

**AUSTRALASIAN LAW REFORM AGENCIES CONFERENCE**

**WELLINGTON**

**13 - 16 APRIL 2004**

**ACCESS TO JUSTICE: RHETORIC OR REALITY**

---

**LAW REFORM AND ACCESSIBILITY**

**GEORGE TANNER<sup>1</sup>**

*“...and where the country once suffered from its vices, it was now in peril from its laws. This circumstance suggests that I should discuss more deeply the origin of legislation and the processes which have resulted in the countless and complex statutes of today.”*

*Tacitus, The Annals, Book III, XXV<sup>2</sup>*

---

---

<sup>1</sup>Chief Parliamentary Counsel, Wellington, New Zealand. I am grateful to my colleagues, Geoff Lawn, Julie Melville, and Ross Carter, for their comments and assistance willingly given in the preparation of this paper.

<sup>2</sup>William Heinemann: Harvard University Press (1951). In the original Latin the passage reads “utque antehac flagitiis, ita tunc legibus laborabatur. Ea res admonet ut de principiis iuris et quibus modis ad hanc multitudinem infinitam ac varietatem legum perventum sit altius disseram.”

**Part 1**  
**Introduction**

- 1 I have always considered speakers and authors who use some Latin or other phrase to flavour their topic as complete show-offs. But the quotation at the beginning of this paper is simply too good to pass up, and quoting the original Latin reinforces the point that not much has changed. Nearly everyone shares the same frustrations with the proliferation of legislation and the strains it places on society that Tacitus expressed almost 2000 years ago. However, unlike the times of which Tacitus wrote, today's laws reflect the values of the liberal parliamentary democracy. It is not by accident that they do. That is, in part, the theme of this paper.
  
- 2 It is predictable that a paper by a legislative drafter begins with preliminary comments about definition, although opinions differ among legislative drafters as to whether the interpretation provision should be drafted first or last. In any discussion of access to justice issues, it is important to be clear about how the concept is used. Six months ago in this lecture theatre, Justice Ronald Sackville, a Judge of the Federal Court of Australia, delivered an address to the First Annual Conference on the Primary Functions of Government held by the New Zealand Centre for Public Law. The Judge's paper, "Some Thoughts on Access to Justice",<sup>3</sup> discusses at the outset different meanings associated with the term "access to justice".
  
- 3 At one level, it is access to the civil justice system, in the sense in which the term is used by Lord Woolf in his report *Access to Justice*<sup>4</sup> that led to sweeping reform of the English civil justice system and to the adoption of new Civil Procedure Rules.

---

<sup>3</sup>Justice Ronald Sackville, Some Thoughts On Access to Justice, Victoria University of Wellington, New Zealand, Faculty of Law, New Zealand Centre For Public Law, 28 and 29 November 2003.

<sup>4</sup>Woolf Report.

It may also, in a slightly wider sense, mean access to the courts generally and not just the civil justice system. The Judge then goes on to say that the 1994 *AJAC Report*<sup>5</sup> took access to justice to mean 3 things: equality of access to legal services, national equity, and equality before the law, meaning the removal of barriers creating or exacerbating dependency and disempowerment.<sup>6</sup> There is an even wider context identified in the Judge's paper, that is, participation in private and public processes not necessarily limited to the democratic process of law-making.<sup>7</sup>

4 In this paper, I treat access to justice as a concept at the wider end of the spectrum of meanings, but necessarily also embracing the narrower meanings. In a free and democratic society under the rule of law, citizens must know what are their rights and obligations in order to do business, to access the services provided by the State, to acquire skills and knowledge, to acquire and dispose of property, to get resolution of disputes, to engage with central and local government, to enter relationships, to move about, to communicate, to work and sustain themselves, and to do whatever else they might wish. They must also know the limitations on their actions and what the sanctions are if their conduct harms others. They must be capable of influencing changes in the laws that govern them through participation in the law-making processes.

5 A free and democratic society depends on the integrity of its laws, that is, that they embody fundamental legal principles, conform with the international obligations of the particular country, and are not harsh, oppressive, discriminatory, or outdated. Respect for the law is fundamental to good order and government. This is the sense in which I suggest commitment to the rule of law has to be viewed, not confined to

---

<sup>5</sup>AJAC Report, 7-9.

<sup>6</sup>*Id.*, 2.

<sup>7</sup>*Id.*, 3.

strict adherence to lawful process.<sup>8</sup> Who would disagree? These are fundamental requirements without which there is never likely to be any real access to justice. They are fragile and easily compromised. They can never be taken for granted. It requires determination, vigilance, and effort to protect and preserve them. Much of this paper examines, in the context of law-making, the extent of that determination, vigilance, and effort.

6 A degree of law reform is involved every time the law is changed. That is so whether the change in the law is a minor adjustment to a statute or regulation or involves sweeping change. Everyone who is engaged in the process of changing the law is to some degree a law reformer. The term law reformer is thus not confined to the expert and formally constituted law reform bodies such as are represented here, but includes legislators in Parliaments and members of executives, Ministers and officials with law-making powers, Ministers and their advisers who formulate legislative policies and place them before Parliament or before the executive in its law making capacity, and the lawyers who translate those policies into legislation. Much of what is said in this paper is, one hopes, of some relevance to the work of specialist law reform agencies, but it is also applicable to law reformers as a whole.

7 Law reformers promote access to justice by ensuring laws are both just and accessible. A principal function of the New Zealand Law Commission is—

“[T]o advise the Minister of Justice [and the responsible Minister] on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.”<sup>9</sup>

---

<sup>8</sup>Lord Steyn *Democracy Through Law*, September 2002 Robin Cooke lecture. Occasional Paper No 12 published by the New Zealand Centre for Public Law.

<sup>9</sup> Section 5(1)(c) of the Law Commission Act 1985.

The framers of that Act have not defined “accessible”, but the dual concepts of comprehensibility and accessibility would, I suggest, indicate that they had more in mind than merely facilitating understanding.

Lord Oliver of Aylmerton has said:

For every legislative enactment constitutes a *diktat* by the state to the citizen which he is not only expected but obliged to observe in the regulation of his daily life and it is the judge and the judge alone who stands between the citizen and the state’s own interpretation of its own rules. That is why it is so vitally important that legislation should be expressed in language that can be clearly understood and why it should be in a form that makes it readily accessible. Edmund Burke observed that bad laws are the worst form of tyranny. But equally, well-intentioned laws that are badly drafted or not readily accessible are also a form of tyranny...<sup>10</sup>

This paper attempts to identify some of the principal factors that influence the content and design of the law and how this affects access to justice. I have not done a comparative study of measures and practices in other jurisdictions to promote principled law-making. However, I can offer a few observations about the New Zealand scene along with a look at one or two other jurisdictions to try to assess how well theory translates into practice. As the theme of this conference provocatively asks, is it reality or just rhetoric?

## **Part 2**

### **Influences on the content of legislation**

- 8 There a number of influences on the development of legislative policy, the design and drafting of legislation, and the implementation of legislation in New Zealand.

---

<sup>10</sup>Rt Hon Lord Oliver of Aylmerton, A Judicial View of Modern Legislation, (1993) 10 Stat LR 2.

The first is the Legislation Advisory Committee (**LAC**) through publication of the Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation (**LAC Guidelines**) and the work of the LAC generally. A second is the New Zealand Bill of Rights Act 1990. There is a certain amount of overlap between them, but each deserves comment. A good deal of what is said will already be familiar to New Zealand listeners. It does no harm to restate it. I suspect that more is written about judicial process than about legislative process.

### *Legislation Advisory Committee and LAC Guidelines*

9 Before the establishment of the Law Commission in February 1986, much of the work of law reform in New Zealand was undertaken by committees appointed by the Minister of Justice. Each had responsibility for a broad subject area. One of the committees, the Public and Administrative Law Reform Committee, became, after the establishment of the Law Commission, the Legislation Advisory Committee.<sup>11</sup> The Committee is appointed by the Minister of Justice. The LAC Guidelines were first published in 1987. They were revised in 1992 and again in 2001. A Supplement to the 2002 edition was published last year.<sup>12</sup> The LAC Guidelines are designed to assist both policy-makers and lawyers in policy development, design, and implementation.

---

<sup>11</sup>The current members of the Legislation Advisory Committee are:  
Richard Clarke QC, Chairperson (also a Law Commissioner)  
Guy Beatson, Chief Economist, Ministry of Economic Development  
Professor J F Burrows, Canterbury University  
Cheryl Gwynn, Deputy Solicitor-General  
Jack Hodder, Partner, Chapman Tripp, Wellington  
Grant Liddell, Crown Counsel, Crown Law Office, Wellington  
Professor Julie Maxton, Auckland University  
Janet McLean, Senior Lecturer, Auckland University  
Hon Justice Robertson, President, New Zealand Law Commission  
George Tanner QC, Chief Parliamentary Counsel.

<sup>12</sup>The LAC Guidelines (incorporating the Supplement) are available in electronic format at <http://www.justice.govt.nz/lac/index.html>.

- 10 The LAC Guidelines are endorsed by the Government. Every Government Bill referred to the Cabinet Legislation Committee and to Cabinet must be accompanied by a written submission signed by the Minister responsible for the Bill stating, among other things, whether the Bill complies with the LAC Guidelines. The LAC Guidelines represent a codification of a good deal of the esoteric knowledge about principled law-making.<sup>13</sup> This is not to say that, before the LAC Guidelines, New Zealand legislation was unprincipled and manifested bad practice. The Guidelines have brought together in a 2-volume publication much in the way of institutional knowledge previously diffused throughout the bureaucracy.
- 11 Annexed to this paper is a copy of the LAC Guidelines Checklist of issues that ought to be addressed in developing legislative proposals. As will be seen, not all the considerations will be relevant. Large cognate statutes, such as the Local Government Act 2002, the Sentencing Act 2002, the Parole Act 2002, and the Terrorism Suppression Act 2002, to take a few recent examples, will require consideration to be given to most, if not all, of the issues identified. A technical amendment to an existing statute may require consideration of only a few of those matters. The subject matter of the legislation is relevant, but not always. Statutes that affect the rights and freedoms of individuals will obviously raise issues. So too will statutes whose principal focus is on commercial matters but that also contain powers of search and seizure and require disclosure of information.
- 12 A quick glance at the checklist gives an insight into the breadth of considerations that have to be addressed. Among the key considerations are—
- have alternatives to legislation been evaluated (Chapter 1)?

---

<sup>13</sup>“Esoteric knowledge” is the term used by Sir Geoffrey Palmer to describe a commodity needed by law reformers in his essay “The New Zealand Legislative Machine”, *Victoria University of Wellington Law Review*, Vol 17, 1987, p 285. Another was stamina.

- is the legislation understandable and accessible (Chapter 2)?
- does the legislation comply with basic common law principles, and how does it affect existing rights (Chapter 3)?
- is the legislation consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (Chapter 4)?
- have relevant Treaty of Waitangi considerations been addressed (Chapter 5)?
- is the legislation consistent with relevant international legal obligations (Chapter 6)?
- what is the relationship between the proposed legislation and the common law (Chapter 7)?
- are there appropriate protections for those affected by the exercise of any new public power (Chapter 8)?
- is it appropriate to provide for delegated law-making powers, and are there adequate safeguards in place to control the exercise of those powers (Chapter 10)?
- are the proposed remedies or sanctions appropriate (Chapters 11 and 12)?
- does the legislation contain adequate appeal rights (Chapter 13)?

- are powers of entry and search justified and subject to appropriate safeguards (Chapter 14)?
- has the Privacy Act 1993 been complied with (Chapter 15)?

13 With the exception of Appropriation Bills, Imprest Supply Bills, and Bills intended to pass through all stages under urgency, Bills introduced in the New Zealand Parliament are referred to parliamentary select committees for consideration. New Zealand legislators are “hands on”. Detailed consideration of proposed legislation by select committees is part of the legislative culture. Bills may undergo radical transformation in the process. Select committees receive written and oral submissions from interested organisations and the public. The Legislation Committee of the New Zealand Law Society regularly makes submissions on Bills before select committees. The LAC has made submissions on Bills for many years and continues to do so. The LAC does so on a selective basis focusing on those Bills that raise issues about whether a Bill gives effect to the particular policy in a manner consistent with legal principle and good drafting practice. The LAC’s terms of reference include “discouraging the promotion of unnecessary legislation”. Consistent with this, the LAC has, over the years, made numerous submissions to select committees recommending that a Bill or provisions in a Bill are unnecessary or that a Bill does not comply with the LAC Guidelines.<sup>14</sup>

---

<sup>14</sup>An LAC submission to the Transport and Industrial Relations committee on the Land Transport (Street and Illegal Drag Racing) Bill, a member’s Bill that was later adopted by the Government, resulted in the omission from the Bill of a provision making the promotion of a street race an offence on the basis that it was adequately covered by section 66 of the Crimes Act 1961.

The LAC raised concerns in a submission to the Commerce Committee that delegated law-making powers in the Electricity Industry Bill that would authorise the making of regulations and rules governing the wholesale electricity market and the transmission of electricity did not contain adequate checks to avoid the possibility of the powers being exercised improperly. The LAC suggested specific amendments to the Bill including that the provisions be made more specific or that principles be included for the guidance of those making the regulations or rules; that consultation be required within government and with the industry before regulations or rules were made; and that any rules be subject to disallowance in the same way as regulations.

- 14 The LAC's submissions do not always make it popular. Its submissions and the appearances of its members before select committees are, however, welcomed by select committees because the LAC is acknowledged as being non-partisan. It has no axe to grind. It can call it as it sees it. Being on the receiving end of LAC submissions is not always comfortable. The practice of making submissions reinforces what is in the LAC Guidelines.
- 15 The LAC's submissions invariably result in changes to legislation. Its contribution to improving the quality of legislation in this country has been undervalued. It does not have a high profile. It works quietly and behind the scenes. It seeks to influence by reasoned argument and persuasion. New Zealand is fortunate to have it and the contribution of those who have led it over the years and those who have served and who now serve on it. Through the process of making submissions on Bills that are seen as falling short of principle and good practice, the LAC and the LAC Guidelines are a powerful discipline on the Government and its advisers.

*New Zealand Bill of Rights Act*

- 16 The New Zealand Bill of Rights Act 1990 affirms New Zealand's commitment to the International Covenant on Civil and Political Rights (1966). It does this by expressly affirming the rights and freedoms contained in the Bill of Rights. The rights and freedoms protected by the Bill of Rights include the rights to life and security of the person and to be free from torture or cruel or degrading or disproportionately severe punishment, the rights to freedom of thought, conscience, religion, and belief, freedom of expression, non-discrimination and minority rights, the right to peaceful assembly and freedom of association and movement, and the rights relating to unreasonable search and seizure, arbitrary arrest or detention, and

---

The Bill was amended to reflect the LAC's submissions and the amended version is now proposed as the basis for regulation of the gas industry in a Bill, the Electricity and Gas Industries Bill 2003, currently before Parliament.

minimum standards of criminal procedure. Other rights protected relate to the right to vote, protection from retroactive penalties and double jeopardy, and the right to the observance of natural justice, to judicial review, and to bring proceedings against and to defend proceedings brought by the Crown in the same way as civil proceedings between individuals.

- 17 Under the Act, the courts have no invalidating power.<sup>15</sup> Nor is there express power in the Act to issue declarations of incompatibility.<sup>16</sup> If an enactment can be interpreted consistently with the rights and freedoms in the Bill of Rights, that meaning must be preferred to any other meaning.<sup>17</sup> The rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society, that is, the concept of justified limitation.<sup>18</sup> The Bill of Rights Act applies only to acts of the legislative, executive, and judicial branches of government and to acts done by any person or body in performing a public function, power, or duty under the law.<sup>19</sup>

---

<sup>15</sup>s 4.

<sup>16</sup>In *Moonen v Film & Literature Board of Review* (2000) NZLR 9, 17, the Court of Appeal said that the purpose of section 5 of the Bill of Rights Act “necessarily involves the Court having the power and, on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. In *R v Poumako* [2000] 2 NZLR 695, 715-720, Thomas J said he was prepared to make such a declaration.

<sup>17</sup>s 6.

<sup>18</sup>s 5.

<sup>19</sup>s 3.

18 In *Moonen v Film & Literature Board of Review*, the Court of Appeal suggested an approach that those concerned with Bill of Rights issues may find helpful. That is to identify the different interpretations that are open and, if only one interpretation is plainly possible, adopt that meaning. If more than one interpretation is open, the interpretation that is the least inconsistent with the particular right or freedom is the interpretation that must be adopted. In determining which of two or more competing meanings is possible, consideration must be given to whether the limitation on the right or freedom that is contended for is justified. That assessment is also a multi-step process. Does the provision, that is the enactment alleged to limit a protected right or freedom, serve an important and significant objective? If it does, is there a rational and proportionate connection between the objective and the provision? There must also be as little interference as possible with the right or freedom.<sup>20</sup> At its heart, it is an exercise in balancing objective against means.

19 The *Moonen* analysis follows on from an earlier majority decision of a strong Court of Appeal in *Ministry of Transport v Noort*.<sup>21</sup> The *Moonen* approach is itself now the subject of a detailed analysis and a suggested reordering by a group of leading Bill of Rights lawyers.<sup>22</sup> This paper is not the place to debate the competing positions. One could, however, be forgiven for thinking that, after almost a decade and a half since the Bill of Rights Act came into operation, there would be a consensus about the way in which the interpretative provisions of the Act should be applied. Regrettably, that is not so. Controversy still rages about the logical steps required in determining whether a particular enactment is or is not inconsistent with

---

<sup>20</sup>*Moonen v Film & Literature Board of Review* [2000] NZLR 9, 17 per Tipping J. The approach in *Moonen* to the concept of reasonable justification, although not explicitly stated, is essentially the same as the approach of the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

<sup>21</sup>[1992] 3 NZLR 260.

<sup>22</sup>Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahony *The New Zealand Bill of Rights*, Chapter 4 “Interpreting Enactments”: Sections 4, 5, and 6, Oxford University Press, p 116ff.

the Bill of Rights. Perhaps the not unfamiliar answer from academics and judges will be to blame the drafters of the statute.

- 20 Putting that frustration aside, a statement of the approach to analysis of Bill of Rights issues in New Zealand is necessary because of the significance it has for the content of legislation. Under section 7 of the Bill of Rights Act, the Attorney-General must bring to the attention of Parliament any provision of a Government Bill or of any other Bill that appears to be inconsistent with any of the rights and freedoms in the Bill of Rights. The requirement is interpreted as requiring a report on inconsistency only if a prima facie breach cannot be justified under section 5 of the Act as a reasonable limit in a free and democratic society.
- 21 All Government Bills undergo “vetting”. The vetting process involves scrutiny of policy proposals as they emerge and of draft legislation as it is developed by teams of specialist lawyers within 2 government agencies.<sup>23</sup> They provide the advice to the Attorney-General in relation to section 7 reports. The robustness of the process has been enhanced by the relatively recent decision of the Attorney-General to make publicly available Bill of Rights advice irrespective of whether a section 7 report is tabled in Parliament. Before this open-minded initiative, in the absence of a section 7 report, neither Parliament, including its select committees, nor anyone else could know why a Bill was considered not to be inconsistent with the Bill of Rights. The release of advice means that if a Bill of Rights issue is raised in the course of a Bill’s passage through Parliament, the House, select committees, and the public will have a better appreciation of the Government’s thinking about the issues and be better

---

<sup>23</sup> Bills sponsored by departments other than the Ministry of Justice are vetted by the Bill of Rights team in that Ministry. Bills sponsored by the Ministry are vetted by the Bill of Rights team in the Crown Law Office. The Ministry will, in carrying out Bill of Rights vetting, consult Crown Counsel. The Solicitor-General and Crown Counsel represent the Government in most litigation before the courts. To the extent that Bill of Rights issues arise in litigation against the Government (which is where most of them do), it is the Solicitor-General and Crown Counsel who will appear and argue those issues. That makes them well placed to advise the Government on Bill of Rights issues in relation to proposed legislation.

placed to engage in informed debate. The vetting process is rigorous. It is not uncommon for the number of separate opinions on Bill of Rights issues in regard to a particular Bill to reach double figures. Draft Bills undergo substantial change in the face of Bill of Rights objections raised during the policy development and drafting processes. Section 7 reports impose a high level of political accountability on a government. No Minister in charge of a Bill wants to have to face a section 7 report if he or she can avoid it.

- 22 Scrutiny of proposed legislation for consistency with what Professor Mark Tushnet describes in his paper, also delivered in this lecture theatre as part of the programme of the New Zealand Centre for Public Law's first annual conference on the primary functions of government, as "first generation classical liberal political rights"<sup>24</sup> did not begin in New Zealand with the enactment in 1990 of the New Zealand Bill of Rights Act. It was done in a less structured and perhaps less focused way by other means.<sup>25</sup> What the statute has done, however, is elevate the importance of Bill of Rights values in the legislative context. These values now have greater legitimacy. That legitimacy has been brought about, not incrementally through the cautious development of common law principles, but by a single event, the passage of an Act of Parliament. Parliament has placed a constraint on the executive. It has also directed the courts to "read down" potentially inconsistent enactments by giving preference to the least infringing interpretation. It has also devised a mechanism designed to ensure that Parliament will be able to address any Bill of Rights

---

<sup>24</sup>Mark Tushnet, *Weak-Form Judicial Review: Its Implications For Legislatures*, Victoria University of Wellington, New Zealand, Faculty of Law, New Zealand Centre For Public Law, 28 and 29 November 2003.

<sup>25</sup>Principally by informal scrutiny of proposed legislation by the Law Reform Division of the former Department of Justice and the advice provided to the Cabinet Legislation Committee as part of its consideration of Bills prior to introduction.

incompatibility. The legislative branch of government has raised the bar by giving statutory recognition to civil and political rights developed both by the common law and international law.

- 23 Professor Mark Tushnet’s paper provides a context for consideration of the significance of the New Zealand Bill of Rights Act. To use Professor Tushnet’s classification, it is “weak-form judicial review”. However, it is no less effective for that as a means of securing in legislation adherence to basic human rights and constitutional values.
- 24 The reasons for this relate to the in-built sanction of section 7 reports drawing the attention of legislators to the possibility that they may, by enacting a statute, expressly override a protected right or freedom with the political costs involved in taking such a step, the careful scrutiny that Bills receive for Bill of Rights compliance, the opportunity for consideration of Bill of Rights issues during the parliamentary process, the scope for more complete consideration of issues resulting from release of Bill of Rights advice to the Government, and the degree to which the legislature is prepared to accept court decisions in Bill of Rights cases. What these considerations suggest, adopting Professor Tushnet’s analysis, is that the New Zealand weak-form judicial review transforms into a strong form.

*Common law principles, the Treaty, international law, and other statutes*

- 25 Other conventions and institutional arrangements operate to promote accessible legislation. It is an established common law principle that Parliament does not intend to legislate in a manner inconsistent with the Treaty of Waitangi.<sup>26</sup> As the LAC Guidelines note, the Treaty has been described as “part of the fabric of New

---

<sup>26</sup> *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129; *Attorney-General v New Zealand Maori Council (No 2)* [1999] 2 NZLR 147.

Zealand society”.<sup>27</sup> Every Minister who proposes to bring a Bill into Parliament must assure Cabinet that the Bill complies with the principles of the Treaty. Another established common law principle is that Parliament does not intend to legislate in a manner inconsistent with relevant international obligations so that statutes and delegated legislation will be interpreted by the courts in a manner that is consistent with those obligations.<sup>28</sup>

- 26 In the development of legislative policy, consideration is also mandated to the specific human rights values contained in the Human Rights Act 1993 and to the privacy principles contained in the Privacy Act 1993. Consideration must also be given to ensuring proposed legislation links, where appropriate, to the Ombudsmen Act 1975<sup>29</sup> and the Official Information Act 1982,<sup>30</sup> which provide respectively for the independent review of administrative action and access to official information.

#### *Delegated legislation*

- 27 Mechanisms exist for review of delegated legislation. The Regulations (Disallowance) Act 1989 enables Parliament by resolution to disallow regulations. Regulations made by the executive and a good deal of other delegated legislation is scrutinised by a parliamentary select committee. Under the Standing Orders, the Regulations Review Committee may draw the Houses’ attention to regulations that

---

<sup>27</sup>*Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 per Chilwell J.

<sup>28</sup>*Sellers v Maritime Safety Inspector* [1999] NZLR 44.

<sup>29</sup>The Ombudsmen Act 1975 provides for review of administrative actions of government, Crown entities, and the State enterprises by the Ombudsmen who are appointed by the Governor-General on the recommendation of the House of Representatives and who may be removed from office only on an address from the House.

<sup>30</sup>The Official Information Act 1982 establishes mechanisms to enable access to official information held by government, Crown entities, the universities, and the State enterprises. The fundamental principle of the Act is that official information must be made available unless there is good reason for withholding it.

contravene any of the grounds listed in Standing Order 378.<sup>31</sup> From time to time the Committee reports to Parliament following an examination of particular regulations. These reports may result from complaints made about a particular regulation or as a result of the Committee undertaking its own investigation. A substantial body of jurisprudence has grown up around the scrutiny role of the Regulations Review Committee.<sup>32</sup> Policy-makers and others take this into account in the policy development and design of legislative schemes.

28 The Committee's role extends to considering delegated law-making powers in Bills. It also undertakes investigations into practices relating to delegated law-making. Its occasional reports have been influential in the development of principles for the design of legislative regimes that rely on delegated legislation. For example, the Committee has reported on the commencement of legislation by Order in Council,<sup>33</sup> instruments deemed to be regulations,<sup>34</sup> and regulation-making powers that

---

<sup>31</sup>Those grounds are that the regulation—

- (a) is not in accordance with the general objects and intentions of the statute under which it is made:
- (b) trespasses unduly on personal rights and liberties:
- (c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made:
- (d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal:
- (e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute:
- (f) contains matter more appropriate for parliamentary enactment:
- (g) is retrospective where this is not expressly authorised by the empowering statute:
- (h) was not made in compliance with particular notice and consultation procedures prescribed by statute:
- (i) for any other reason concerning its form or purport, calls for elucidation.

<sup>32</sup>See *Regulations Review Committee Digest*, Ryan Malone, New Zealand Centre for Public Law, Victoria University of Wellington.

<sup>33</sup>Investigation into the Commencement of Legislation by Order in Council (23 August 1996).

<sup>34</sup>Inquiry into Instruments Deemed to be Regulations—An Examination of Delegated Legislation (6 July 1999).

authorise international treaties to override statutes.<sup>35</sup> The Committee sets, and monitors the observance of, standards in regard to delegated law-making. Many other jurisdictions have similar parliamentary scrutiny committees. They are another discipline on law-makers.

### *The influence of the courts*

29 The courts also exert discipline on Parliament and the executive. Decisions in which enactments are found to be inconsistent with the Bill of Rights will cause careful consideration to be given to compliance within government. Although not strictly, a Bill of Rights case, the decision of the Court of Appeal in *Drew v Attorney-General*<sup>36</sup> led to a review of other potentially offending regulations. Just as governments want to avoid section 7 reports, so to are adverse findings in the courts unwelcome. The executive does not set out to exercise its delegated law-making powers in a way that will lead to court decisions declaring its efforts invalid. That is the last thing it wants. A successful court challenge to regulations that prescribe fees or to an important order can have serious implications. It is sometimes thought that the development and drafting of delegated legislation is done to a lesser standard than primary legislation. That is not so. Because delegated legislation usually has the most direct impact on the citizen, whether individual or corporate, it is viewed with the utmost importance.

30 What I hope this illustrates is the existence of powerful influences driving the principled development of legislation. Bill of Rights compliance has statutory

---

<sup>35</sup>Inquiry into Regulation-Making Powers that Authorise International Treaties to Override any Provisions of New Zealand Enactments (March 2002).

<sup>36</sup>[2002] 1 NZLR 58. In *Drew* the Court of Appeal declared invalid a regulation denying legal representation to an inmate charged with a disciplinary offence on the basis that the regulation-making power in the Penal Institutions Act 1954 did not authorise the making of a regulation that would be inconsistent with the Bill of Rights. The decision rests on the vires of the regulation, rather than incompatibility with the Bill of Rights.

support. Others, such as compliance with the LAC Guidelines, rely on a form of internal self-evaluation mandated by government direction. A statute protects against abuse by the executive of its law making powers. They are an effective combination of forces directed at promoting access to justice in the sense I have taken it.

31 The mechanisms are not necessarily ideal. There is no formal process for Bill of Rights scrutiny once a Bill has been introduced into Parliament. In his submission to the Standing Orders Committee in the context of the 2003 review of the Standing Orders, the Clerk of the House advocated that select committees have a formal mandate to scrutinise Bills for Bill of Rights compliance. Others have made similar pleas. In a parliamentary environment in which significant changes are made to Bills as they pass through the legislative process, there will be risks that a non-complying measure will get through the net.<sup>37</sup> The scrutiny and reporting on Bill of Rights compliance is done within government. Would an independent agency be more appropriate to carry out the task? For myself, I believe a process that imposes an onerous self-discipline on government Ministers and their advisers to ensure compliance with fundamental legislative principles and the principles of good legislative design is likely to be the most effective. At the same time, some form of separate parliamentary scrutiny could do no harm.

32 The Regulations Review Committee consists entirely of members of Parliament. While it is, by convention, chaired by an opposition member, it includes members

---

<sup>37</sup>In *R v Pora* [2001] NZLR 37 the Court of Appeal considered the effect of enactment by the Criminal Justice Amendment Act (No 2) 1999 of a new section 80 of the Criminal Justice Act 1986. Section 4(2) of the principal Act provided that no court could impose a sentence or penalty on an offender which could not have been imposed at the time of the commission of the offence. The later amendment imposed a longer minimum non-parole period (13 years) for the offence of murder if the commission of the offence involved home invasion. The amendment was expressed to apply in relation to offences committed before the commencement of the amendment. The amendment was contained in a Supplementary Order Paper moved in the committee stages of the Bill by a back bench member and adopted by the House. It was not, however, the subject of separate Bill of Rights clearance.

representing the governing coalition and its political supporters. A government majority would almost always be guaranteed to defeat a disallowance motion. It is not surprising, therefore, that no regulations have ever been disallowed. Would an independent office of Parliamentary Commissioner be seen as providing a more transparent check in the area of delegated legislation? These are issues, I suggest, that merit consideration by law reformers.

*The practice in other jurisdictions*

33 I have outlined mechanisms peculiar to New Zealand. Other jurisdictions adopt different approaches. Queensland has in place a system that involves constant assessment of legislative proposals against fundamental legislative principles during the policy development, drafting, and parliamentary processes. The system is designed to ensure that fundamental legislative principles underpin Queensland legislation and that departure from them is explained and justified. The system involves evaluation within government in much the same way as New Zealand, but at its heart are 2 statutes.

34 The first is the Legislative Standards Act 1992. The Title of the Act describes it as an Act relating to standards of legislation, the drafting of legislation, and other purposes relating to legislation. Section 3 states that the purposes of the Act include ensuring that—

- Queensland legislation is of the highest standard
- an effective and efficient legislative drafting service is provided for Queensland legislation
- Queensland legislation, and information relating to it, is readily available in printed and electronic form.

35 The Act then goes on to state that those purposes are primarily to be achieved by establishing the Office of the Queensland Parliamentary Counsel. Rather a lot to ask

of the law drafters. Section 7 sets out the functions of that Office. In addition to the obvious function of drafting legislation, the Office must advise Ministers, government entities, and members of the Queensland Legislative Assembly on the application of fundamental legislative principles. It is also required to ensure the Queensland statute book is of the highest standard. The term “fundamental legislative principles” is defined in section 4.

36 It is worth setting out the definition in full.

**4 Meaning of “fundamental legislative principles”**

- (1) For the purposes of this Act, “**fundamental legislative principles**” are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
- (2) The principles include requiring that legislation has sufficient regard to—
  - (a) rights and liberties of individuals; and
  - (b) the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
  - (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
  - (b) is consistent with principles of natural justice; and
  - (c) allows delegation of administrative power only in appropriate cases and to appropriate persons; and
  - (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
  - (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
  - (f) provides appropriate protection against self-incrimination; and
  - (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
  - (h) does not confer immunity from proceeding or prosecution without adequate justification; and
  - (i) provides for the compulsory acquisition of property only with fair compensation; and

- (j) has sufficient regard to Aboriginal tradition and Island custom; and
  - (k) is unambiguous and drafted in a sufficiently clear and precise way.
- (4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—
- (a) allows the delegation of legislative power only in appropriate cases to appropriate persons; and
  - (b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
  - (c) authorises the amendment of an Act only by another Act.
- (5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—
- (a) is within the power that, under the Act or subordinate legislation (the “**authorising law**”), allows the subordinate legislation to be made; and
  - (b) is consistent with the policy objectives of the authorising law; and
  - (c) contains only matter appropriate to subordinate legislation; and
  - (d) amends statutory instruments only; and
  - (e) allows the subdelegation of a power delegated by an Act only—
    - (i) in appropriate cases and to appropriate persons; and
    - (ii) if authorised by an Act.

37 The other statute is the Parliament of Queensland Act 2001. Section 80 of the Act establishes a parliamentary committee called the Scrutiny of Legislation Committee. Section 103 defines the Committee’s responsibilities as including considering the application of fundamental legislative principles stated in the Legislative Standards Act to Bills and subordinate legislation and the lawfulness of subordinate legislation. The Committee reports weekly to the Legislative Assembly, by way of an *Alert Digest* in relation to Bills introduced into the Assembly, as to whether a Bill conforms with the principles and also on other matters not included in the principles.

38 The Queensland system relies on internal self-assessment of both primary and delegated legislation by government agencies and the Cabinet in a process that is

similar to that followed in New Zealand. In essence, it requires consideration of possible compliance issues by the sponsoring department, the Office of the Queensland Parliamentary Counsel, and Cabinet before examination by the Scrutiny of Legislation Committee. A similar process is followed for delegated legislation with the added requirement of certification by the Office of the Queensland Parliamentary Counsel. New Zealand's Parliamentary Counsel also have a similar certification responsibility in regard to delegated legislation. Queensland differs from New Zealand in having a parliamentary committee specifically charged by statute with scrutinising Acts.

39 In Victoria, Australia, a Scrutiny of Acts and Regulations Committee is established by the Parliamentary Committees Act 2003. The Committee's functions include reporting to Parliament whether any Bill—

- trespasses unduly on rights or freedoms
- makes rights, freedoms, or obligations dependent on insufficiently defined administrative powers
- makes rights, freedoms, or obligations dependent on non-reviewable administrative decisions
- unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Privacy Act 2000
- unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2001
- inappropriately delegates legislative power
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

40 The Scrutiny of Acts and Regulations Committee has additional functions conferred on it by the Subordinate Legislation Act 1994. Under that Act, the Committee is

required to report to Parliament on delegated legislation on much the same basis as the New Zealand Regulations Review Committee. Two grounds are worth noting. They are that the legislation is inconsistent with principles of justice and fairness or that it is likely to result in administration and compliance costs that outweigh the likely benefits sought to be achieved by the legislation.

- 41 There is a further mechanism in regard to delegated legislation. Section 13 of the Subordinate Legislation Act requires the Chief Parliamentary Counsel of Victoria to give a certificate broadly as to the same matters as the scrutiny committee must consider. The scrutiny committee publishes reports (alert digests) on Bills before the second reading debate. As well as the formal mechanisms, the Chief Parliamentary Counsel will raise with the Victorian Government any issues of fundamental legislative policy not otherwise capable of being resolved. That is also the case in New Zealand.
- 42 In the Australian Commonwealth, Bills drafted by the Office of Parliamentary Counsel (**OPC**) that raise similar issues to those discussed must be referred to the Attorney-General's Department. The issues include whether a provision in a Bill might discriminate against an individual, infringe civil or political rights, affect social justice for Aboriginals, Torres Strait Islanders, or South Sea Islanders, delegate law-making powers, confer administrative discretion that should be reviewable, allow search, seizure, arrest, detention, or entry onto premises or confer other coercive powers, provide for the collection, storage, or use of personal information, confer powers to require production of documents or to question a person, or remove the privilege against self-incrimination.
- 43 Bills introduced into the Commonwealth Parliament are examined by a Scrutiny of Bills Committee against the principles that constitute the Committee's brief. The Committee was established in 1981 following a recommendation by the Senate

Standing Committee on Constitutional and Legal Affairs that a committee be established to maintain a watching brief on all Bills introduced into the Parliament. The work of the Committee is governed by Senate Standing Order 24 and the 5 principles set out in that order. The Committee reports to the Senate on whether Bills—

- trespass unduly on personal rights and liberties
- make rights, liberties, or obligations unduly dependent upon insufficiently defined administrative powers
- make such rights, liberties, or obligations unduly dependent upon non-reviewable decisions
- inappropriately delegate legislative powers
- insufficiently subject the exercise of legislative power to Parliamentary scrutiny.

44 The Committee examines Bills introduced into either the House of Representatives or the Senate and reports on them in an *Alert Digest*. The Committee's comments are drawn to the attention of the responsible Minister, whose response is then reproduced in a subsequent report by the Committee. Bills are amended as a result of the Committee's criticism and the Senate's comments on a Bill are a matter of public record. The sorts of matters commented on include provisions that operate retrospectively, override the privilege against self-incrimination, reverse the onus of proof in criminal proceedings or create strict liability offences, allow search and seizure without warrant, confer on administrators ill-defined and wide powers, exclude or limit or do not provide for judicial review or merits review, authorise delegated legislation to override primary legislation ("Henry VIII clauses"), allow for important matters to be determined by delegated legislation, allow taxes and levies to be fixed by delegated legislation, or allow subordinate legislation to deal with a matter by adopting other material (incorporation by reference). It is part of

the role of the legislative drafters in OPC to raise issues that are likely to be of concern to the Australian Parliament and the Scrutiny of Bills Committee in particular.

### **Part 3**

#### **Legislative language and accessibility**

- 45 Lord Oliver’s injunction that badly drafted laws, however well intentioned, are a form of tyranny relates to issues about accessibility at a different, but equally fundamental, level. Badly drafted laws create a range of problems. Not only is there a cost involved in having to get legal advice or in recourse to the courts to ascertain meaning, but more importantly the courts, and not Parliament or the executive, ultimately determine what the legislation means. Parliament cannot complain about “judicial legislating” if that is the necessary consequence of unclear legislation. Badly drafted laws constitute a barrier to access to justice. In an ideal world, legislation would always be crystal clear and the courts would have nothing more to do but apply it. The drafting of legislation is not, however, an exact science.
- 46 To a degree, accessible legislation will always be illusory. A reader cannot go to a statute and safely assume that, having read the words, he or she will know what the law is on the subject with which the statute deals. The meaning of a statute is affected by interpretation legislation and by common law principles of interpretation, like the canons of construction.
- 47 In some jurisdictions, legislation expressly authorises recourse to extrinsic aids in the reading of statutes. In others, reference to material outside the statute is permissible within limits determined by the courts. Whether recourse to material outside the statute should be permissible at all or, if so, to what extent, is not

without controversy.<sup>38</sup> Two eminent Judges writing over half a century apart and on opposite sides of the common law world have each spoken about the inherent problems of resorting to external sources to interpret legislation. In his celebrated address in 1947 to the New York Bar Association, Justice Felix Frankfurter refers to the old adage that “only when legislative history is doubtful, do you go to the statute”.<sup>39</sup> Justice Kirby voiced the same misgivings in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* when he said:

In statutory construction, there is a tendency, noted in several recent cases, for judges and others to look first to a number of external sources for guidance, including judicial generalities or legal history. It is as if some who have the responsibility of interpretation of legal words find the reading and analysis of the texts themselves distasteful, like dentists happy to talk about the problem but loath to pull a tooth. In statutory construction this error of approach must be rooted out. The proper place to start is the statute. A wide range of other materials may now be accessed, if need be, to assist in the task. But the task remains that of finding meaning of the legislation from the text, not from other materials.<sup>40</sup>

48 Context is crucial in understanding the meaning of the statutory text. Other legislation that deals with related aspects of the subject matter of a particular statute may also affect its interpretation. A legislative regime might consist of a statute and delegated legislation that a reader needs to know about. Legislative history may be relevant. International law may also affect meaning. In a recent article, Mark Gobbi identified out of a total of 700 New Zealand public statutes 92 public statutes giving

---

<sup>38</sup>Johan Steyn, *Pepper v Hart: A Re-examination*, *Oxford Journal of Legal Studies*, Vol 21, No 1 (2001), p 59.

<sup>39</sup>*Some Reflections on the Reading of Statutes. Landmarks of Law*, p 210. See also *Columbia University Law Review*, Vol 47, No 4 p 527.

<sup>40</sup>(2000) 186 ALR 289, 307.

effect to international treaties or conventions to which New Zealand is a party.<sup>41</sup> In the same article he notes that in the 1920s and 1930s, no statutes implemented specified treaties, whereas in the 1980s 13 and in the 1990s 24 statutes implemented specific treaties. In New Zealand, the Treaty of Waitangi may be relevant depending on the statute involved, irrespective of whether the Treaty is expressly referred to in the statute.<sup>42</sup>

49 Some statutes embody economic concepts that readers need to be familiar with in order to understand them. Trade practice legislation is a good example. Nor will a reader of a statute necessarily know what interpretation has been placed on particular provisions by the courts. In many instances, the written word of a statute cannot safely be relied on without also considering relevant case law. As Lord Steyn has observed, “[u]ltimately, common law and statute coalesce in one legal system”.<sup>43</sup> A statute that consolidates earlier legislation may just re-enact, with or without modification, earlier provisions that have been given a particular interpretation by the courts. Understanding the thrust of a new statute may necessitate understanding the previous law. It would be impossible to appreciate the effect of reform of a country’s company law without understanding the changes being made to the previous law.

50 For these reasons, the bare words of a statute tell only a part of the story. Does it matter then how the statute is drafted? As long as the lawyers and judges can make sense of it, does it matter whether anyone else can? Why the obsession with plain language? The answers to these questions are fairly obvious. First, because

---

<sup>41</sup>Mark Gobbi “Drafting Techniques for Treaties in New Zealand, *Statute Law Review*, Volume 21, Number 2, pp 71-103 (2000).

<sup>42</sup>*Huakina Development Trust v Waikato Valley Authority* [1987] NZLR 188.

<sup>43</sup>*Pierson v Secretary of State* [1997] 3 All ER 577, 605.

ascertaining the meaning of legislation already presents many challenges, the easier it is to understand the statutory text the better, and even if the only concern was for lawyers and judges, the easier it is for them to understand it the better. We do not live in an age where learning is a privilege enjoyed by a handful of citizens like judges and clerics. In the words of Michele Asprey, lawyers are no longer seen as “the learned custodians of unknowable secrets”.<sup>44</sup>

51 Secondly, the assumption that people don’t read legislation is simply wrong. One need only look at the list of best sellers to see which statutes are in greatest demand. They are not all “lawyers’ law”. The numbers of “hits” on the New Zealand website of up-to-date legislation also shows that the public reads legislation. Thirdly, and not surprisingly, legislators want to understand the legislation they are invited to enact. The public also want understand it so that they can influence its final form. That is an important component of access to justice. Clearly drafted legislation also exposes bad policy, especially in the development phase. If an unpleasant message has to be communicated, and not all legislative messages are pleasant ones, the message ought not to be hidden in a mass of words.

52 Steps have been taken in New Zealand in recent years to change the way in which legislation is drafted. As Michèle Asprey observes, “[s]everal Law Commission and Committee reports proved to be catalysts for much of the progress made in the plain language movement in the last 30 years or so”.<sup>45</sup> The New Zealand Law Commission was the catalyst for reform in this country through the publication of 3 separate reports: Report No 17 published in 1990 and called *A New Interpretation Act Is To Avoid “Prolivity and Tautology”*,<sup>46</sup> Report No 27 published in 1993 and

---

<sup>44</sup>Michèle Asprey, *Plain Language For Lawyers*, 3rd ed, The Federation Press, 2003, p 3.

<sup>45</sup>*Ibid*, p 65.

<sup>46</sup>NZLC R 17.

called *The Format of Legislation*,<sup>47</sup> and Report No 35 published in 1996 and called *Legislation Manual Structure and Style*.<sup>48</sup> The reports represented an integrated approach to reform of the language and design of New Zealand legislation. It was brave of the Commission to suggest that New Zealand legislation was other than perfect. However, its recommendations reflected pressure for change world-wide and there was not a doubt that change was needed.

53 With effect from 1 January 1997, the New Zealand Parliamentary Counsel Office made a number of modest changes to the style and expression of legislation. These included:

- avoiding archaic language (“hereby”, “notwithstanding”, “hereunto”)
- expressing dates in simpler form (“1 January 1997”, rather than “the 1st day of January 1997”)
- omitting unnecessary referential words (“of this Act”, “of this section”, “of this subsection”) when it is clear which part of the Act is being referred to
- using arabic in place of roman numerals (“Part 21”, instead of “Part XXI”)
- using “must” rather than “shall” (“notice must be given”, not “notice shall be given”)
- using the active voice (“The Minister may appoint up to 9 members” instead of “Up to 9 members may be appointed by the Minister”)
- omitting qualifying words (“subject to”, “except as provided in”)
- using simpler expressions of age (“a person who is 18 years old” instead of “a person who has attained the age of 18”).

The changes were debated in Parliament and welcomed.<sup>49</sup> Otherwise they went unnoticed, as they should have.

---

<sup>47</sup>NZLC R 27.

<sup>48</sup>NZLC R 35.

<sup>49</sup>(1997) 559 NZPD 869-879.

54 Then, over the recess following the election of the first MMP Parliament, the PCO produced its first drafting manual. Chapter 5 “Style”, contains a comprehensive set of guidelines for clear legislative drafting. It incorporates much of the material in the Law Commission’s report *Legislation Manual Structure and Style*. Chapter 5 stresses the importance of drafting in plain language and structure and organisation of material. The guidelines endorse some basic principles which can too easily become lost sight of in the challenges law drafters face to integrate complex policies and massive amounts of material into an understandable and effective statute. They include, for example,—

- using the simplest word that best conveys the intended meaning
- using short sentences
- using the active voice
- constructing short sections
- using common speech equivalents for traditional forms of expression (“without notice” instead of “*ex parte*”, “under” instead of “pursuant to”).

55 The importance of structure is also stressed. This means—

- substantive material should precede procedural material
- the general should precede the particular
- provisions of general application should precede those of limited application
- the fundamental and important should precede matters of lesser significance.

56 The next step in the reform process was the passage of the Interpretation Act 1999 to replace the Acts Interpretation Act 1924, which as the Law Commission recognised was itself little different from the even earlier Interpretation Act 1888. The reasons given by the Law Commission for reform included changes in the perception of the role of the State, changes in the approach of the courts to interpretation, the role and potential of new technology, the enactment of new interpretation statutes in Australia, Canada, and the United Kingdom, and

developments in the drafting and presentation of legislation in other jurisdictions.

57 There are a number of differences between the Bill recommended by the Law Commission and the Act. For example the Act did not, as the Law Commission had recommended, reverse the statutory presumption that the Crown is not bound by Acts of Parliament. The Act is longer and more detailed than the proposed Bill. The new Act has removed anomalies and inconsistencies in the earlier statute and, in restating many of the provisions in that statute in simpler and plainer language, it was designed to lead the way. Because interpretation legislation contains the legislature's own directions to readers of legislation and to the courts as to how legislation is to be interpreted, it ought to be the most accessible of all the statutes.

58 In its report *The Format of Legislation*, the Law Commission recommended a fundamental redesign of the New Zealand statute book. As the Commission observed in its report:

Good, functional typography and design are invisible. Good design allows readers to concentrate their energy on substance rather than be distracted by format. Good design can also facilitate the very drafting of legislation because it can make the task more logical. The nature of the message will of course influence the appearance of the text: the design must be appropriate to the substance, and to the reader. But bad design remains bad design, even though it may be redeemed to some extent by familiarity.<sup>50</sup>

59 A number of factors were identified as influencing the need for change. They included, echoing Tacitus, the increasing complexity and volume of legislation, the need for legislators to spend more time dealing with legislative policy and not trying to ascertain meaning, the need for administrators to understand the law they administer, the need for lawyers to ascertain the law more easily, economic savings,

---

<sup>50</sup>*Ibid*, p 1.

and the need for the public to understand the laws that govern their personal business affairs. They are, coincidentally, the same sorts of considerations that underlie the importance of drafting legislation in plain language.

60 The new format, including a new typeface, was introduced on 1 January 2000 for Bills, Acts, and statutory regulations. Parliament resolved that Bills before Parliament on that date were to be converted into the new format. The more significant changes included:

- a new and larger typeface (Times New Roman 12pt in place of Baskerville)
- section headings appear above the text, where they are more distinct
- a running head at the top of each page contains the number of the Part and the number of either the first or the last section appearing on the page
- defined terms in bold rather than within double quotes
- simplified punctuation
- simplified layout of provisions with different levels indented progressively
- consequential amendments to other statutes are listed alphabetically, not chronologically, and the layout of the amendments is simplified
- the Long Title and Short Title are replaced with a single Title and, quite often, a purpose provision
- a legislative history appears at the end of every Act
- more white space on the page.

61 The Acts and Regulations Publication Act 1989 was amended so that the format and design changes could be incorporated into reprints of Acts and statutory regulations enacted or made before the changes took effect. The Bill to amend the Act was described by a member of Parliament in the debate on the Bill, in what might be described as “a cheap shot”, as “one of the most underwhelming Bills ever to come before the House”. The Act was also amended to enable reprints to be produced so

as to be consistent with current legislative drafting practice. The need for these changes is obvious. A statute reprinted in the pre-2000 format and reflecting earlier drafting practices with post-2000 amendments in the current format and reflecting current drafting practices would be a strange beast. The enlarged reprint powers are subject to the overriding qualification that no change may be made that, if enacted, would change the effect of the legislation.<sup>51</sup>

62 At about the same time, the format of United Kingdom statutes also underwent substantial modification. The typeface is now Book Antiqua, described as a compromise between the House of Lords (which recommended Times New Roman) and the House of Commons (which recommended Palatino).<sup>52</sup>

63 The passage of the Interpretation Act 1999 was achieved as a result of the PCO, the Law Commission, and the Ministry of Justice working in close collaboration over a period of about 3 years. The changes to the format of legislation also took about 3 years to implement. Each depended on strong parliamentary support.

64 Numerous other changes have been made to the expression of New Zealand legislation over recent years. They include—

- the use of outline sections or Parts that provide an overview of what a particular Act is about<sup>53</sup>
- the use of examples both in the text of the legislation and in separate

---

<sup>51</sup>Section 17C(2) of the Acts and Regulations Publication Act 1989.

<sup>52</sup>*Clarity* No 44, p 40.

<sup>53</sup>See, for example, the Property (Relationships) Act 1976, Personal Property Securities Act 1999, Animal Products Act 1999, New Zealand Public Health and Disability Act 2000, and Health Practitioners Competence Assurance Act 2003.

“example boxes” following the provisions to which they relate<sup>54</sup>

- flow-charts<sup>55</sup>
- tables.<sup>56</sup>

65 Examples are a useful method of supplementing a particular legislative rule with an explanation of how the rule will apply in a particular situation. They are not new. They have been used in the Consumer Credit Act 1974 (UK), the Occupiers Liability Act 1957 (UK), the Indian Evidence Act 1972, and the Indian Penal Code. Examples now feature extensively in Australian Commonwealth legislation and in the legislation of Victoria, Queensland, and the Australian Capital Territory. In an interesting study of the role of examples in legislation, an Australian academic lawyer, Jeffrey Barnes, says this:

Examples have altered the language and structure of statutes in significant ways. Their separate location after the relevant provision has allowed a variety of means of expression, including most radically, the narrative form. It has also allowed the example to rival the rule for legal or practical effect.<sup>57</sup>

66 Many of the features outlined above appear in the legislation of other jurisdictions. They are part of an international trend to make legislation more accessible to both the ordinary and the expert reader. Legislation is used every day in a vast array of

---

<sup>54</sup>See, for example, the numerous examples in the Personal Property Securities Act 1999, Property (Relationships) Act 1976, and Overseas Investment Exemption Notice 2001 (SR 2001/410).

<sup>55</sup>See the flow chart in Part 3 of the Trade Marks Act 2002 outlining the process for obtaining registration of a trade mark. See also the diagram in clause 3(3) of the Criminal Records (Clean Slate) Bill 2001.

<sup>56</sup>See section 77 of the Administration Act 1967, which sets out in tabular form how property is to be distributed on an intestacy. See also the table of categories of Crown entities set out in clause 42 of the Public Finance (State Sector Management) Bill 2003.

<sup>57</sup>Jeffrey Barnes, *Shining Examples*, a paper presented at the Conference of the Commonwealth Association of Legislative Counsel (in association with the 13<sup>th</sup> Commonwealth Law Conference), Melbourne, Australia, 17 April 2003.

different environments. Administrators apply it, lawyers structure transactions around it and advise on it, judicial officers in the courts and tribunals apply it, exercise discretions under it, and interpret it, individuals and corporations use it, whether as manufacturers, sellers, or employers, and ordinary citizens use it to ascertain their rights and obligations. Interpretation of legislation is now widely regarded as the most important aspect of judicial work.<sup>58</sup> There is a great challenge on law reformers to continue to make legislation ever more accessible. This is in part the result of governments making legislation available free on the Internet. Particularly if one is a lawyer, a shift in mindset is required along with a recognition that legislation has a far wider audience today than it ever did. It requires a degree of experimentation to find out what works best. It also calls for balanced judgment and an element of courage. Not everyone thinks the use of plain language in a legislative context is a good thing, and there are well positioned individuals ready with disparaging criticism of one's efforts.

67 Two Australian Judges provide an interesting contrast in perspective. In a decision given in 2000 in the Queensland Supreme Court in *FAI Insurance Co Ltd v Spannagle*, Justice Chesterman said:

The Act and the regulations are in the modern style. No attempt has been made to articulate with any precision what the legislation intends. Different words are used to give expression to the one concept and any continuity of terminology is avoided as is any consistency in the treatment of the concept. Instead, one finds disjointed platitudes set forth with almost banal generality. In this wilderness of words two factors appear to indicate that it is within the power of the Transport Administration to renew registration retrospectively after the effluxion of a period of registration.

...

---

<sup>58</sup>Johan Steyn, *Pepper v Hart: A Re-examination*, *Oxford Journal of Legal Studies*, Vol 21, No 1 (2001), p 59. Hon Justice Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2002) 48 *Clarity* 3. J J Spigelman AC "The Poets Rich Resource: Issues in Statutory Interpretation" (2002) 21 *Australian Bar Review* 224. Lord Steyn *Interpretation (Treaties, Constitutions, Statutes, and Contracts)*, an address delivered at Victoria University of Wellington, September 2002.

It would have been relatively straight forward to express the notion simply and clearly but any requirement of intellectual discipline is avoided by the modern parliamentary draftsman for whom freedom of expression is to be prized above comprehension.<sup>59</sup>

68 More recently and sympathetically, Justice Dyson Heydon, a Judge of the High Court of Australia, has written:

Parliament, when it changes the law, is usually capable of doing so with a degree of clarity because legislation is drafted by persons with considerable training, experience and skill in drafting. They are capable of achieving a much greater degree of precision than a group of judges can, particularly a group of judges speaking in separate judgments.<sup>60</sup>

69 I'm with Justice Heydon.

#### **Part 4**

#### **Other factors affecting accessibility of legislation**

##### *Complex legislative schemes*

70 The complexity of a legislative regime can affect the accessibility of legislation. The ballet *Coppelia* by Delibes is set in a town in Galicia. It is the story of Dr Coppélius, a toymaker, and of the infatuation of a handsome young villager called Franz, who is engaged to the burgermeister daughter Swanilda, with one of Dr Coppélius' dolls. If Dr Coppélius were alive today, living in New Zealand, and carrying on business as the owner of a toy shop, he would be faced with having to comply with various pieces of legislation, including the Holidays Act 2003, the Employment Relations Act 2000, and the Health and Safety in Employment Act 1992. Another piece of legislation directly affecting his business would be the Fair

---

<sup>59</sup>[2000] QSC 002 at paras 21 and 22.

<sup>60</sup>Hon Justice Dyson Heydon "Judicial Activism and the Death of the Rule of Law" *Otago Law Review* (2004) Vol 10 No 4, 493 at 509.

Trading Act 1986. If he were to search the website of New Zealand legislation at [www.legislation.govt.nz](http://www.legislation.govt.nz) for that Act, he would see from reading section 40 that he would commit an offence if he contravened any of the provisions of Part 3. If he were to look at Part 3, he would see that regulations can be made prescribing product safety standards relating to goods. If he was on his guard, he would find that a standard had been made for children's toys, the Product Safety Standards (Children's Toys) Regulations 1992.

71 Having located the regulations on the website he would read them and expect to find out what he must do. He would then discover that the regulations prescribe a standard for the manufacture of children's toys for children aged 3 and under. He would see that regulation 2 defines "toy" to mean an object manufactured, designed, labelled, or marketed as a plaything for use in learning or play by a child. He would also see, and possibly take comfort from the fact, that dolls are specifically included under regulation 2(m). So he knows for certain that he must continue on. The regulations themselves, however, won't help him. What they do is prescribe, as the applicable standard, New Zealand Standard—The Prevention of Ingestion and Inhalation Hazards in Toys Intended for Use by Children Under Three Years of Age (NZS 5822:1992) promulgated by the Standards Council.

72 Where might Dr Coppélius get hold of a copy of that document? The regulations don't tell him. Neither does the Fair Trading Act. What does he do? If he had read to the end of the regulations, he would have seen that they are administered in the Ministry of Consumer Affairs. Inquiry of the Ministry won't assist because the Ministry is prevented by copyright considerations from supplying him with a copy of the standard. He is likely to be advised to try the Standards Council. He could go to the Standards Council or search its website. A successful search of the Council's website would, in turn, send him to a place on the website called the "Shopping Basket" and there he would be told that he could purchase a hard copy for \$68.69

plus GST which would be couriered to him at an address he would have to provide or he could get an electronic copy at a 10% discount for \$61.82 plus GST. All this assumes Dr Coppélius has both a computer and a credit card. He could try the Manufacturers Federation. If he were desperate, he could go to a lawyer.

73 This may be a somewhat extreme example. It is not, however, untypical of a phenomenon that has been around for many years but has now firmly taken root in the legislative environment. It is known as “incorporation by reference”. It is one of the things the Australian Scrutiny of Bills Committee looks at closely. It is common for statutes expressly to authorise regulations or other legislative instruments to incorporate other documents by reference. Some also authorise the regulations to incorporate these other documents with modifications.

74 The Fair Trading Act permits this kind of modification. In the unlikely event that Dr Coppélius also sold children’s nightware in his toy shop, this is exactly what he would find were he to read the Product Safety Standards (Children’s Nightwear and Limited Daywear Having Reduced Fire Hazard) Regulations 1999. He would have to read not just the Act, the regulations, and the Australian/New Zealand Standard 1249:1999—Children’s Nightwear and Limited Daywear Having Reduced Fire Hazard, but also the variations to that standard in Part 1 of the Schedule of the regulations. If he also sold cigarette lighters, his problems will be even worse because he will have to find International Safety Standard for Lighters—Safety Specification (ISO 9994:1995E) and apply specific clauses of that standard with the modifications set out in the schedule of the Product Safety Standards (Cigarette Lighters) Regulations 1998 and also the American standard Consumer Product Safety Standard for Cigarette Lighters (16 CFR 1210) that applies to labelling.

75 In the face of the growing trend to incorporate by reference, the LAC has published a set of guidelines that are designed to confine the practice to a limited class of case

and to ensure that there is proper consultation before material is incorporated, that the incorporated material is accessible, and that the status of any amendments is clear.<sup>61</sup>

76 New Zealand securities law has several sources. A primary statute, the Securities Act 1978, establishes a Securities Commission and defines its functions and powers, specifies the principal instruments for making public offerings, sets out remedies available to investors for material misstatements by issuers, enables the Commission to take offer documents off the market, and confers wide regulation-making powers for regulating advertising and the content of offer documents. It also gives the Securities Commission an exemption power. Detailed regulations relate to securities advertising and prescribe the information that must be included in different types of offer document. A myriad of exemptions granted by the Commission alter the application of the primary statute and the regulations in specific cases and also generally.

77 Legislation dealing with disclosure of market sensitive information by public issuers, directors and officers of public issuers, and substantial security holders, insider trading, the regulation of securities exchanges, and futures is contained in another statute, the Securities Markets Act 1988 and in regulations made under it. Regulation of takeovers is found in another statute, the Takeovers Act 1994, a code made under that Act, the Takeovers Code 1999, and exemptions granted by the

---

<sup>61</sup>The LAC considers that a document may be appropriate for incorporation if—

- the document is long or complex, covers technical matters only, and few persons are likely to be affected
- the document has been agreed with a foreign government, and cannot easily be recast into an Act or delegated legislation
- it is appropriate for the document to be formulated by a specialist government or inter-government agency or private sector organisation, rather than by Parliament of Ministers
- the document has been developed by an organisation for use in relation to a product (for example, motor vehicles) manufactured by it.

See Part 6 and Appendix 4 Legislation Advisory Committee Guidelines 2003 Supplement to 2001 Edition.

Takeovers Panel. In essence, the legislation dealing with most aspects of securities market regulation is contained in statutes, regulations, a code, and exemptions.

78 In other areas, the picture is similar. New Zealand's food legislation is found in statutes, regulations, a standard that adopts an Australian standard, exemptions granted by the Director-General of Health and local authorities, and guidelines.

79 Rules are made under 3 transport statutes: the Civil Aviation Act 1990, the Maritime Transport Act 1994, and the Land Transport Act 1998. Regulations made under each of these Acts prescribe offences for breaches of particular rules.<sup>62</sup> These are not always confined to matters of a purely technical nature likely to affect only a small number of people, as rule 19.7(b) of the Civil Aviation Rules shows. The rule prohibits a person from going on board, or being carried in, an aircraft under the influence of liquor or drugs. The Civil Aviation (Offences) Regulations make it an offence. I recently travelled from the United States to New Zealand in business class and was offered, long before the aircraft had taken off, a second glass of champagne before I had finished the first. The merest raising of an eyebrow would have resulted in a third glass. While it may be that the risks increase with the class of travel, that is not necessarily so. On another journey across the Pacific, this time in economy class but some time after take-off, a colleague and I were given a large bottle of rum to share between us on the journey on the pretext, we were told, that supplies of everything else had run out.

80 What these examples indicate is that, in the regulation of complex activities, legislative structures inevitably become complex. It is impossible to avoid recourse to delegated legislation. Including in statutes the material commonly put into regulations and other instruments would swamp them in detail to the point where

---

<sup>62</sup>Civil Aviation (Offences) Regulations 1997, Maritime Offences Regulations 1998, and Land Transport (Offences and Penalties) Regulations 1999.

they became unreadable and the task of the legislator impossible. A proliferation of different legislative instruments below the level of the statute can sometimes be avoided even though that means a large set of regulations to enhance accessibility.

81 Where a number of separate statutes deal with different aspects of a particular topic, such as securities law, an obvious question is whether a single consolidating statute would be preferable. Consolidating statutes have the advantage of accessibility and coherence. On the other hand, their size can make it difficult for users. There is a tendency to want to incorporate everything into one big Act rather than several Acts each dealing with discrete matters. A judgment has to be made in each case. An argument can be made for combining the 3 securities related statutes into a single Act, but taking it a further step and amalgamating them with the Companies Act would result in a mismatch of concepts and an unwieldy statute.

82 These are not just issues about packaging. They are difficult but important considerations that affect the design of legislative regimes and require careful analysis to ensure the best outcome for users.

### *Continual amendment*

83 Continual amendment can also affect the accessibility of legislation. A statute may begin life with a sensible and coherent structure, but after frequent amendments end up, to use the description of a senior Queens Counsel in describing a large and important piece of legislation, looking like “the back of the family station wagon setting off on the summer holiday”. The Judicature Act 1908, enacted as part of the 1908 consolidation, has been amended 36 times by way of direct amendment and times too numerous to count by way of consequential amendment. The principal amendments relate to—

- jurisdiction in relation to the liquidation of bodies other than companies

- establishment of the commercial list
- establishment of the judicial office of Master of the High Court
- reconstitution of the Rules Committee so as to include rule-making for the District Courts
- power to detain and sentence for contempt
- power for the High Court to sit in Australia in proceedings under the Commerce Act 1986 and for the Federal Court of Australia to sit in New Zealand in comparable proceedings under the Trade Practices Act 1974
- creation of the Civil and Criminal Appeals Divisions of the Court of Appeal
- restrictions on vexatious litigants
- recovery of money paid under mistake of law or fact
- power for the Court of Appeal to appoint technical advisers
- application for review (by the stand-alone Judicature Amendment Act 1972).

84 The more an Act is amended, the more it loses its coherence. Frequent amendment can be a sign that there was insufficient time to develop the policy for, and then draft and enact, the statute. It may also reflect legitimate changes in the policy area with which the statute deals. Reprinting alleviates to some extent the problems of accessibility in cases such as these, but a heavily amended statute remains a heavily

amended statute. If anything, a reprint can make the incoherence more obvious.

*A mixture of statute and common law*

85 Continual amendment is a particular kind of impediment to accessing the law. Another is the impact of significant statutory incursion into the common law and the reverse phenomenon of common law incursion into, or gloss on, the statute. New Zealand evidence law is a mixture of case law and statute law.

86 In the preface to its report *Evidence: Reform of the Law*,<sup>63</sup> the Law Commission observed that—

.. in its present form the law of evidence is a patchwork of disparate elements that have never been co-ordinated and whose effect is frequently disputed by experts. Problems resulting from ancient rules of the judge-made common law, themselves often neither precise nor readily accessible, have been met by ad hoc statutory reforms which have in turn presented difficulties of construction and of scope.

87 The Commerce Act 1986 is an example of a statute around which an essential jurisprudence has quickly developed to spell out the Act's underlying principles. That was always anticipated, but it means that to understand the statute one has to be familiar with a substantial body of case law in New Zealand, Australia, and the United States as well as the decisions of the Commerce Commission. The discretion contained in section 4 of the Family Protection Act 1956 cannot be understood without recourse to the cases decided under it and the way in which the concept of “moral duty” has been developed by the courts.

---

<sup>63</sup>Ibid, p xvii.

*Accessibility and the common law*

88 I have not said anything in this paper, already becoming unacceptably long, regarding accessibility of the common law, except to the extent that both common law and statute intersect. One advantage the judge has over the drafter of a statute is that the judge has a freer hand. He or she has a wider range of options for communicating meaning. The judge can express a proposition in different ways, define issues, engage in discussion and analysis, employ more context, and generally make a judgment more interesting reading. A long judgment often results.

89 The notion that judges declare the law has long since been discredited. A judgment of a court is, however, an authoritative statement of the law, whether the judgment involves the construction of a statute, contract, lease, will, or other document, or determines the liability of one party to another, or decides on the lawfulness or otherwise of executive action. Frequently, a court has to decide complex factual issues before determining the relevant law and applying it. Judgments involve careful evaluation of competing arguments on fact and law. A judgment is likely to contain a mix of factual narrative, analysis of the arguments put forward by counsel, an exposition of the law, and a decision on the issues before the court.

90 However, a reader cannot usually go to a judgment and quickly find out what the law is on the matter with which the judgment deals. He or she will have to read it or possibly read several judgments on the same matter. Even a dissenting judgment may agree on the law as it is stated in the other judgments, but not on its application to the particular facts. This presents considerable challenges to people who have not been trained, as lawyers have, in how to read the judgments of the courts.

91 The drafter of a statute or a regulation is confined to a single statement of a legal proposition. Each provision has to be “tight”. There is little room for explaining scope or context. There is the additional constraint that the longer a statute is, the

more time may be required to enact it. Statutes and judgments are fundamentally different kinds of document. While a statute or other legislative instrument provides little or no context to help the reader, a judgment may provide a great deal of context. A statute is a series of legal propositions without explanation as to the policy that underlies them. That policy may have been developed in a lengthy and rigorous process involving extensive consultation, but the statute invariably says nothing about it. The reader has to look elsewhere. By contrast, a judgment will generally explain the policy underlying the law. I have recently had to read a line of cases dealing with the restrictions on companies carrying on legal proceedings other than by solicitors and appearing at hearings other than by counsel. The underlying policy for the restrictive rules is articulated by Sir Thomas Bingham MR in his judgment in *Radford v Freeway Classics Ltd*.<sup>64</sup> Knowing the rule is one thing, but knowing the reason for it gives it meaning.

92 In a perverse way, the less contextual assistance afforded by the statute makes it easier to identify the legal rules the statute contains but more difficult to understand the rules, while the greater contextual framework afforded by the classical common law judgment makes it more difficult to identify the legal rule but makes it easier to understand it.

93 When Parliament enacts a statute, it speaks with a single voice. So too does the executive or other person exercising law-making powers. There is only one statement of the law, not several. Multiple judgments in the New Zealand Court of Appeal, while much less frequent now, are not uncommon. Appellate courts in other jurisdictions commonly deliver multiple judgments, although I do not know whether the trend is the same.

---

<sup>64</sup>[1994] BCLC 445 (CA).

94 Volume 1 of the *All England Law Reports* for 2003 contain reports of cases decided in the High Court, Court of Appeal, House of Lords, and Privy Council. Multiple judgments were given in the following 3 cases reported in the volume. In *R (Williamson) v Secretary of State for Education and Employment*<sup>65</sup> the Court of Appeal had to consider whether parents' religious belief that physical "correction" was appropriate was interfered with by a provision of the Education Act 1996 that prevented teachers imposing corporal punishment and was contrary to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. By a majority, the court held that the section did not inhibit the carrying out of those beliefs. Each Judge delivered a separate judgment. The report of the decision extends to 80 pages. *Mathews v Ministry of Defence*<sup>66</sup> is a decision of the House of Lords in which the question was whether a statutory limitation on actions in tort was incompatible with Article 6 of the Convention. Each of the 5 Law Lords gave separate judgments, each holding that because the limitation was not procedural there was no incompatibility. The report is 40 pages long. The case reported immediately after *Mathews* is *Runa Begum v Tower Hamlets London Borough Council*,<sup>67</sup> in which the House of Lords had to consider whether a procedure for dealing with disputed claims for housing relief was incompatible with Article 6. Again, 5 separate judgments were delivered, each deciding that there was no incompatibility. The report is about 30 pages long.

95 Of the 62 cases reported in the volume, 46 were decisions of courts comprising more than one judge and in 26 of those cases more than one judgment was

---

<sup>65</sup>[2003] 1 All ER 385.

<sup>66</sup>[2003] 1 All ER 689.

<sup>67</sup>[2003] 1 All ER 731.

delivered. In essence, just over 50% of cases in the Court of Appeal and House of Lords involved more than one judge delivering a judgment. It is, of course, only a snapshot.

- 96 The trend in the New Zealand Court of Appeal is summarised in a paper delivered in 2001 to a Legal Research Foundation seminar by the President of that Court, Sir Ivor Richardson. Sir Ivor said:

The incidence of multiple judgments has significant implications for the workload of individual judges and for the court as a whole. Clearly where there is dissent there have to be at least two judgments. That aside, there have been distinct changes in our practice over the years. In 1960 multiple judgments were delivered in 22% of the cases, in 1980 it was 25%, in 1990 9%, 1997 and 2000 6% and 4% respectively. What is all the more striking is that multiple judgments and dissents are confined largely to civil matters, except perhaps in the early Bill of Rights years. That reflects the requirement of s 398 of the Crimes Act 1961 for a single judgment except where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced. It reflects the legislative importance attached to the certainty and finality of the result.

More broadly, the proportion of multiple judgments is a matter of judicial approach. There are at least 3 factors at play. First, workload pressures may encourage dividing judgment writing responsibilities. Second, at the particular time the court may put a lot of emphasis on trying to send a clear statement — perhaps at the expense of burying or blurring differences in detail or masking complexity. Third, there is the influence of the personalities and attitudes of the particular set of Judges on the court at the time.<sup>68</sup>

- 97 Volume 1 of the *New Zealand Law Reports* for 2002 contains reports of 43 decisions of the Court of Appeal and Privy Council, in 8 of which more than one judgment was given. Volume 2 for the same year contains reports of 39 decisions of the Court of Appeal and Privy Council, in 10 of which more than one judgment

---

<sup>68</sup>Sir Ivor Richardson, *Trends in Judgment Writing in the Court of Appeal*, Legal Research Foundation Seminar: 2 March 2001.

was given. Volume 3 for the same year contains reports of 40 decisions of the Court of Appeal and Privy Council, in 4 of which more than one judgment was given.

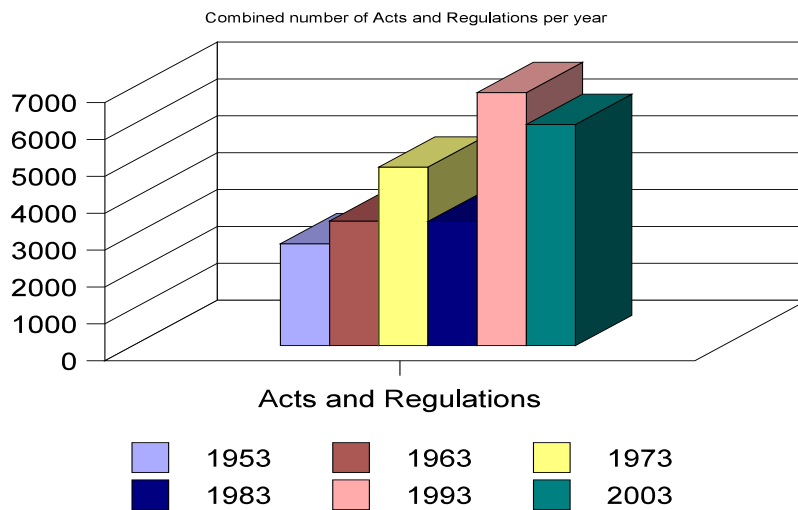
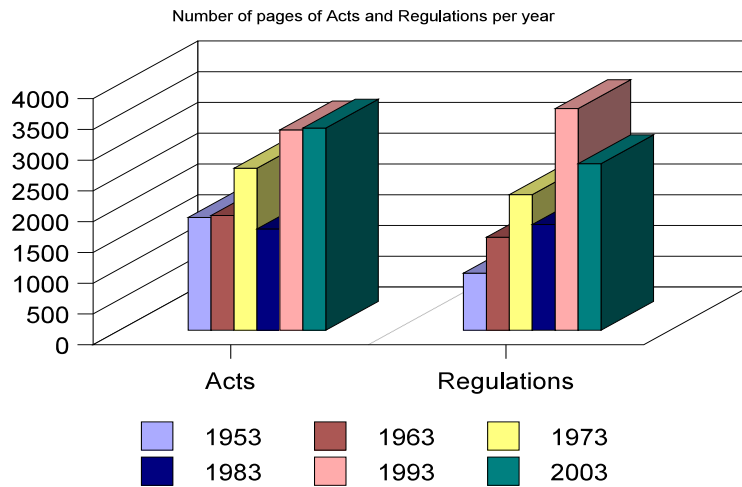
- 98 I am far from suggesting there is anything inherently wrong with multiple judgments. Different judicial perspectives and explanations can elucidate complex legal problems. One suspects a lot depends on the type of case before the court and whether it is a 3, 5, or 7 judge court. If the issues were simple, multiple judgments and long judgments would doubtless be rare. A reader may, however, feel more confident about ascertaining the state of the law by reading a single judgment and not having to be on the lookout for subtle variations that can be a feature of several judgments. I mention judge-made law to illustrate the point that, in looking at accessibility of the common law, there are no absolutes either.

*Too much law*

- 99 Everyone, like Tacitus, complains there is too much legislation. They point to the increasing volume of statutes, regulations, orders, notices, codes, and guidelines that daily emanate from legislatures and those who have law-making powers. A former Chancellor of the Exchequer, and for a time one of the Government's business managers, Lord Howe QC, described it as "legislative lust".<sup>69</sup> The following table shows the number of pages of Acts passed and regulations made in New Zealand in each of the years 1953, 1963, 1973, 1983, 1993, and 2003.

---

<sup>69</sup>Rt Hon Lord Howe of Aberavon QC, "Managing the Statute Book" *Statute Law Review*, Volume 13 Number 3, pp 165-178 (1992).



100 The increase results from many factors, including expansion of the role of the State, advances in science and technology, threats to the environment and national borders, the influence of international law, and public demand for legislative responses to social and economic issues. One suspects the trend in the common law world is similar. The caseload of the New Zealand Court of Appeal went from 78 decisions

in 1960 to 458 in 2000, an increase of 500%.<sup>70</sup> Any increase in the quantity of law generated by the legislative and judicial branches of government must affect its accessibility. It is incumbent on governments to provide the best facilities for access that they can.

## **Part 5**

### **Keeping the law up to date: challenges and responses**

101 Legislation reflects the values, policies, and literary conventions of the time. For this reason, it can get out of date quickly. That threatens access to justice. What can be done to mitigate the threat? There are several ways in which statute law can be modernised. Modernisation can be categorised as non-substantive or substantive. Non-substantive modernisation involves consolidation or reprinting. Substantive modernisation involves full-scale reform designed to update both the policy of legislation as well as its expression.

102 Throughout their short history New Zealand statutes have been both consolidated and reprinted. New Zealand legislation was last consolidated in 1908. The 1908 consolidation reduced the number of public Acts from 806 to 208. As Professor John Burrows aptly describes it, “[t]he 1908 consolidation was an impressive achievement. It effectively wiped the slate clean; New Zealand’s statute law may be said to have started afresh in 1908.”<sup>71</sup>

103 In essence, consolidation involves re-enacting in a single principal Act all Acts relating to a particular subject without making changes to the policy of the

---

<sup>70</sup>Sir Ivor Richardson, *Trends in Judgment Writing in the Court of Appeal*, Legal Research Foundation Seminar: 2 March 2001.

<sup>71</sup>J F Burrows, *Statute Law in New Zealand*, 3rd ed, Butterworths p 93.

legislation being consolidated. It is interesting to see what has happened since 1908. Although this involves some history that readers may find tedious, it reveals a serious concern at the highest levels of government for making statute law accessible and the practical steps that were put in place to achieve this.

- 104 Speaking on the second reading of the Bill for the Statutes Drafting and Compilation Act 1920, the Attorney-General, Hon Sir Francis Bell, explained that, in the Law Drafting Office (renamed the Parliamentary Counsel Office in 1973), there would be separate Bill Drafting and Compilation Departments. The Attorney explained what he hoped to achieve by separating the 2 Departments, namely “continuous compilation and a practical end to the condition of the statute book since 1908”:

The duties [of the 2 Departments of the Office], as honourable gentlemen will see, are carefully distinguished by Departments, so that the officers of one Department shall not be performing the duties of the other. The real reform that I have been trying to effect is that the compilation officers will not be taken off their own work. I hope that at the beginning of the next session Parliament will have to consider two sets, and two entirely and distinct and separate sets, of laws—one presented by the Law Drafting Department under the direction of a Minister of the Crown, comprehending amendments to the existing law, and the other for the consideration of the Legislature, consisting of the consolidation and compilation of already existing law upon the various subjects.

- 105 The Attorney’s intention was to have a separate, dedicated team, headed by the Compiler of Statutes, to compile and consolidate statutes for re-enactment. Section 6(2) of the Act made the Compiler of Statutes a statutory office, in providing that “The chief officer of the Compilation Department shall be called the Compiler of Statutes, and shall be a principal officer of the Law Drafting Office”, and section 5 of the Act is as follows:

**5 Duties of officers of Compilation Department**

The duties of the officers of the Compilation Department shall be—

- (a) as and when directed by the Prime Minister or the Attorney-General, to compile, with their amendments, statutes, amendments whereof have been enacted, and to supervise the printing of such compilations:
- (b) to report to the Prime Minister or the Attorney-General upon verbal or technical alterations of language which may be adopted for the purpose and in the course of any compilation:
- (c) to consider the language and effect of the statutes, compilation whereof is directed, and to state for the consideration of the Prime Minister or the Attorney-General suggestions or proposals for the alteration of the law enacted by such statutes, or for the extension or limitation of the effect of such statutes, or for amendment of the wording of any such statute:
- (d) such other duties relating to the compilation of statutes and the amendment or extension or limitation of the effect of statutes enacted by Parliament as the Prime Minister or the Attorney-General may from time to time assign to be performed by the Compilation Department.

106 John Curnin held the office of Compiler of Statutes for some time before his death in 1904. However, Frederick Revans Chapman<sup>72</sup> was first to hold the office of Compiler of Statutes under the 1920 Act. The son of Henry Samuel Chapman (the second Judge of the Supreme Court of New Zealand), Frederick Revans Chapman trained in England but practised in Dunedin, and was the first native-born New Zealander appointed as a Judge of the Supreme Court of New Zealand.

107 Chapman retired from the Supreme Court bench in 1921. On 3 March 1921 (the day after his resignation from the bench took effect), he was appointed Compiler of Statutes,<sup>73</sup> an office he held until 1924. Chapman assisted in the compilation, amendment, and consolidation of Acts of Parliament, and in this way helped to

---

<sup>72</sup>See, generally, "The Late Sir Frederick Chapman" (1936) NZLJ 172–174; P Spiller, "Chapman, Frederick Revans 1849 – 1936". *Dictionary of New Zealand Biography* (updated 31 July 2003); P Spiller, *The Chapman Legal Family*, VUP, Wellington, 1992.

<sup>73</sup>*New Zealand Gazette* (1921) No 23 (March 3) p 621.

produce such legislation as the long-standing Workers' Compensation Act 1922.<sup>74</sup>  
As Sir Kenneth Keith has observed,

[t]he period from 1912 to 1935 is notable primarily for law reform offshore as the Solicitor-General, Sir John Salmond KC, prepared the codes, still largely in force, for the Cook Islands (1915) and Western Samoa (1921); and for the consolidation of major statutes (such as the Land, Rating, Chattels Transfer, Mining, Coal Mines, Industrial Conciliation and Arbitration, Electoral, and Magistrates' Courts Acts) undertaken in the mid-1920s by the former Justice F R Chapman as compiler of statutes under Salmond's Statutes Drafting and Compilation Act 1920.<sup>75</sup>

108 Opening the third Session of the 20th Parliament of New Zealand, His Excellency the Governor-General (Viscount Jellicoe) made a speech to the Legislative Council and the House of Representatives on 22 September 1921. The speech concluded as follows:

Under the direction of the Compiler of Statutes a compilation of the law relating to Companies has been drafted, and will be laid upon the tables of both Houses. The English Companies Act of 1908 was passed in the same year as the last compilation of the New Zealand Companies Acts, and it has been found desirable to incorporate some of the provisions of the English Act which do not appear in the New Zealand Act. Care has been taken to preserve the New Zealand law relating to private companies in its present form. My Ministers propose that the Companies Act should not be proceeded with beyond its first stages during your present session in order that members of the public specially concerned may have full opportunity of examining its details and suggesting amendments or alterations.

Compilations have also been completed, in each case with certain amendments, of the Stamp Acts, the Death Duties Acts, and the Acts relating to Factories, Industrial Conciliation and Arbitration, Shops and Offices, and Workers' Compensation. My Ministers

---

<sup>74</sup>P Spiller, *The Chapman Legal Family*, (VUP, Wellington, 1992, p 212.

<sup>75</sup>*Law stories: Essays on the New Zealand Legal Profession 1969–2003*, LexisNexis, Wellington, 2003, p 355.

trust that your consideration will result in these compilations being placed on the statute-book of this year.

I commend all these matters to your consideration, and pray that Divine Providence may guide your deliberations.<sup>76</sup>

109 In a similar speech on 14 June 1923, at the opening of the Second Session of the 21st Parliament of New Zealand, the Governor-General said:

Attention has been given during the recess to the important work of compilation of statutes, but the process has been somewhat delayed by the necessity for the services of an additional Judge of the Supreme Court, and the temporary appointment of the Compiler of Statutes, the Honourable Sir Frederick Chapman, to that office.

Bills consolidating the Companies Acts, the Chattels Transfer Act, the Land and Income Tax Act, the Harbours Act, and the Stamp laws will be laid before you. The very difficult and important work of consolidating the Dominion land laws has also been undertaken. As the result, a lengthy and elaborate measure will be submitted for your consideration.

. . .

I commend the subjects to which I have referred to your earnest attention, and I trust that the blessing of Almighty God may rest upon your deliberations.

110 James Christie was Compiler of Statutes for 2 periods. The first was from 1 April 1924 to 1 June 1925. The second, much longer (16-year) period, was from 1 June 1929 to 30 June 1945. Christie had been Law Draftsman since 1918 and, on the enactment of the 1920 Act, became the first chief officer of the Bill Drafting Department of the Law Drafting Office. The Act does not prevent the same person from being chief officer of both Departments of the Office, and it has become standard for the Law Draftsman, or Chief Parliamentary Counsel, to also hold the office of Compiler of Statutes. As a 1962 newspaper report states:

---

<sup>76</sup>*New Zealand Gazette Extraordinary* (1921) No 86 (Sept 22) pp 2377, 2379–2380.

Originally, under Sir Francis Bell's Statutes Drafting and Compilation Act 1920, provision was made for the establishment of two separate departments—Law Drafting and Law Compilation—each with its own executive head. But the distinction has not been maintained, and today the compilation and preparation of new statutes are the responsibility of the Law Draftsman and his staff.<sup>77</sup>

111 Between the 2 periods during which Christie was Compiler of Statutes, the office was held by Ernest Yevily Redward. Appointed on 1 June 1925, Redward died in office about 4 years later (on 15 June 1929). He earlier worked in the Crown Law Office, and retired from work there in 1925.<sup>78</sup> Redward was also for a number of years editor of the periodical *Index to the Laws of New Zealand, General, Local, and Provincial* (known as "*Curnin's Index*"). Estimates of appropriations for the Law Drafting Office for 1929–1930 (AJHR B.—7) record the sum of £800 as a "Compassionate allowance to the widow of the late E.Y. Redward, Compiler of Statutes".

112 In a paper published in 1932, the Attorney-General, Hon Sir Thomas Sidey, summarised compilation and associated revision work from 1920–1932 in the following terms:

On the question of Consolidation, it must be obvious to all who have frequent occasion to use the Statute Book that a very great deal has been done since 1908 to remedy the inconvenience caused by frequent amendments, however necessary they may be.

---

<sup>77</sup>RJ, "The Law Draftsman weighs every word", *Weekly News*, 13 June 1962.

<sup>78</sup>(1968) NZLJ 70. The *Supplementary New Zealand Gazette* (1914) No 46 (April 30) pp 1763, 1888 gives 1 March 1885 as the date of Redward's first appointment to the permanent staff of the public service or the Crown Law Office or both. Redward's date of birth is given as 10 August 1869 by the *Supplement to the New Zealand Gazette* (1916) No 50 (April 27) pp 1221, 1255.

Consolidations with amendments, complete redraftings, and pure compilations, of lengthy Acts, numbering nearly seventy in all, have been passed within the last twelve years.<sup>79</sup>

113 Since 1932, statutes have been reprinted with their amendments incorporated and are *prima facie* evidence of the law made by the reprinted legislation.<sup>80</sup> Reprints are exactly that, reprints not re-enactments, and they are compiled with minimal change. They are not consolidations. In the Foreword to the 1931 Reprint, the then Chief Justice, Sir Michael Myers, suggested that the idea of another full-scale consolidation was considered but rejected as too ambitious because of the need to involve people with legal knowledge and drafting skills. He also refers to the advantages of a reprint in not presenting “the grave danger of the law being unintentionally altered” in the course of consolidation.

114 In the United Kingdom, the Consolidation of Enactments (Procedure) Act 1949 (apparently passed at the suggestion of former First Parliamentary Counsel Sir Granville Ram) enables consolidations that make to existing law “corrections and minor improvements”, defined by section 2 of the Act as—

amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not of substantive importance, and amendments designed to facilitate improvement in the form or manner in which the law is stated.

115 Consolidation Bills including amendments under the 1949 Act have a special procedure. A joint select committee of both Houses considers these Bills to ensure amendments in them are not important enough to be separately enacted. Further, as

---

<sup>79</sup>(1932) NZLJ 300, 302.

<sup>80</sup> Section 29A of the Evidence Act 1908.

they go through the House, they are not subject to amendment. These Bills therefore take up a minimum of Government time.

116 The English Law Commission introduced a further refinement, including in consolidation Bills not only amendments under the 1949 Act, but also amendments recommended by that Commission. Again, these Bills are scrutinised by a joint select committee of both Houses, which gives its views to Parliament. Members are not prevented from proposing amendments to Bills in this category, but there is a convention that members will not take up this opportunity to attempt substantial changes in the law.<sup>81</sup>

117 In an address given to the Statute Law Society in London in 1997, the Chairman of the English Law Commission, Hon Mrs Justice Arden, said:

As regards the consolidation of statutes, the Chairman receives regular reports on the work being done by Parliamentary Counsel at the Law Commission to prepare consolidation Bills. Consolidation is a highly skilled task, requiring painstaking care by counsel and support from the government departments involved. This part of the work of the Commission has its fair share of problems. One of the major stumbling blocks often turns out to be the decision by the department to devote its resources to something else. Save in the most exceptional case we learn about this before work on the consolidation begins. But the fact remains, there are relatively few statutes which, for one reason or another, departments want consolidated. This is just as well because the Commission's resources for this work are limited. Thus consolidation will take place, we would hope at a steady rate, but consolidation alone will not transform the statute book.<sup>82</sup>

---

<sup>81</sup>Bennion, *Statute Law*, Oyez Publishing Limited, 1980, pp 71–72.

<sup>82</sup>Hon Mrs Justice Arden, "Improving the Statute Book: A Law Reformer's Viewpoint", *Statute Law Review*, Volume 18, Number 3, pp 169-176.

118 In Canada, at the federal level, the Statute Revision Act (Chapter S-20) provides for a continuing revision and consolidation of Canadian statutes and regulations. A permanent Statute Revision Commission, established by the Act, performs duties imposed by the Act under the direction of the Minister of Justice and Attorney-General of Canada.

119 In preparing a revision of the public general statutes of Canada, the Commission has, by section 6 of the Act, powers to—

- omit expired, repealed, suspended, or spent provisions
- omit provisions that, although enacted as or in public Acts, have reference only to a particular country, province, locality, place or body politic, or otherwise have no general application
- include provisions that, although enacted as or in private Acts, or although deemed to be local Acts or enactments, are of such a character that they impose duties or obligations on, or limit the rights or privileges of, the public
- alter numbering and arrangement
- alter language to preserve a uniform mode of expression, without changing the substance of any enactment
- make minor improvements in the language of the statutes that may be required to bring out more clearly the intention of Parliament, or make the form of expression of the statute in one of the official languages more compatible with its expression in the other official language, without changing the substance of any enactment
- make changes in the statutes required to reconcile seemingly inconsistent enactments
- correct editing, grammatical, or typographical errors in the statutes.

- 120 Revised statutes are presented for examination and approval to Committees of the Senate or House, or to joint Committees and, once examined and approved, are presented as a Bill for enactment by the Minister of Justice and Attorney-General.
- 121 There have been occasional consolidations in New Zealand since the decision to reprint rather than consolidate. In 1976, and again in 1994, Parliament enacted an Income Tax Act. In both cases the consolidation was passed without political contention and on the basis of agreement not to relitigate the policy of any provisions. The Income Tax Act 1994 was referred to as a reorganisation of the 1976 Act. Section AA1 of the 1994 Act makes it plain that the purpose of the Act was to re-enact the law contained in the 1976 Act in a reorganised form and that the reorganisation of the provisions and change in style and language were not intended to affect the interpretation of the provisions of the 1976 Act as they are included in the 1994 Act. The 1994 Act was itself a precursor to the rewriting of the Act that began in 1995 and was enacted just a few days ago.
- 122 A kind of consolidation occurs from time to time when a new Act is enacted to replace several Acts dealing with different aspects of the same broad subject, but this is usually done as part of a more general single reform of the law on the matter. The Resource Management Act 1991 replaced a number of statutes relating to environmental planning and protection, but it introduced new concepts and approaches.
- 123 There is a limit to what consolidations and reprints (non-substantive modernisation) can achieve to make legislation more accessible. A resumption of the consolidation and revision work of the first 30 years of last century, and of the requisite companion (specialised, and time-limited) parliamentary procedures, might well ensure that modernisation does not occur only as a by-product of substantive reform. What stands in the way of continuous consolidation, however, are resource

considerations and the fact that governments' appetites for ordinary legislation will consume every available expert. The more laws that modern societies enact, the more important it becomes that citizens are provided with proper access.

*The law reform environment*

124 This is not the place to get into a comparison of the methodologies of the statute and the common law. The common law does, however, have at least one advantage over the statute, that is, that the common law can change of its own accord. It does not require an Act of Parliament. An Act of Parliament can change the common law, and frequently does, but it is not essential. The problem the common law faces, however, is that it moves cautiously and haphazardly. The establishment of precedent takes time, sometimes decades. The right cases have to present themselves and the parties have to be willing to pursue them through the hierarchy of courts. There is no certainty until the highest appellate court decides. There is no law reform programme within the common law. Ground-breaking shifts of policy are rare. In the world of the statute they happen all the time.

125 The problem the statute faces, at least in some legislatures (of which New Zealand is one), is that it is often only the ground-breaking measures that get passed. The reasons relate usually to a lack of parliamentary time, a lack of necessary departmental resources, or both. This is difficult territory because there are always examples that can be used to suggest that the perception is unreliable. However, in general, I believe this is true of the New Zealand legislative environment. Governments do not bring Bills before Parliament to change the law unless they have a particular wish to make policy changes and Parliaments do not enact those Bills unless they agree it is desirable to make the change. Whether a Bill proposes a major reform or just a technical adjustment, there has to be a policy imperative.

- 126 I attended, in 1996, a conference on the drafting of tax legislation. The deputy head of the United Kingdom Revenue Board gave an address in which he described some of the features of the tax rewrite project that had just been embarked upon by the British Government. He spoke to an audience principally comprising lawyers engaged in the drafting of legislation, most of whom were disciples of plain language legislative drafting. He said the rewrite was not driven by a desire for clear and accessible legislation for its own sake, or because British tax law was complicated and needed to be rewritten in plain language because it was nicer that way. What drove the rewrite and the commitment of substantial funding was the need to protect the revenue base. In other words, it was all about money, not aesthetics. This message came as a shock to some of his audience.
- 127 The greater the importance attached by government to effecting policy change, the more likely it is that the legislation required to bring about that change will get the necessary attention within government and Parliament. The result is that the law is likely to get updated only if there are particular policy objectives driving the change. Substantive modernisation of the law is a casualty of this phenomenon.
- 128 If the processes of consolidation and reprinting are limited in what they can achieve in improving accessibility and more extensive reform depends on political will, how can the law be updated? At various times it has been proposed to rewrite the Social Security Act 1964 without making any policy change on the basis that it has been amended often, lacks coherence, and is difficult for users. It has never happened. Rewriting the Income Tax Act 1994 has taken about 10 years. The Family Courts Rules 2002 sit somewhere between consolidation and a pure form rewrite. The new rules incorporated into a single set of rules, all the rules made under the various statutes applying in the Family Court. Rewriting the Family Courts Rules has also taken about 10 years and at times involved up to 5 legislative drafters. These examples illustrate the level of resource and time involved.

- 129 The Law Commission's mandate is specific in this regard. It includes systematic review of the law of New Zealand, making recommendations for the reform and development of the law of New Zealand and, as already noted, advising on ways in which the law of New Zealand can be made as understandable and practicable as possible. I do not propose here to attempt an evaluation of how effective the Law Commission has been in the 18 years following its establishment. Clearly, its reports have led or contributed to legislation in a wide range of areas. They are success stories.
- 130 The Commission's first report, *Imperial Legislation in Force in New Zealand*,<sup>83</sup> contributed to the Imperial Laws Application Act 1988, although much of the work in identifying which Imperial statutes should continue to apply in New Zealand had already been done by a former Law Draftsman, Graham Hamilton. The Commission recommended reform of New Zealand's chattel securities legislation in a 1989 report, *A New Personal Property Securities Act for New Zealand*.<sup>84</sup> The Personal Property Securities Act 1999 was enacted 10 years later, although it followed a Canadian model rather than the approach recommended by the Commission.
- 131 The Commission's 2 reports on reform of company law, *Company Law: Reform and Restatement (1989)*<sup>85</sup> and *Company Law Reform: Transition and Revision (1990)*<sup>86</sup> led to the enactment in 1993 and 1994 of a new Companies Act and a substantial quantity of related legislation. A report *Legislation and its Interpretation: Statutory*

---

<sup>83</sup>NZLC R 1.

<sup>84</sup>NZLC R 8.

<sup>85</sup>NZLC R 9.

<sup>86</sup>NZLC R 16.

*Publications Bill (1989)*<sup>87</sup> resulted in splitting a Statutory Publications Bill into 2 separate statutes, the Acts and Regulations Publication Act 1989 and the Regulations (Disallowance) Act 1989. Two reports on specific issues relating to damages, *Aspects of Damages: Employment Contracts and the Rule in Addis v Gramophone Co (1991)*<sup>88</sup> and *Aspects of Damages: the Rules in Bain v Fothergill and Joyner v Weeks (1991)*,<sup>89</sup> led to statutory change on 2 matters. The Commission's report on *Arbitration (1991)* led to the new Arbitration Act 1996, following introduction by a back bench Government member of a Bill drafted in the Commission and then supported by the Government.

- 132 As already noted, the Commission's report *A New Interpretation Act: To Avoid "Prolivity and Tautology (1990)*<sup>90</sup> resulted, almost a decade later, in a new Interpretation Act. Its 2 related reports, *The Format of Legislation (1993)*<sup>91</sup> and *Legislation Manual: Structure and Style (1996)*<sup>92</sup>, were influential in the changes to the design of New Zealand legislation and to legislative drafting practice. A report entitled *Habeas Corpus: Procedure (1997)*<sup>93</sup> resulted in the enactment of the Habeas Corpus Act 2001 which provided for a more effective procedure for habeas corpus applications, repealed 3 Imperial Acts relating to habeas corpus, and abolished all writs of habeas corpus other than the writ of *habeas corpus ad subjiciendum*.

---

<sup>87</sup>NZLC R 11.

<sup>88</sup>NZLC R 18.

<sup>89</sup>NZLC R 19.

<sup>90</sup>*Ibid.*

<sup>91</sup>*Ibid.*

<sup>92</sup>*Ibid.*

<sup>93</sup>NZLC R 44.

- 133 As against this, there are a number of significant Commission reports that have not, or not yet, borne fruit. They include *Criminal Procedure: Part One: Disclosure and Committal (1990)*<sup>94</sup> *A New Property Law Act (1994)*<sup>95</sup>, 3 reports on succession law *Succession Law: Homicidal Heirs (1997)*<sup>96</sup>, *Succession Law: A Succession (Adjustment) Act (1997)*<sup>97</sup>, and *Succession Law: A Succession (Wills) Act (1997)*<sup>98</sup>, *Police Questioning (1994)*<sup>99</sup>, and a 2-volume report on reform of evidence law *Evidence: Reform of the Law and Evidence: Code and Commentary (1999)*.
- 134 The Commission's proposals for new legislation on property law and wills stand out as examples of excellent substantive modernisation initiatives, but they must have government and parliamentary support if they are to materialise. A related problem, but by no means an insignificant one, is that the longer it takes to implement law reform proposals, the more difficult it becomes to do so. A momentum builds up and with it the enthusiasm and determination that are essential to driving legislative change. That has to be capitalised on, not left to evaporate. The Law Commission's recommendation for new interpretation legislation was implemented almost a decade after the Commission's report.
- 135 The key players in the Commission, Sir Kenneth Keith and the able researchers, had moved on. The task of implementation fell to Professor Richard Sutton as acting President and then to Sir Kenneth's successor, Justice David Baragwanath, and a

---

<sup>94</sup>NZLC R 14.

<sup>95</sup>NZLC R 29.

<sup>96</sup>NZLC R 38.

<sup>97</sup>NZLC R 39 (although implemented in part by the Property (Relationships) Amendment Act 2001, Family Proceedings Amendment Act 2001, and the Administration Amendment Act 2001).

<sup>98</sup>NZLC R 41.

<sup>99</sup>NZLC R 31.

new team who had to revisit much of the Commission's original thinking. Advisers in the Ministry of Justice had also departed. So when it came to look seriously at the new legislation it was a case of "fresh faces".

- 136 The Commission's work on evidence reform began under the leadership of Hon Sir John Wallace QC and continued under Sir Kenneth Keith and Justice Baragwanath. I attended a function in 1999 to celebrate the completion of the reports. That is now 5 years ago and other key Commission members, particularly Judge Margaret Lee, are no longer at the Commission. In relation to the property law reform, succession, and evidence reports, at least the key players are still alive.
- 137 Moreover, it is also hard to explain why a recommendation to modernise the law on habeas corpus is able to take precedence over modernisation of property law and wills. Without wishing to diminish the importance of habeas corpus, few people apply for the writ; almost everyone makes a will.
- 138 This state of affairs is not good. It shows the difficulties faced in getting traction for law reform proposals and the consequences of delay. It also indicates a disturbing lack of principle in determining what proceeds and what does not. Resorting to the tactic of having Law Commission Bills introduced into Parliament through the back door mechanism of a back bench member is understandable, but it is not good process. There ought to be more success stories.
- 139 A law reform agency cannot expect to have every recommendation it makes endorsed by a government. The government has to support the passage of the Bill through Parliament. If the agency sticks to "black letter law", the risk of government rejection may be lessened, but it does not follow that the prospects of reform are any better. Experience in New Zealand suggests the prospects are worse. The terms of reference of the New Zealand Law Commission are not so confined anyway and it

would be a tragedy if the Commission limited its horizons. After all, one of its first assignments was a reference from the Government of the day to “examine and review the law relating to bodies incorporated under the Companies Act 1955, and report on the form and content of a new Companies Act”.<sup>100</sup>

140 Again, this is not the place to get into a discussion of the philosophy of law reform, but a few comments are pertinent. “The business of law reform is not just a technical exercise. It is the business of improving society by improving its laws, practices and procedures. This involves a consideration of competing values.”<sup>101</sup> In my view, it is a complete misconception to regard “black letter law” or “lawyers’ law” as empty of social, economic, or other policy content. I have taken part in discussions on company, securities, insider trading, takeovers, financial reporting, foreign investment, banking, insurance, and competition law that have generated as much if not more passion and been more likely to have degenerated into punch-ups among the participants than discussions on reform involving controversial moral issues. Never let it be said that commercial lawyers are without emotion.

141 A law reform agency is well placed to take on the review of a complex and controversial area of the law, and its recommendations for change that are balanced and supported by good research and consultation should stand as much chance of acceptance as anything else. A law reform agency is able to consider issues and recommend changes in a reflective environment without the intense day-to-day pressures and constantly changing priorities that officials face in government departments.

---

<sup>100</sup>*Ibid*, p ix.

<sup>101</sup>[1995] NZLJ 270, 273. The quoted text is from an article by Jeremy McGuire entitled “Comments on the Powers of the New Zealand Law Commission” and appears as an extract from M Zandar, *The Law Making Process*, 1980, p 303. The author of the article attributes the same sentiments to Justice Kirby.

- 142 Law reform agencies are, in my view, indispensable in promoting access to justice through bringing outdated laws up to date, both in terms of their policy content and their expression. There are obviously challenges in increasing both the rate and speed of implementing law reform proposals, at least in this country. Success depends on acceptance by governments of the importance of having legislation that reflects contemporary needs and aspirations, and it also requires acceptance by legislators of those objectives. For the most part, law reform measures ought to proceed without being treated as raising issues of fundamental constitutional, social, or political importance requiring the most rigorous scrutiny. In other words, in a climate of trust, the prospects for acceptance should be greater.
- 143 Ministers will always want advice that law reform proposals are sound. After all, it is the Ministers who take responsibility for the legislation required to implement those proposals and who also have to procure any necessary funding. They will seek that advice from their departmental advisers, who will usually also have to support particular measures through the legislative process. That is constitutionally right and proper.
- 144 One suspects that in New Zealand resource constraint is where a large part of the problem lies. Law reform agencies must engage with governments at all levels. A culture of co-operation with government's advisors is essential. We have seen in New Zealand that it can be very effective. Independence is important, but it cannot be allowed to stop the wheels from turning. Persistence is also essential. Lobby groups agitate all the time and they get results.

## Part 6

### **An answer to the question: access to justice: rhetoric or reality?**

- 145 It would be nice to be able to give an unequivocal “yes” or “no” answer to the question that is the focus of this session, but in the law that is seldom possible. As Lord Steyn has commented, “[t]here is often no right answer; there is just the best answer”.<sup>102</sup> One would have to say that access to justice through both statute law and delegated legislation, in the sense in which I have defined it, is and can only ever be a qualified reality.
- 146 Considerable effort goes into ensuring that legislation conforms to fundamental legislative principles through a combination of internal scrutiny and a statutory process in the case of Bill of Rights compliance and internal scrutiny in the case of compliance with the principles of good legislative design set out in the LAC Guidelines. Much delegated legislation is subject to parliamentary scrutiny and possible disallowance under a statutory procedure. As noted, other jurisdictions employ similar systems. Greater attention to improving the language and format of legislation is also important in making legislation accessible. New Zealand’s efforts in this regard are also mirrored in other jurisdictions. The importance of communicating legislation clearly and effectively is now acknowledged and aspired to by the offices entrusted with the drafting of the law worldwide.
- 147 The qualifications come from the fact that a statute or other legislative instrument is only ever a part of an overall legal framework. The words of the instrument seldom stand alone. The law on a particular topic is invariably a combination of statute, delegated legislation, and case law. Understanding a statute will often presuppose a knowledge of relevant international law. Interpretation is affected by

---

<sup>102</sup> Lord Steyn *Interpretation (Treaties, Constitutions, Statutes, and Contracts)*, an address delivered at Victoria University of Wellington, September 2002.

the elusive concept of “context” and material outside the text itself. To get the complete picture one has to go to the text writers.

- 148 Modernisation of the law should be viewed as part of the infrastructure of any modern democratic society committed to upholding the rule of law. Perhaps we should look seriously at a properly resourced process for consolidation that was effective in New Zealand in the early part of last century. Substantive modernisation falls to the law reform agencies, who should be better supported in their important work by governments and by more amenable parliamentary processes.
- 149 All this suggests that it will never be possible to design a perfect system for making the law accessible in an absolute sense. While that has to be acknowledged, at the same time modernisation must always be the objective. Consolidation, reprinting, codification, general reform, as well as improvements in the language and style of legislation are the principal mechanisms available. This is not, however, a journey that has an end.