and a number of our research staff are similarly within that categorisation.

During the 1990's in Australia, there were 4 part-time Commissioners who were not legally qualified<sup>39</sup>. In many jurisdictions it is commonplace to have consultants who are not members of the legal profession.

The make-up of the Commission, the qualities, the skills and the experience which Commissioners have will inevitably have a significant effect on the nature and type of

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<sup>36</sup> Law Commission Act 1985, s5(2)(a)

<sup>37</sup> Sir Geoffrey Palmer, *Evaluation of the Law Commission : Report for the Associate Minister of Justice and Attorney-General Hon. Margaret Wilson* (Chen & Palmer, Wellington, 2000)

<sup>38</sup> Professor Ngatata Love and Justice Eddie Durie

<sup>39</sup> Professor Peter Baume, Professor of Community Medicine, University of New South Wales, Professor Bettina Cass, Professor of Sociology and Social Policy, University of Sydney; Dott Paolo Totaro, Chairman of Ethnic Affairs Commission, NSW; Mr Leigh Hall, General Manager, Investment Operations, with the Australian Mutual Provident Society Ltd (from *Annual Reports ALRC 1990-2000*)

work that can most effectively, efficiently and productively be undertaken. I am persuaded that we can do better and more effective work if, in the appointment of Commissioners and in engaging research staff and consultants, we embrace people from other disciplines. Wider perspectives can only be advantageous in assessing the present and recommending productive change for the future.

### **The Mission of a Law Commission**

The longer I am involved in the law (my interest and perspectives have been many and varied over more than 4 decades) the more I am persuaded that the law in my country (and I suspect in many parts of the world) has become too much of an end in itself. It is too often inward looking and with norms, standards and approaches maintained for the benefit of those who are already within the group or club and insufficiently directed to the needs and rights of the general populace. By that I mean that, as an institution, the Courts and Tribunals of our land, and the laws which are administered in them, are not sufficiently accessible or available to the general community. There are barriers of cost. There are barriers of time. There are barriers of ethos and language. Worldwide there is a need for renewal and improvement on a continuous basis.

I reject the notion that the law is so complicated and complex that we who are its operators at various levels and in sundry ways cannot express ourselves more directly and more openly and that we cannot be more responsive to the needs of the community which are to be served.

In the rhetoric of high days and holidays, we speak of the Courts as the 'third arm of Government', but it is an arm which has insufficiently adapted to contemporary needs, nor which in its approach adequately reflects the changes in technology especially in the last part of the 20<sup>th</sup> Century. The law is heartily caught in a time-warp and appears over-influenced by how things happened a century ago. I believe that the overwhelming reason to have a Law Commission, and the hallmark against which we should determine whether one is effective, is whether, in all areas of the law and its manifestations, the

fundamentally excluding attitudes and approaches are being challenged and sensible alternatives are being offered to them.

Last year we were involved in a short project on covert filming<sup>40</sup> as an immediate response to a lacuna in our law with regard to those who use new technology to invade the personal space of New Zealanders by filming up skirts or in changing rooms or toilets.

At the other end of the spectrum we took almost 3 years to undertake a comprehensive review of New Zealand Courts and Tribunals<sup>41</sup>. This was an opportunity to step outside the immediate confines of the existing structures and see whether there were new and better ways of doing things which would maintain the integrity of process but advance accessibility to the law.

Our Law Commission, like many, has undertaken serious reviews of areas of both substantive and procedural law. The review of evidence law<sup>42</sup> was a mammoth undertaking. A review of the Property Law Act<sup>43</sup> similarly is typical of what goes on around the world.

There are a myriad of areas which will be studied, assessed and which will be candidates for reform. The wider and more diverse the input, the better will be the outcome.

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<sup>40</sup> Law Commission *Intimate Covert Filming* NZLC SP15 (Wellington, 2004)

<sup>41</sup> Law Commission *Striking the Balance* NZLC PP51 (Wellington, 2002); *Seeking Solutions: Options for Change to the New Zealand Court System: Have your Say: Part 2* NZLC PP52 (Wellington, 2002); *Delivering Justice for All* NZLC R85 (Wellington, 2004).

<sup>42</sup> Law Commission *Evidence* NZLC R55 (Wellington, 1999)

<sup>43</sup> Law Commission *A New Property Law Act* NZLC R29 (Wellington, 1994)

Lawyers in New Zealand, and I suspect in much of the common law world, are in economically secure and socially privileged positions. The financial returns in maintaining the present way of doing things is to their clear advantage. Confronting the legal establishment is draining and difficult. Many politicians shy away from it. My experience is that bureaucrats, and those in the Executive arm of Government, are often intimidated and overawed by Judges so the potential for change is seriously diminished.

A Law Commission which “*is not afraid to follow the truth, wherever it may lead*”<sup>44</sup>, is one of the few mechanisms which has the ability to deal with reality and to seek to bring the law, in all its facets, into at least the late 19<sup>th</sup> Century even if it would be over-optimistic to imagine that we could get it anywhere near the 21<sup>st</sup> Century.

Certainty and stability need not demand an absence of change. There are fundamental principles which must be maintained with integrity, but these must be responsive to the state of knowledge (particularly advances in science and technology) which infect and influence all other parts of our community. You do not achieve justice by cocooning the law in a past which is divorced from a current social, economic and operational reality.

Law Commissions never have legislative power or authority. They do provide the opportunity, however, to challenge lawmakers, to educate the public and to raise awareness of the ongoing consequences of the present way of doing things. For example, in 1999 we undertook a review of the law relating to retirement villages<sup>45</sup> where there was a need for these phenomena, which had developed in our country as in many others, to be better accommodated within the legal structure. This has now been reflected in legislative change.

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<sup>44</sup> Jefferson to William Roscoe, 27 December 1820, in *The Writings of Thomas Jefferson*, vol. 15, ed. Lipscomb and Bergh, 303

<sup>45</sup> Law Commission *Retirement Villages NZLC R57* (Wellington, 1999)

## **The Structural and Operational Framework**

What sort of organisation is required to deal with this specific and unique role? Dedicated law reform agencies like those we are each involved with do not have a monopoly on this revision and improvement. Politicians and civil servants often do reform. So do Judges, although if it is too obvious they are doing so, they are at risk of being pejoratively labelled as activists by critics of an outcome. So by what are we to be known?

Statutory independence I see as essential. In my judgment a Law Commission must never be constrained in its ability to approach a problem as it sees fit, to assess an issue and all its ramifications and have the ability to recommend and report without inhibition or constraint. That does not mean that a law reform agency can or should act in a way which is theoretically or practically unrealistic, lacking in principle, inconsistent or inequitable. But the controls should not be external and certainly should not come from any of the branches of government. A law commission cannot be beholden to a party political agenda. It should not be responding to the demands of an interest group nor in a particularised way be reacting to an individual case. It cannot be a body which is told what the answer is to be before its inquiry has begun. There must be a vision and principle at the core of the investigation which must nonetheless be locked in reality.

Those of us involved need to remember that the more ambitious recommendations are, the more opportunity is presented for those who are uncomfortable with the thrust, or unhappy with the prospect of change, to go on the defensive and lobby against reform. The challenge for law reformers is to find a resolution of the tension between what is pragmatically achievable and what principle and integrity suggest. There is an ongoing challenge for us all in how we engage with politicians, the bureaucracy, the judiciary and the wider community without being captured by any of them. We cannot hope to be relevant or effective if we have an agenda which is unrelated to current needs, perceptions and aspirations. But law reform bodies must be alongside these other parts of the community and not submerged by them.

Secondly, membership must be for finite terms so that Commissioners have security of tenure. This avoids any possibility of needing to keep an eye on the response of the appointer in what the Commission is persuaded needs to be recommended. If membership is at will, consciously or unconsciously the work of a Commission will be subject to a chilling effect. If there is any sort of restraint then the reason for having the body which is different to law reform sections within governmental departments, or the advocacy for change of academics, will lose its essential and necessary efficacy.

Thirdly, it is important that the Commission itself can influence the work it is to undertake. For almost 20 years, the Law Commission in New Zealand has operated on the basis of an annual Memorandum of Understanding<sup>46</sup>. Our Act requires that we should give priority to matters referred by government, but leaves open the ability for self-referrals. In the period immediately before my Presidency, there was a substantial amount of self-referral work which evinced little in the way of reaction or response from Government. I see that as counter-productive.

Law Commissions are not cheap to run<sup>47</sup>. There is a substantial investment of tax funds. They must be employed in ways that have the potential to be productive. It is one thing to say that there can be direction as to the course of work and quite another to say that there can be control over how that research is done or what is off limits.

Setting the work programme requires ongoing dialogue. It requires respect on each side but open and forthright communication. Like the concept of judicial independence properly understood, it is a mechanism for ensuring that those who are to make the recommendations are free to go where their research takes them and are not subject to restriction. But independence and accountability can operate in tandem. A Commission

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<sup>46</sup> Ministry of Justice, Memorandum of Understanding between the Law Commission and the Minister Responsible for the Law Commission, 2004-2005

<sup>47</sup> Operating expenditure for NZ Law Commission for 2003/2004 was \$3.4 million

can be both free of control but responsive to the legitimate expectations of the community.

Around the world there has been an enormous amount of very high quality research done by Commissions which thereafter has sat on a shelf and not been responded to. This is in part due to the nature of the work. Often reforms will be uncomfortable or challenging to some who are particularly influential within society and who will endeavour to avoid change being implemented. New Zealand has no better hit rate than anywhere else. I am not satisfied that implementation is not the only measure of success. Often Law Commission reports are a superb repository of high-quality research which can be available generally within the community (both legal and lay) and will have influence even if there is not wholesale adoption of particular recommendations. Cannibalisation of reports is certainly well known. If this occurs there has been a positive outcome.

It goes without saying that all work must be carried out with absolute objectivity, total integrity, high quality research, meaningful community involvement and participation and that the report is written in plain language.

The manner in which we express our recommendations remains problematic. There are some who believe everything must be in the mode favoured in judgments or embraced by academics. But we have to communicate effectively with a wider audience. The primary lawmakers, and thus the implementers of law reform, are politicians. We have to capture and excite their interest and that of their advisers.

The law is for, and affects, the entire community. We need to express ourselves carefully, precisely and accurately, but in a form that is generally understood. If all or any of those hallmarks are missing, then the work is diminished and its effect reduced. Even where well informed and well intentioned people could reasonably disagree with a conclusion, the setting out of the problem, the coverage of the way in which it is

responded to in other places, the academic writing on the subject and the community responses to it are all valuable and important to record.

Sir Geoffrey Palmer (the 'father' of our Law Commission) was asked at the beginning of 2000 to review the operation of the New Zealand Law Commission<sup>48</sup>. Not unsurprisingly he was sympathetic to our activities and continuation, but one of the important outcomes was that the Government has now committed itself to responding to Law Commission reports within six months.

The responses to date have been patchy. For example, a large part of our work for the last 3 years was concerned with a review of the entire Courts system. Some recommendations were threatening and challenging, particularly to some Judges and the legal profession. Because the Government is currently involved in a Baseline Review of the Ministry of Justice,<sup>49</sup> it was able to finesse much of the report by indicating that the outcome of the Baseline Review would have to occur first<sup>50</sup>. Although we see that as unsatisfactory, because our report deals with mission and vision while the Baseline Review is more focussed at an operational level, the response requirement was important.

Government has a responsibility, not least because the Parliament has funded our operation, to assess what we are doing and indicate whether they accept or reject the recommendations for reform that are made.

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<sup>48</sup> Sir Geoffrey Palmer, *Evaluation of the Law Commission : Report for the Associate Minister of Justice and Attorney-General Hon. Margaret Wilson* (Chen & Palmer, Wellington, 2000)

<sup>49</sup> A stock take of the Ministry including its strengths and weaknesses and the resource implications for the future.

<sup>50</sup> Ministry of Justice *Government Response to the Law Commission Report on Delivering Justice for All* < <http://www.justice.govt.nz> > (last accessed 28 January 2005)

Timeframes for implementation will frequently be frustrating. A superb report was published on reform of our property law 10 years' ago<sup>51</sup>. Because it is not a politically attractive or high-profile area of the law, this has been left to languish. I am confident that one day the fruits of it will emerge in the same way as the monumental task of evidence law reform (carried out in the late 1990's) has been critical in the framing of an Evidence Code which we are told is due to be introduced into Parliament this year.

An aside. There can be a temptation for government to refer to a Law Commission matters that are in the 'too hard' basket. There will be issues about which there is controversy and emotional division. The Law Commission can be seen as a handy parking place or at least a safety valve. This can lead to unhealthy pressure and explosive tension, particularly if the subject is one which gets near to the party political agenda.

Law Commissions must ensure that they stick to their knitting and do not become used as a dumping ground. Basically I suggest they should be proactive rather than reactive. So much law change is driven by political necessity, perceived electoral advantage and special interest pleading. There are abundant opportunities for reactions to those criteria. For Law Commissions to justify their existence, they must be in a different league. Unless we can demonstrate that we can add value to the society in which we operate, we can hardly expect the continuation of funding streams.

### **What is our knitting?**

What would I see then as the fundamental requirement for selection of work to be undertaken?

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<sup>51</sup> Above 43

First, there has to be a clear acceptance and demonstration that there is a need for law reform. I suspect that there is never going to be a shortage of candidates within this category. All of our statute books are replete with legislation which is outmoded in its approach or expression. There are constant new challenges about issues which require attention. It is not sensible, however, to use a law commission as a place to deal with matters which are not a high priority for the government, or as a mechanism to get an issue off the political agenda, or because it's the hobby-horse of some individual commissioner.

Secondly, there needs to be a clear indication that reform could have a significant impact on the life of New Zealand and New Zealanders and is viewed as a priority. Special pleading for interest groups is not a good initiator. There will be matters which affect some but not all, where reform is needed to overcome injustice and inequity, but the law commission should not be a repository of arcane and irrelevant studies.

We should only be involved in work which does have a priority within the overall society. Indulging in fascinating academic issues which are peripheral, or so near the edge as to be irrelevant, is not a good use of public funds.

Thirdly, we do best in projects which require a substantial and sustained, long-term commitment. There may be some narrow one-off issues which can be attended to, but basically those will best be dealt with in ministries or other governmental operational agencies. They are better fixed by policy advisers within law reform sections. Law commissions can sensibly consider those matters which otherwise suffer from or are neglected because of short-term electoral cycles. In every society changes of approach and operation which lack profile or excite high level interest, can impact beneficially on so many.

Next I am of the view that law reform work is, by its very nature, consultative and it must be consultative beyond the immediate interest group. Some have advocated law

commissions only looking at black letter law. I have elsewhere suggested that while that is an interesting position to advocate, no-one has ever satisfactorily defined what is 'black letter'. Things which seem most formal and arid can still have social and economic consequences. Those who are closest to the use and operation of a part of the law are not the only people who have a constructive slant or a rational view upon it. Reform should not be left in total capture by the insiders.

I have a personal predilection that the operation needs to be totally open. No surprises and a complete sharing of information throughout the reference. I don't know what life is like in other capitals around the world, but I have to say that Wellington, New Zealand, finds that a somewhat extraordinary concept to cope with. Public servants particularly (and if I am being honest I would have to say Judges also) often seem to have difficulty in engaging in open-ended dialogues. They are very keen to learn what you are thinking in advance, but less keen to place their own cards on the table.

Those who are employed to service and advise politicians may be, or feel, constrained. When I look back to my early days as a practitioner, close to the chest is how we ran litigation in Courts. Many of the most skilled advocates were those who kept the greatest number of rabbits in hats with which they could surprise and steal a march.

I suggest in both areas times have changed and that the best outcomes will flow from totally open and unrestrained sharing of ideas and possibilities as work in progress.

In the Courts in my country, through case management and better planning, litigation by ambush has gone but the influence of that former approach I still see as being alive and well. If in seeking to simplify and improve and rationalise the law, there should be no hidden agenda. A Law Commission simply wants to identify the best outcome. I can see no reason to hold anything back. I encourage my fellow Commissioners and research staff to share ideas with all who have something to contribute throughout our processes. We need to tell people that what we are discussing is work in progress and

that there is not yet a final determination, but this business of secrecy and subterfuge I find counter-productive and unattractive.

In my view in life generally, best outcomes arise where every proposition is open to challenge, scrutiny and assessment. If law reform agencies are not operating at that level, I suggest that they lose their reason to exist.

It takes considerable skill sometimes to assess who can be affected and who can make a contribution. Sometimes, in seeking to do so, you are likely to face hostility from those who consider that the patch is theirs alone. Most people now accept that, in the law generally, we have traditionally failed, rather abysmally, in our processes and procedures as well as in our decision-making to have sufficient regard to economic consequences. Too often, in a desire to be consistent, we fail to recognise that the same response will have enormously different consequences for some individuals. Doing the same thing in the same way might be termed justice, but it is frequently unfair and inequitable. Law reform is about tackling these problems.

A constant challenge is the possibility of becoming involved in collaborative projects where other arms or organs of government which are looking at issues and we are seen as having a contribution to make. This is a thorny area. It has the potential for us to become subsumed into the process of others and for our independence to be consequently distorted. On the other hand, if we have the capacity and the skill to deal with a matter which requires a principled assessment, then we should not be aloof or detached.

The core test must always be whether there is a guarantee of independence in the process, assessment and recommendation. If any of those have to be compromised, then the Law Commission should not be involved. If there is a conclusion which is to be argued towards as a fundamental requirement of the exercise, then the Commission has no part to play.

## **The operational template**

How do you go about it – well how long is a piece of string? A law reform body has to be flexible, innovative, creative and sensible. Generally, however, there is a template which will be influential:

- a) What is the law in the area?
- b) What are the problems or deficiencies that exist?
- c) What could be done to meet those problems?
- d) What is recommended and why?

The variations on the theme are extraordinary, but I suggest those bases must all be covered. It is an intellectual process, rooted in integrity, free of bias or prejudice and rigorously committed to improvement. Access to the law is the ultimate goal and all our activities and processes should be influenced accordingly.

A final word. There is a difficult issue about whether a body like a law commission should become involved in reviewing or reporting on fundamental constitutional change.

New Zealand's founding constitutional document is the Treaty of Waitangi which was signed in 1840 between the indigenous Maori and the British Crown. What rights and responsibilities it created is hotly debated. The European settlers did not much heed it or honour its commitments in any appreciable way for many decades. When I was at law school we were taught that the Treaty of Waitangi had no legal force as it was a document which had never been incorporated into domestic law.

In the last 30 years there has been a marked move, particularly since the creation of the Waitangi Tribunal<sup>52</sup>, to deal with grievances of Maori iwi, particularly in relation to unjust confiscation of their land. Initially these were restricted to current complaints but the jurisdiction has now been extended back to 1840.<sup>53</sup>

In the last few years there has been increasing pressure to determine the exact place of the Treaty in our nation's life and for clarity about wider constitutional issues.

New Zealand is like Britain in that we do not have a single constitutional document. Our Constitution Act 1986 is scant in its coverage. There has been sustained agitation and a number of conferences to consider both what in fact our overall position is and more importantly what it should be. No consensus has so far emerged.

An issue arose as to whether the Law Commission should be requested to become involved in an exercise to clarify the issues. It is not the path which has been adopted, which I am pleased about. Late in 2004 a decision was taken to have a Select Committee consider our current constitutional arrangements<sup>54</sup> and for the State Services Commission to do a stock take of the current position.

These are issues of high policy and principle rather than questions for legal analysis and determination. I had a serious concern that if we had become involved in this issue our role would have become politicised. Issues of high principle which require a long view and independence need not be off a Law Commission's agenda, but this has become a very politicised question and there must be substantial concerns when that occurs.

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<sup>52</sup> The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act 1975

<sup>53</sup> Treaty of Waitangi Act 1975 s6(1) was repealed and substituted on 6 January 1986 by Treaty of Waitangi Amendment Act 1985 No 148, s3(1), the original Act restricted complaints to *“any act which, after the commencement of this Act”*

<sup>54</sup> The setting up of a special select committee to review New Zealand's constitutional arrangements was announced by Prime Minister Helen Clark on 13 November 2004 at an Address to New Zealand

The Select Committee which is investigating the issue has been boycotted by a number of political parties. There is a divisive and contentious debate. There is much heat and not a lot of light. I am not sure that a statutory body constituted like ours would not have been a good place to deal with such issues in these circumstances.

If decisions are taken to change our constitutional arrangements, including for instance our becoming a republic, or having a written constitution which does or does not include the Treaty of Waitangi, then advising on the implementation of policy decisions already taken is an area in which the Law Commission could play a part. But where there is a heavy party political overall in assessing the underlying fundamental decisions it does not appear to me to fall comfortably or wisely into the ambit of our work.

## **Conclusion**

There are no absolutes in any of this. There are no immutable protocols which must be applied. Different circumstances in different jurisdictions will require different responses. Law Commissions must not stand aloof, locked in some straightjacket which is unresponsive to contemporary community needs, values and aspirations. But in all we do we must be sure that we can add value. We are not repositories of all wisdom with a monopoly on the answer to every social, economic and governmental problem. Where thorough legal research and analysis, together with comprehensive consultation is required, we have particular skills to offer. We need to ensure that we do not lose our credibility by meddling in areas where other perspectives and qualities are at the heart of the task.