

The Sale of Liquor, Public Law and the Law Commission

Rt Hon Sir Geoffrey Palmer
President
Law Commission

LexisNexis Public and Administrative Law Conference
Stamford Plaza, Auckland

15 August 2008

Introduction

The Law Commission is busier than at any time in its history. We have a large range of projects in the criminal law and public law area. And, of course, criminal law is a branch of public law.

Sale and Supply of Liquor

Last week the Associate Minister of Justice, the Hon Lianne Dalziel, gave the Law Commission terms of reference for a comprehensive review of the regulatory framework for the sale and supply of liquor.

This is an ambitious project that will take more than two years.

The review will aim to define the objectives and principles of a New Zealand framework for regulating the sale and supply of liquor, and develop a coherent framework.

The objective of the Sale of Liquor Act 1989 is to establish a reasonable system of control over the supply and sale of liquor to the public with the aim of contributing to the reduction of liquor abuse so far as that can be achieved by legislative means.

There is, however, increasing concern regarding the extent of alcohol related harm. Communities seem to be frustrated by their inability to effectively manage that harm.

The Sale of Liquor Act 1989 was based on recommendations made by the 1986 Working Party on Liquor chaired by the late Sir George Laking. For those of you who cannot remember the state of the previous law, let me tell you it was remarkable. There were 29 different sorts of licence. The law was a potpourri of confusion, economic protection and lack of principle.

What the objectives of the old law were was hard to say. The Laking Working Party said the 1962 Act “failed to break out of the pattern of the past and continued largely to be a vehicle for the reconciliation of the conflicting interests of the liquor industry and its opponents.” The Laking Working Party recommended reduction of the number of types of licence to four. And that is now the law.

One problem with liquor is that it is always the subject of a conscience vote in Parliament. This does not help. Indeed it is hard to see these days why liquor should be the subject of a conscience vote. The fact that it always has been is hardly a good reason.

I suspect the practice has its origins in the prohibition movement late in the 19th century and early in the 20th century. Since that was such a strong political movement, it was impossible for members of political parties to agree on a subject so divisive. I wonder if that is still the case. Perhaps the time has come to reconsider the matter.

If there were not a conscience vote, it would certainly assist in securing a coherent, consistent and rational framework for dealing with a substance that imposes significant social costs on New Zealand, but will continue to be a part of our life. The Law Commission will examine the issue.

It is now more than 20 years since the Laking Working Party report. It was a significant and substantial reform in its day. But the caravan moves on. Laws always have to be reviewed to see that they meet the current circumstances and demands. Laws need to be adjusted to fit new realities.

The Sale of Liquor Act has been amended substantially since its enactment in 1989. The amendments that have been made have not always added to its coherence or its tidiness. Sir John Robertson chaired an Advisory Committee on the sale of liquor that reported in 1997. Significant changes were made as a result of that report and incorporated by the Sale of Liquor Amendment Act 1999. Among them was the reduction of the minimum drinking age to 18 years and Sunday trading.

The terms of reference for the present review are broad. It is a root and branch review. Research carried out since the Laking Working Party Review and the 1997 Robertson Review has shed light on the scale of costs imposed by alcohol misuse in New Zealand. A 2002 study estimated that the social cost of alcohol-related harm included costs of \$760m for the public health sector, crime-related costs of \$280m, social welfare costs of \$232m, other government spending costs related to alcohol harm of \$383m and lost productivity of \$1.353b. All these amounts are expressed in 2008 dollars.

Another study estimated the health harm in New Zealand from alcohol use at around 12,000 years of life lost per year with an even greater burden resulting from alcohol-related disability.

An appropriate legislative framework can make a contribution to minimising alcohol-related harm. How much of a contribution is not an easy question to judge. In the end it is all a question of balance and community attitudes.

The terms of reference for the Law Commission's comprehensive review bear a striking similarity to those of the Laking Working Party that reported in 1986. But there are also a number of specific points that are drawn to particular attention. In fact there are 15 of them.

The terms of reference are as follows:

- (1) To examine and evaluate the current laws and policies relating to the sale, supply and consumption of liquor in New Zealand.
- (2) To consider and formulate for the consideration of Government and Parliament a revised policy framework covering the principles that should regulate the sale, supply and consumption of liquor in New Zealand having regard to present and future social conditions and needs.
- (3) To deal explicitly with a number of issues, including:
 - the proliferation of specific outlets and the effect this has on consumption;
 - how the licensing system should be structured and who should be responsible for which aspects of licensing decisions;
 - revising the licence renewal and fee framework to consider whether risk can be more appropriately managed and to ensure that the funding of the licensing and enforcement regime is adequate;
 - to ensure that unnecessary and disproportionate compliance costs are not imposed by the licensing system;
 - the age at which liquor can be purchased;

- the responsibility of parents for supervising young members of their family who drink;
 - the influence of excise tax on alcohol and how pricing policies can minimise harm from alcohol consumption;
 - advertising of liquor and whether there should be restrictions on discounting alcohol or advertising discounts;
 - the relationship between the Sale of Liquor Act 1989, the Resource Management Act 1991 and the Local Government Act 2002;
 - the relationship between the Sale of Liquor Act 1989 and the liquor-related offences in the Summary Offences Act 1981;
 - the application of competition law to the sale of liquor;
 - the need to ensure the appropriate balance between harm and consumer benefit;
 - the health effects of alcohol use and the ways to ameliorate these adverse effects;
 - the effects of alcohol use on the level of offending in the community and consideration of measures to minimise such offending; and
 - enforcement issues in relation to liquor, including penalties, bans, measures to control alcohol related disorder and to deal with intoxicated people, and methods for preventing the use of fake proof-of-age identification.
- (4) To prepare an issues paper for publication and take submissions on it, and to engage in extensive public consultation
- (5) To prepare a final report, including the proposed new policy framework and draft legislation, so that people can judge accurately the precise effects of what is proposed.

On the same day that the Associate Minister of Justice announced the terms of reference for the Law Commission's inquiry, the Government introduced a Bill, the Sale and Supply of Liquor and Liquor Enforcement Bill.

The Bill is designed to implement the recommendations arising from the review of the sale and supply of liquor to minors and the review of the sale of liquor and liquor enforcement issues, which were both undertaken by the Ministry of Justice. It introduces a new system of enforced self-regulation of alcohol advertising that arose out of the review of the regulation of alcohol advertising.

The Bill also seeks to address the drinking behaviour of minors. The explanatory note to the Bill summarises its policy objectives in the following form:

- Support a more moderate drinking environment and culture to reduce the normalisation of youth drinking;
- Enhance the responsibility of friends and adults who supply alcohol to minors;
- Increase youth responsibility and accountability;
- Improve compliance and responsibility of industry;
- Increase community input into licensing decisions; and
- Clarify the types of premises that may hold off-licences.

The Bill restricts drivers under the age of 20 years who do not have a full licence to an alcohol level of zero.

Perhaps the most significant amendments relate to requiring an applicant for a liquor licence to notify the district licensing agency of the publications in which a public notice of application will be given and giving the agency/licensing authority the power to decline an application or impose conditions even where the application for the licence is unopposed. The licensing authority will have to have regard to any local alcohol plan. Grocery stores with a floor area of less than 150 square metres will not be able to be granted an off-licence, except in very limited circumstances.

The Bill demonstrates a substantial pulling back from the liberality that has characterised the law in recent times. This law, if it is passed by Parliament, along with the rest of the Act, will be looked at by the Law Commission in its review.

I want to say a few words about the way in which the Law Commission will go about conducting this review. There are important and conflicting social issues, health issues and law and order issues involved in this review. It will require widespread consultation. We will do this in a systematic way by setting up reference groups with which we can interact on a continuing basis.

Among those groups will be:

- The various industry stakeholders;
- Treatment services;
- Local Government;
- Māori groups;
- Pacific Island interests;
- Asian communities; and
- Any others that show an interest.

Many departments of state and ministries have interests in aspects of the liquor law. The core agencies include the Ministry of Justice, which administers the Sale of Liquor Act, the Ministry of Health, the New Zealand Police and the Alcohol Advisory Council.

Others who will have an interest in aspects of our work include the Ministry of Youth Development, the Ministry of Social Development, the Ministry of Economic Development, the Ministry of Culture and Heritage that deals with broadcasting matters, Te Puni Kokiri, the Ministry of Pacific Island Affairs, the New Zealand Customs Services on account of excise tax, the Department of Internal Affairs, the Ministry of Transport, the Ministry of Women's Affairs and, of course, the Treasury.

In order to secure maximum assistance from these government agencies, an Inter-Departmental Committee is being established. This Committee will be chaired by the Deputy Secretary of Justice, Jared Mullen, and its purpose will be to co-ordinate the gathering of information and input of ideas to the Review. This will be a very valuable contribution to the Law Commission's study.

Indeed, because so many agencies have a stake in liquor issues, it is an ideal topic for being dealt with by the Law Commission process. The Law Commission should be given projects across the boundaries of several portfolios and that involve a significant degree of public consultation.

As Sir Ivor Richardson, the retired President of the Court of Appeal once said, the Law Commission "... is the statutory equivalent of a semi-permanent Royal Commission with a roving function ...".¹

The project on the sale and supply of liquor has started already and the Law Commission is recruiting some new staff with special expertise to assist.

I must say I will enjoy leading this project. In a previous life, I was the Minister of Justice in charge of the Sale of Liquor Act 1989 and the policy process that led to it.

Other projects

Let me go through the Law Commission's work programme in detail.

*Admissibility of Previous Convictions*²

Following a number of high profile trials in relation to alleged criminal offending by members of the Police, the Commission is reviewing existing rules of evidence around admissibility of previous convictions, similar offending and bad character and in particular the extent to which the Court is made aware of the prior convictions of an accused, any other allegation of similar offending by the accused, and any other evidence of the accused's bad character. This report has been tabled in Parliament. It recommended no changes at present but said the Act should be kept under review.

¹ Sir Ivor Richardson "Commissions of Inquiry" (1989) 7 No 1 Otago Law Review, 3.

² New Zealand Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character* (NZLC IP4 2007).

Civil List Act 1979

The Civil List Act 1979 has not been reviewed for many years and is out of date in a number of respects. The statute provides for the remuneration for the Governor-General and annuities for former Governors-General; remuneration of Ministers, Parliamentary Under-Secretaries, and Members of Parliament; annuities for former Prime Ministers; and authority for appropriation for these purposes. The Act covers a range of different interests and it is desirable for an independent body to conduct any review. An Issues Paper on this was published two weeks ago, and public submissions may be made until 5 September 2008.

*Comprehensive Criminal Procedure*³

This is a collaborative project with the Ministry of Justice, the Parliamentary Counsel Office and other justice agencies to draft legislation incorporating provisions from the Crimes Act 1961, District Courts Act 1947 and Summary Proceedings Act 1957 in a comprehensive, plain language statute. It is designed to improve the fairness and efficiency of court processes and to reduce delays, and will build on recommendations from related Commission work.

Criminal Defences: Insanity and Infanticide

A review of the defence of insanity will look at the application of the defence in practice, the problems with current formulation and operation of the defence and whether it should be retained. Further work on the partial defence of infanticide will also be included in this review.

Land Transfer Act 1952

The Commission is reviewing the Land Transfer Act with a view to modernising it and updating it. It is not proposed to review the fundamentals of the Torrens system. The review will look at discrete aspects of the current Act and the land transfer system with a view to removing anomalies and recommending improvements. The review follows on from the new Property Law Act, which was passed earlier in 2007

³ New Zealand Law Commission *Simplification of Criminal Procedure Legislation* (NZLC SP7 2001), and *Criminal Pre-trial Processes: Justice through Efficiency* (NZLC R89 2005).

and enacted Commission recommendations set out in the 1994 report *A New Property Law Act* (NZLC R29).

Maximum Penalties

In the development of proposed reforms to sentencing, it was recognised that there was a need to review the role, format and structure of maximum penalties. Changes to maximum penalties will be recommended to correct existing anomalies and ensure consistency with the purposes and framework of a sentencing guideline system. The work will be co-ordinated with the Sentencing Establishment Unit and the Sentencing Council.

Misuse of Drugs Act 1975

The Minister of Health has asked the Commission to review the Misuse of Drugs Act 1975 and the penalties imposed under it. This will include consideration of the way in which the statute should reflect the Government's overall drug policy, its alignment with other cognate statutes, the structure of offences, and the effectiveness of the current classification system. The Commission will work with officials from the Ministries of Health and Justice on this review.

Part 8 of the Crimes Act 1961

This is a review of the offences of assault and injury to the person in Part 8 of the Crimes Act 1961, covering the overall scheme of the Act's provisions and whether a more coherent scheme can be devised; the elements and scope of individual offences; the relationship between offences; and maximum penalty levels and relativities.

Prerogative Writs

The purpose of this project is to simplify the expression and content of the law of judicial review as contained in the Judicature Amendment Act 1972 and Part 7 of the High Court Rules. The focus is procedural, not to examine the grounds of judicial review or work towards a statutory restatement of the circumstances in which the Court may exercise its supervisory role. An Issues Paper on the subject was published last week. The closing date for submissions is 30 September 2008.

*Presentation of New Zealand Statute Law*⁴

The Commission, in conjunction with the Parliamentary Counsel Office, will investigate and recommend methods of making New Zealand Statute Law more accessible and user-friendly by the introduction of a more systematic method of classifying and/or indexing Acts of Parliament. There are 1102 public acts of Parliament on the books in New Zealand, yet much of this law can neither be accessed nor understood by ordinary people. A final report on this subject should be available quite soon.

The project will also review the Statutes Drafting and Compilation Act 1920, the governing statute for the Parliamentary Counsel Office, as part of its wider assessment of New Zealand statute law.

Privacy

There are 4 distinct sub-projects within this large project:

Project 1 – overview of privacy values, changes arising from technology, international trends and the implications for NZ.⁵

Project 2 – the law relating to public registers in light of privacy considerations and emerging technology.⁶

Project 3 - adequacy of New Zealand's civil and criminal law to deal with invasions of privacy.

Project 4 – possible changes to Privacy Act 1993.

Private School Legal Frameworks

This review will consider issues around:

- safeguarding educational standards in private schools because the registration criteria in s35A of the Education Act 1989 is limited to the

⁴ New Zealand Law Commission *Presentation of New Zealand Statute Law* (NZLC IP2 2007).

⁵ New Zealand Law Commission *Privacy: Concepts and Issues* (NZLC SP19 2007).

⁶ New Zealand Law Commission *Public Registers: Review of the Law of Privacy: Stage 2* (NZLC R101 2008).

school's "efficiency", without ability to decline registration if previous conduct makes it inappropriate, or to impose sanctions;

- legislative provision to cover registration of private correspondence schools, as currently any application for this type of school must be declined regardless of academic merit.

*Public Inquiries*⁷

This project has involved reviewing the law relating to public inquiries, including Royal Commissions and other commissions under the Commissions of Inquiry Act 1908, Ministerial inquiries, ad hoc inquiries under specific statutes, and departmental inquiries. The legislation governing inquiries is very dated and the proposed outcome of the project is new legislation that meets society's contemporary needs, reflects its diverse values and provides effective constitutional arrangements for the conduct of public inquiries. A bill based on the report may be introduced shortly.

Public Safety and Security

The Law Commission has been asked to consider and report on whether existing legislation, including the Crimes Act 1961 and the Arms Act 1983, should be amended to cover the conduct of individuals who create risk to or public concern about the preservation of public safety and security. The Commission will make recommendations on any changes to the law that may be necessary or desirable. The Law Commission is required to take into account the need to ensure an appropriate balance between the preservation of public safety and security and the maintenance of individual rights and freedoms.

*Unified Tribunals Framework*⁸

The Commission is working jointly with the Ministry of Justice, to identify the issues involved in establishing a unified tribunal structure, including the operational implications of the incremental inclusion of tribunals in the new structure. A discussion paper was launched by the Minister of Justice in July.

⁷ New Zealand Law Commission *The Role of Public Inquiries* (NZLC IP 1 2007) and *Public Inquiries* (NZLC IP 5 2007).

⁸ New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008).

New Zealand has a proliferation of tribunals. The project will identify (and develop) the objectives and values of tribunals and a system of tribunals. This work will provide the conceptual framework for an analysis of the existing system of tribunals, and the later assessment of the options for reform. The purpose of the project is to provide a more accessible, simple and structured tribunal system that demonstrates coherent and consistent administrative law values.

Victims Compensation

This work will include a comparative analysis of the compensation regimes in Australia and New Zealand and whether court ordered reparation to victims should be paid in advance of recovery from offenders. An interim report should be available in September 2008.

War Pensions Act 1954

The War Pensions Act review will look at the language and scheme of the Act to update and modernise it. It will focus on the administration and policy behind the war pensions scheme with a view to streamlining some of the processes and management of pensions. An Issues Paper of 280 pages was published two weeks ago. Submissions close on 28 November 2008. The current structure exhibits many difficulties.