
LAW REFORM AND THE LAW COMMISSION
IN NEW ZEALAND AFTER 20 YEARS – WE
NEED TO TRY A LITTLE HARDER

Address to the New Zealand Centre for Public
Law, Victoria University of Wellington
Thursday, 30 March 2006

Rt Hon Sir Geoffrey Palmer
President, Law Commission

Introduction

- 1 It is a great pleasure for me to address the New Zealand Centre for Public Law at the Victoria University of Wellington, my alma mater.¹ Public law is a subject that has long been dear to my heart.² When in London recently, I had dinner with Sir Paul Walker, the first Director of the Centre for Public Law at this University. He is now a High Court judge in England.
- 2 Everywhere law reform agencies face serious challenges. The primary one comes down to getting the work implemented. As Justice Michael Kirby of the High Court of Australia recently put it, there is a “failure, anywhere, to establish a satisfactory link between the institutional law reform body and the lawmakers with the power to convert proposals for legal reform into action”.³ The problem exists in all countries where there is a Law Commission.
- 3 The New Zealand Government has recently adopted a programme to implement six previous reports of the Law Commission and has made progress towards that end.⁴ In her Prime Ministerial statement to Parliament in February, the Rt Hon Helen Clark said one of the initiatives in the justice and security area should be to

¹ I am most grateful to George Tanner QC, Chief Parliamentary Counsel and Dr Warren Young, Deputy President of the Law Commission for their comments on an earlier version of this paper.

² Geoffrey Palmer “The New Public Law: Its Province and Function” (1992) 22 VUWLR 1.

³ Hon Justice Kirby “Law Reform and Human Rights – Scarman’s Great Legacy” (lecture for the Law Commission of England and Wales, Gray’s Inn, London, 20 February 2006) 43. See also the *Cri de Coeur* from my distinguished predecessor, Justice David Baragawanath, “The Role of the New Zealand Law Commission” (2001) Occasional Paper No 2, New Zealand Centre for Public Law 6–8.

⁴ Quite apart from the initiative to deal with older reports of the Law Commission, several of its recommendations are currently before Parliament. There is the Evidence Bill, resulting from a lengthy study concluding with a 1999 report in two volumes recommending a Code (New Zealand Law Commission *Evidence* (NZLC R55, Wellington, 1999) and the Crimes (Covert Intimate Filming) Amendment Bill which responds to the Commission’s 2004 study paper (New Zealand Law Commission *Intimate Covert Filming* (NZLC SP5, Wellington, 2004)). The Criminal Procedure Bill currently before Parliament would implement the Commission’s reports on criminal prosecution (New Zealand Law Commission *Criminal Prosecution* (NZLC R66, Wellington, 2000)), juries in criminal trials (New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, Wellington, 2001)), and acquittal following perversion of the course of justice (New Zealand Law Commission *Acquittal Following Perversion of the Course of Justice* (NZLC R70, Wellington, 2001)). There is also the Coroners Bill which is based on the Commission’s 2000 report (New Zealand Law Commission *Coroners* (NZLC R62, Wellington, 2000)).

“give priority to law reform proposals already received from the Law Commission which update key statutes, for example in the property law area”.⁵

- 4 The issue of how to secure governmental legislative and official attention once law reform reports are produced is certainly a significant problem. Justice Kirby is correct in saying that nowhere has this issue been effectively tackled. In another recent analysis, he reaches the following dismal conclusion:

In terms of this logjam in our institutions, we are certainly not ‘there’. In my view, we are not even on the way to ‘there’. We are no closer to ‘there’ than we were 30 years ago when I began my work with law reform agencies. No one is ‘there’. ‘There’ seems to be an illusion. Sometimes we think we see it. Thus, law reformers cultivate officials and look for the ‘triggers of activation’ that will gain an advocate in Cabinet who will initiate official consideration and action on a law reform report. But it seems amazing that our constitutional government should be so dependent on chance factors of that kind. If it could be explained by controversy and difficulty, the impediment would be more understandable and tolerable.⁶

- 5 In this lecture I shall attempt to throw some light on what I believe the real nature of the underlying issue to be and suggest some possible ways of approaching resolution of it. There lurks beneath this implementation issue something deeper than political indifference to worthy projects.
- 6 I shall begin by outlining the nature of the New Zealand Law Commission and my own approach to law reform and background in it. What follows is a set of observations on post-modern philosophical approaches to the law that pose obstacles for statutes and for law reform projects. I go on to make some suggestions on how to approach the problem of the design of statute law, the

⁵ Rt Hon Helen Clark, “Prime Minister’s Statement to Parliament” (14 February 2006) 11. There is work currently being done to implement the Commission’s reports on changes to the Arbitration Act 1996 (New Zealand Law Commission *Improving the Arbitration Act 1996* (NZLC R83, Wellington, 2003)); a new Wills Act to replace the Wills Act 1837 (New Zealand Law Commission *Succession Law: A Succession (Wills) Act* (NZLC R 41, Wellington, 1997)); Homicidal Heirs (New Zealand Law Commission *Succession Law: Homicidal Heirs* (NZLC R38, Wellington, 1997)); as well as the Property Law reform report prepared by Commissioner Blanchard (as he then was) in 1994 (New Zealand Law Commission *A New Property Law Act* (NZLC R29, Wellington, 1994)). I am optimistic that there will be legislation introduced to implement these reports. Work is also proceeding on the Life Insurance Report (New Zealand Law Commission *Life Insurance* (NZLC R87, Wellington, 2004)) and Apportionment of Civil Liability (New Zealand Law Commission *Apportionment of Civil Liability* (NZLC R47, Wellington, 1998).

⁶ Michael Kirby “Are We There Yet?” in Brian Opeskin and David Weisbrot *The Promise of Law Reform* (The Federation Press, Sydney, 2005) 433, 445.

presentation of it and particularly its accessibility. Then I shall consider its relationship to delegated legislation and the problems that that poses. Lastly, I shall examine the under-developed fields of both pre-legislative and post-legislative scrutiny of legislation.

The Law Commission at Twenty

7 The year 2006 marks the 20th birthday of the Law Commission in New Zealand. The Commission's aim is to "promote the systematic review, reform and development of the law of New Zealand".⁷ The Commission carries out that aim:

- By making recommendations to the Minister of Justice for the reform and development of a particular aspect of the law, on a reference from the Minister or on its own initiative;
- By advising Government departments and other public sector organisations on their own reviews of aspects of the law and on proposals made as a result of the review.

8 The Commission is obliged to have regard to the desirability of simplifying the expression and content of the law so far as is practicable. It is obliged also to take into account Te ao Maori (the Maori dimension) and to give consideration to the multi-cultural character of New Zealand.

9 In short, the Law Commission is a law reform agency. In new lingua franca of public administration, it is an independent Crown Entity. The independence is important – the Law Commission is not the same as a Department of State. It has the same sort of independence that Judges have in formulating its recommendations. Yet it must be attentive to both the Executive Government and Parliament - these are the bodies that are responsible for implementing any changes recommended by the Commission. No organisation that spends tax payers' money can engage in the design of utopian schemes that have no prospect

⁷ Law Commission Act 1985, s 3.

of being adopted. One purpose of the Law Commission is to suggest changes to the statute book for the betterment of all New Zealanders.

- 10 New Zealand's law reform agency was created relatively late compared to the rest of the common law world. England and Scotland received permanent Law Commissions by legislation in 1965. The Commonwealth of Australia passed legislation for the Australian Law Reform Commission in 1973 and it commenced operations on 1 January 1975. New South Wales set up its agency even earlier, in 1967. Canada has had the interesting experience of setting up a Federal Law Reform Agency, then in 1992 abolishing it, only to set up another in 1997.
- 11 The reason that New Zealand was late in setting up such an agency lies in the fact that it had already devoted serious effort to the topic, setting up a Law Revision Committee in 1937. By the 1960s there had been established a series of part-time Law Reform Committees that, working with the old Department of Justice which itself contained a large and extremely-able law reform division, produced a lot of legal change. There was resistance to changing this structure. But the open Government election manifesto commitments of the 4th Labour Government promised to establish a full-time Law Reform Commission. It was one of my most pleasant duties as a member of that Government not only to write that portion of the manifesto before the 1984 election, but also to design the legislation. Not surprisingly, therefore, I regard the legislation as satisfactory. As Minister of Justice I was also responsible for recommending the appointments to the new Commission and providing references to it.
- 12 Sir Owen Woodhouse was the first President and this was no accident. My taste for law reform was fostered by Sir Owen when I first met him while I was a student at the University of Chicago Law School, and he was Chair of the Royal Commission on Personal Injury. The Commission visited Chicago in 1966. On my return to New Zealand I found that he had picked me out to write the Government White Paper on the Royal Commission's Report on Personal Injury.⁸

⁸ Geoffrey Palmer "The New Zealand Experience" in *International Workshop – Beyond Compensation: Dealing with Accidents in the 21st Century* (1993) 15 U Hawaii LR 604,

That began an association for me with the Accident Compensation reforms that continued not only in New Zealand but also in Australia, when Sir Owen was invited to Chair the Committee of Inquiry there that started work in 1973.

- 13 For me, the 1967 report of the Royal Commission on Personal Injury remains a model of what a law reform project should be.⁹ It was a big reform. It made massive improvements to the life of accident victims. The reform was plainly in the public interest, and it has endured. I wrote a long book about that adventure; the experience founded the whole basis for the rest of my legal and political career. The lessons about law, policy and change from that experience are with me still.¹⁰ So Sir Owen Woodhouse seemed to me then and seems to me still the very model of a modern law reformer.
- 14 I came to the Presidency of the Law Commission having spent a legal career divided almost exactly into three equal parts – academic lawyer, law practitioner, and Member of Parliament. In all these roles I have done more or less the same thing – a lot of law reform. I won't bore you with the details, but the fields in which I have worked on reform include Accident Compensation; defamation; the Trespass Act; flammable fabrics; jurisdiction of the Waitangi Tribunal and the place of the Treaty of Waitangi; resource management, other environmental legislation and environmental treaties; the New Zealand Bill of Rights; the Constitution Act; victim support legislation; criminal and penal legislation; the Cabinet system and the structure of the Department of Prime Minister and Cabinet and the Prime Minister's Private Office; local Government reform; official information; electoral law; reform of Parliamentary standing orders and Select Committee system; reform of the State sector; the state-owned enterprises legislation; reform of the Public Finance Act; development of the Regulations Disallowance Act, the Racing Act, the Lawyers and Conveyancers Act. And it

606; and Geoffrey Palmer *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (Oxford University Press, Wellington, 1979).

⁹ Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, 1967).

¹⁰ When I was leaving Australia after the experience with the Woodhouse reforms there in 1975, I was asked by Justice Michael Kirby if I would join the Australian Law Reform Commission as a Commissioner. I told him I preferred to go back to New Zealand where law reform could actually be achieved!

should be mentioned for present purposes, reviewing the Law Commission for the Government in 2000.

Post-modernism and law reform

- 15 These experiences have convinced me that law and properly structured legal institutions are important. I have the old-fashioned belief that things can be improved by good law-making; legislation is not everything, but it is something. As Justice Kirby put it in the article quoted earlier, “Law Reform is part of the stable machinery of modernity”.¹¹ I have spent now 40 years in the law, much of it in reform activities. I am beginning to feel there is a sense of unfulfilled expectations about law reform and the legal climate generally. It is to the philosophical cause of that unease I now turn. Legislative reform truly does represent modernity, but we seem to be living in a post-modern age.
- 16 There seems to be an infection seeping into the legal system in the Western world. It is the infection of post-modernism.¹² It has implications for law reform. It constitutes a serious challenge to law reform. Post-modernism is marked by the break up of the nation state and the weakening of normative social institutions, particularly the law. It is marked by scepticism concerning the foundations of knowledge. It advances the view that language constructs reality, but does not mirror it. Post-modernism points out the insoluble difficulties in postulating coherent unitary texts or sets of legal principles.

¹¹ Kirby “Are we there Yet?” in Opeskin and Weisbrot above n 5, 445.

¹² I am not an authority on post-modernism, but I seek to set out here what I take to be its chief messages. Some useful works are: Thomas Bridges *The Culture of Citizenship: Inventing Postmodern Civic Culture* (State University of New York Press, Albany, 1991); Babette Babich (ed) *Continental and Postmodern Perspectives in the Philosophy of Sciences* (Ipswich Book Co Ltd, Ipswich, 1995); Michel Foucault *The Order of Things* (Pantheon Books, New York, 1970); Raymond Geuss *The Idea of Critical Theory: Habermas and the Frankfurt School* (Cambridge University Press, Cambridge, 1981; Garay Minda *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (New York University Press; New York; 1995); Richard Posner *Overcoming Law* (Harvard University Press, Cambridge, 1995); Dennis Paterson “Postmodernism, Feminism and Law” (1992) 77 Cornell L Rev 254; “Postmodernism and Law: A Symposium” (1991) 62 U Colo L Rev; and JM Balkin “What is a Postmodern Constitutionalism?” (1992) 90 Mich L Rev 1966.

- 17 Post-modernism took over from modernism, signalling a negative attitude towards modernity and the enlightenment. Modernism is associated with people like Max Weber. He found that modernity was typified by pervasiveness of the bureaucratic form of Government and the rational legal forms of political authority. Weber considered that such modern societies require a mass of rules; these rules are administered by grey and faceless people called bureaucrats.¹³
- 18 Post-modernism sets itself against authority. It denies that there is any independent authority in the law. According to post-modernism, law is merely one discourse among many and has no objective basis. As such, both philosophy and jurisprudence lack foundations. They turn into word games. Under such an analysis the great traditions of the law collapse and there can be no clarity about what will follow. Post-modernist argument brings the authority of law into serious issue.
- 19 Naturally, there are many critics of the post-modernist message. That is not surprising since the message is that everything is more or less chaos. There is no basis to anything and everything is fluid. It has a nihilistic caste to it. As an intellectual theory it may have had its day - one certainly hopes so.
- 20 Much of post-modern thought had its origins in literary criticism. When viewed through a post-modern lens, the relationship between law and literature leads to uncomfortable conclusions. Texts are as much a foundation of statute law as they are of literature. Thus, infirmities in the text and particularly suggestions that texts have no meaning are particularly destructive.
- 21 The most distinctive intellectual method of post-modernism is “deconstruction”. This is a word, that from a semantic point of view, sits between “destruction” and “construction”. Deconstruction seems to change our usual understanding of history. Indeed, it suggests that everything is contingent and unstable. The principle technique of deconstruction is to destabilise binary oppositions. This is done by showing that the dominant term presupposes or depends on its opposite.

¹³ Max Weber and Stanislaw Andreski (ed and trans) *Max Weber on Capitalism, Bureaucracy, and Religion: A Selection of Texts* (Allen and Unwin, London, 1983).

- 22 In the result, deconstruction demonstrates that all texts are open to many conflicting meanings. It does not demonstrate that they are meaningless. Applied in a legal context, deconstruction leads to the inference that whatever legal interpretation is adopted, it is due to something outside the text. This has led many critical legal studies adherents to use the techniques of deconstruction to uncover conflicts that are hidden by conventional legal discourse.
- 23 I do not wish to turn this lecture into a disquisition on legal philosophy, but I do think that post-modernism has had, and will continue to have, an important effect on our legal institutions: post modernists tend to believe there should be as little law and legislation as possible since they are sceptical that law can achieve anything. Even though it has manifest and serious defects, the theory undermines trust in the institutions of the law, its effectiveness and its legitimacy. It leads to a pragmatic, short-term approach. Post-modernism may be in the process of being replaced by pragmatism, with which it has some affinities.¹⁴
- 24 Post-modernism will have its strongest effects on statute law. Massive amounts of law are made in New Zealand every year, of which primary legislation sometimes does not produce the greatest bulk. Today, New Zealand's primary laws comprise nearly 1100 statutes; 1096 to be precise. We had only 600 principal Acts in 1978.¹⁵ Under the authority of today's Acts there are 4292 instruments published in the statutory regulations series. There exist also, according to Parliamentary Counsel Office website, 273 sets of "deemed regulations"; this last number, the site warns us, may be incomplete. How many pages of law this amounts to I cannot say because it is too big a job to count. The largest statute we have – the Income Tax Act 2004 covers 2088 pages and takes three volumes of the 2004 statutes. There were seven volumes that year.
- 25 This proliferation of forms of lawmaking poses problems in itself. But it also poses significant problems for the system of Government as a whole. It makes it

¹⁴ Posner, above n 11, 10.

¹⁵ Kenneth Keith "A Lawyer Looks at Parliament" in John Marshall (ed) *The Reform of Parliament: Contributions by Dr Alan Robinson and Papers Presented in his Memory Concerning the New Zealand Parliament* (New Zealand Institute of Public Administration, Wellington, 1978).

much more difficult ever to see the body of law as a whole. This is a situation that gives some credence to post-modern legal theories. The law cannot be found, cannot be made sense of and often appears to lack ascertainable principles.

- 26 Issues concerning the rule of law also stem from this proliferation. In a recent address, Justice Grant Hammond of the New Zealand Court of Appeal made a most thoughtful and charming set of observations by looking at New Zealand through the eyes of Sarah, who visits New Zealand from a far flung planet.¹⁶ Sarah finds the gap between the ideal of the rule of law and the reality in New Zealand to be deeply troublesome:¹⁷

This is because the New Zealand legal system is, in operation, distinctly inequitable and inefficient. This industrious little country keeps pumping out more law than any comparable jurisdiction in the galaxy. But in practice it is only for those who can afford it. For those who cannot afford all this law, and who are likely to need it most, there is far too little law. She thinks (legal aid notwithstanding) that most Kiwis find their legal rights hopelessly compromised by the cost of legal services, the extraordinary procedural complications produced by the law, and the seemingly interminable and frustrating delays involved in advancing proceedings to anything like a conclusion.

- 27 Sarah cannot understand why New Zealand has put up with this state of affairs. She is concerned about whether the tireless law generating activity in New Zealand actually produces good outputs. She is worried about whether New Zealand would receive a pass mark concerning its appreciation of the role and limits of law. She tends to the view that a small-scale society could get by with fewer rules. She also finds that the spirit of producing progressive solutions to legal problems that was pioneered in New Zealand seems to have been lost.
- 28 What concerns me most in taking over the helm at the Law Commission at this time is the relative failure to look at the body of our laws as a whole, and impose on them some organising pattern or principles that will enable our legal system to work effectively and fairly in practice. Simply adding to the bulk of the law without considering its overall pattern is problematic. It was this thought that

¹⁶ Hon Justice Hammond, "Law from Afar" (address to the North American Alumni Association, 4 November 2005).

¹⁷ The degree to which Sarah's view accords with Justice Hammond's view is not a matter I can comment on. Judges must be careful in their extra-judicial utterances, no doubt.

constituted the overarching principle behind the thinking that set the Law Commission on its way.

- 29 The establishment of the Law Commission was not based on post-modern thinking, rather the reverse. It was fuelled by the vision that the law could be accessible, understandable, coherent and administered fairly by institutions that are neutral and behave with integrity. These are hopes that ought not to be abandoned lightly.
- 30 Consider what I have said so far in light of one of the principal functions of the Law Commission, this is:¹⁸

To take and keep under review in a systematic way the law of New Zealand.

- 31 What does this mean? How does one carry out a task as vast as that? The existing statute law of New Zealand is anything but systematic. That of course does not mean to say that reviews of it cannot be systematic. In some ways the objective may suggest something along the lines of a Jeremy Bentham codification project. This was certainly the feeling that drove the English Law Commission at its inception and it was stated as one of its objects. But little progress has been made. It has been virtually abandoned as utopian. If one takes the first principal function mentioned in the Law Commission Act 1985 and adds to it the fourth, does that make a difference?:¹⁹

To advise the Minister of Justice [and the responsible minister] on ways in which the laws of New Zealand can be made as understandable and accessible as is practicable.

Looking at these goals 20 years later, one would have to conclude that they are highly aspirational goals and probably no nearer completion, and perhaps further away, than they were in 1985 when the Law Commission Act was passed.

¹⁸ Law Commission Act 1985, s 5(1)(a).

¹⁹ Law Commission Act 1985, s 5(1)(d).

32 That is not to say progress has not been made as a result of the Law Commission itself. The Commission can take much credit for such developments as:

- The Interpretation Act 1999 and plain English drafting; and
- Reports on the format, structure and style of legislation.

These are signal achievements and deserve to be celebrated. Indeed, all Law Commission reports, however narrow the topic, make recommendations to simplify the law and make it more accessible.²⁰

33 There may be ways to rectify the situation. I turn next to one of them.

Accessibility of statute law in New Zealand

34 There is one practical approach I intend to explore at the Commission as a means of making the primary statute law more accessible. In New Zealand, unless one knows the name of the principal Public Act, there is good chance that relevant provisions can be overlooked. The New Zealand statute book is both massive and unmanageable. More useful is the American approach, where both at State and Federal level, a code is produced of all State law or Federal law passed by the legislature, rearranged under topic headings.²¹ I intend to use the State of Iowa in this example because I am reasonably familiar with its statute law. It is a state of three million people with an emphasis on primary industries, a characteristic it shares with New Zealand. I use the Iowa Code of 2003 in the text because I have it in hard copy, but the 2005 Code is now available and can be searched online.

35 The Code allows people in both the public sector and the private sector to locate and read all the relevant primary statute law that may be important to a particular concern. All the law on, for example, “animals” can be found in one place but with full cross referencing. In New Zealand, by way of contrast, the *2005 Tables*

²⁰ See George Tanner “Imperatives in Drafting Legislation: A Brief New Zealand Perspective” (2005) 31 CLB 33, 35–37.

²¹ The code here is not used in the same sense as in which Bentham discussed codification. He saw codes “as complete and self-sufficient and not to be supplemented or modified save

of New Zealand Acts and Ordinances and Statutory Regulations in Force contains the following entry:

Animal Control Products Limited Act 1991;

Animal Identification Act 1993;

Animal Products (Ancillary and Transitional Provisions) Act 1999;

Animal Welfare Act 1999;

Animals. See also Animal Remedies; Wild Animal Control; Wildlife;

Animals Law Reform Act 1989.

- 36 There is a great deal more in the statute book about animals than mentioned in the entry. For example, the Dog Control Act 1996. I do not need to labour the point; our indexing is inadequate. Furthermore, it makes the New Zealand statute book virtually totally inaccessible to those that need use it overseas, since those users usually do not have the annual Tables referred to above. These are separately published in soft cover, although they are now also available on the Parliamentary Counsel Office website.
- 37 Since MMP, it can no longer be said that New Zealand is the fastest law-maker in the west, but we are surely quite accomplished at making the law hard to find. This needs to be fixed. We now have, in large measure due to the combined efforts of the Law Commission and the Parliamentary Counsel Office, plain English drafting.²² What we do not have is adequately accessible statute law.²³ It is too easy to overlook statutory provisions.

by legislation”, David M Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) 237.

²² The Parliamentary Counsel Office was established by Statutes Drafting and Compilation Act 1920, s 2. Section 4 set out the duties of the Bill Drafting Department of the Office and the duties of the Compilation Department of the Office are in s 5.

²³ Notwithstanding the broad aims of the Acts and Regulations Publishing Act 1989, the long title of which states that it is an Act:

(a) To provide for the printing and publication of Acts of Parliament and statutory regulations; and

(b) To ensure that copies of Acts of Parliament and statutory regulations are available to the public; and

38 Indeed, animals are a good example for Iowa too. They are as important to the economy of Iowa as they are to that of New Zealand. In the *Skeleton and Popular name Index* to the 2003 Code of Iowa the following headings appear under the: “Animals” heading:

- Abuse;
- Bestiality;
- Care in commercial establishments;
- Contest events;
- Cruelty;
- Dead animals, disposal;
- Diseases;
- Domesticated animal activities, liability;
- Endangered species;
- Facilities, offences relating to;
- Feed;
- Hunting;
- Livestock;
- Poultry;
- Wild animal depredation;
- Zoos.

39 After each of those headings, the reader is referred to a chapter of the Code or, in three instances, a cross-reference to another heading in the Code. In the *Detailed Index* we find the main headings:

- Animal Abuse;
- Animal Horse-Drawn Vehicles;
- Animal Facilities;
- Animal Feeding Operations;
- Animal Health Boards;
- Animal Neglect;
- Animal Nutrient Products;
- Animals Pounds;
- Animals;
- Animal Shelters;
- Animal Torture;
- Animal Wardens.

(c) To provide for the Government Printing Office to cease to be a department of

40 Under the heading “Animals” alone, we find 177 separate headings and many other sub-headings. By looking at this index one can find any law that one might possibly want to know about from mules and muskrats to wolves and woodchucks. Often there are cross-references to other headings in the index. For example, under the heading “Quail, hunting”, it says “see “HUNTING, subhead Game hunting.” The cross-referencing is extensive. Under the heading “progeny” there are references to the Uniform Commercial Code, that triumph of American Realist jurisprudence, and Karl Llewellyn. This system is quick and easy to use. One is not referred to a statute but to a chapter in the Code. The Code comprises statutes that are rearranged.

41 The Code is published under the authority of Chapter 2B of the Code itself. The Code is made up Acts of the General Assembly of Iowa. But they are not arranged in the same way they were passed. The Code has sixteen titles:

- I State Sovereignty and Management;
- II Elections and Official Duties;
- III Public Services and Regulation;
- IV Public Health;
- V Agriculture;
- VI Human Services;
- VII Education and Cultural Affairs;
- VIII Transportation;
- IX Local Government;
- X Financial Resources;
- XI Natural Resources;
- XII Business Entities;
- XIII Commerce;
- XIV Property;
- XV Judicial Branch and Judicial Procedures;
- XVI Criminal Law and Procedure.

42 Under each of these sixteen headings there are a number of subtitles. For example, under Education and Cultural Affairs the arrangement of the subtitles is as follows:

the public service.

1. Elementary and Secondary Education;
2. Community Colleges;
3. Higher Education;
4. Regents Institutions;
5. Educational Development and Professional Regulation;
6. School Districts;
7. Cultural Affairs.

43 If we go to the Code itself, under “Education and Cultural Affairs” we find the following arrangement:

Title VII Education and Cultural Affairs

Subtitle 1 Elementary and Secondary Education

Chapter 256-Department of Education and there are four sub-chapters within that chapter.

44 When we look at 256.1 “Department Established”, we find at the end of the section the legislative history, that is to say, where the provision came from.

45 By contrast, in the New Zealand Tables, we are offered only the names of eight statutes with the word “Education” in their short titles. No assistance is offered as to how often issues relating to education might be found in other statutes.

46 The Editor of the Code who is a member of the State Legislative Service Bureau is required to place in the Code all Statutes of a general and permanent nature. Of course, the annual session laws including all Acts and Joint Resolutions passed at each session of the bi-cameral Assembly are published. But they are published separately from the Code.

47 Iowa has elections every two years and the legislature meets every year. The law requires a new Iowa Code to be issued as soon as possible after the final adjournment of the second regular session of the general assembly. A new Code supplement is issued as soon as possible after the first regular session of the general assembly. So in New Zealand terms, the whole of the statute law is reprinted in Iowa every two years in an integrated and accessible manner. The matter of its setting out and the print is of importance. Chapter 2A is set out in the Appendix as an example.

48 As I have said, the Code is published under the authority of chapter 2B of the Code itself. Chapter 2B.12 provides as follows:

2B.12 Iowa Code And Code Supplement.

1. A new Iowa Code shall be issued as soon as possible after the final adjournment of the second regular session of the general assembly. A new Code Supplement shall be issued as soon as possible after the first regular session of the general assembly. A Code Supplement may be issued after a special session of the general assembly or as required by the legislative council.

2. The entire Iowa Code shall be maintained on a computer data base which shall be updated as soon as possible after each session of the general assembly. The Iowa Code and Code Supplement shall be prepared and printed on a good quality of paper in one or more volumes, in the manner determined by the Iowa Code editor in accordance with the policies of the legislative council, as provided in section 2.42.

3. An edition of the Iowa Code or Code Supplement shall contain each Code section in its new or amended form. However, a new section or amendment which does not take effect until after the probable publication date of a succeeding Iowa Code or Code Supplement may be deferred for publication in that succeeding Iowa Code or Code Supplement. The sections shall be inserted in each edition in a logical order as determined by the Iowa Code editor in accordance with the policies of the legislative council.

4. Each section of an Iowa Code or Code Supplement shall be indicated by a number printed in boldface type and shall have an appropriate headnote printed in boldface type.

5. Appropriate historical references or source notes may be placed following each section.

6. The Iowa Code published after the second regular session of the general assembly shall include:

- a.* An analysis of the Code by titles and chapters.
- b.* The Declaration of Independence.
- c.* The Articles of Confederation.
- d.* The Constitution of the United States.
- e.* The laws of the United States relating to the authentication of records.
- f.* The Constitution of the State of Iowa.
- g.* The Act admitting Iowa into the union as a state.
- h.* A chapter title, number, and chapter analysis at the head of each chapter. The chapter number shall be printed at the top of each page.
- i.* All of the statutes of Iowa of a general and permanent nature, except as provided in subsection 3.

j. A comprehensive index and a summary index covering the Constitution and statutes of the state of Iowa.

7. The Code Supplement published after the first regular session of the general assembly shall include:

a. All of the statutes of Iowa of a general and permanent nature which were enacted or amended during that session, except as provided in subsection 3, and an indication of all sections repealed during that session, and any amendments to the Constitution of the State of Iowa approved by the voters at the preceding general election.

b. A chapter title and number for each chapter or part of a chapter included.

c. An index covering the material included.

8. A Code or Code Supplement may include appropriate tables showing the disposition of Acts of the general assembly and other reference material as determined by the Iowa Code editor in accordance with policies of the legislative council.

[C97, p. 5; S13, p. 3; C24, 27, 31, 35, 39, § 168; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, § 14.12; 82 Acts, ch 1061, § 2--4]

91 Acts, ch 258, §12

C93, § 2B.12

94 Acts, ch 1107, § 19

- 49 A number of editorial powers and duties are set out in the law as well. What this means in practice is that, every two years, the entire statute law of the State of Iowa is reprinted. The 2003 Code amounts to four thick volumes of about 1500 pages each.
- 50 What I am trying to demonstrate here is that a modern method exists of providing the law in an accessible form and systematic manner, without the need to go through the session laws as they were passed by the Iowa legislature. The session laws of Iowa are drafted in such a way as to amend, add or subtract from the Code, accepting its pattern of organisation. It is the arrangements of these laws and the indexing that is the key to this accessibility.
- 51 With modern technology, such a process should not be impossible in New Zealand. In my view, it needs to be seriously considered.²⁴

²⁴ This suggestion is not new. I first put it forward in 1979, Geoffrey Palmer *Unbridled Power* (Oxford University Press, Wellington, 1979) 82.

- 52 There will be a lot of work in making the necessary arrangements. There are important design issues, and the compatibility with the new computerisation that has been introduced by Parliamentary Counsel will need serious examination. But since it involves a manipulation of material that will all be online by then, this should be possible.
- 53 I have had some discussions with Chief Parliamentary Counsel on the topic, and I am looking forward to examining with him and his office how to advance these ideas. I certainly do not wish to cast doubt on the current public access to legislation project being undertaken by the Parliamentary Counsel Office which will provide an official electronic version of the New Zealand statute book. On the contrary, I think that project is an essential step in improving public access to legislation – a step that is long overdue and that will bring New Zealand into line with most other comparable jurisdictions. Indeed, once New Zealand has an official electronic statute book, it will be much easier to introduce further improvements in the arrangement and presentation of our legislation by taking advantage of modern technology. The future development of more powerful search engines will doubtless assist.
- 54 As a first step to codification, and a sort of half-way house between the current system and the Iowa Code, would be a subject-matter index of legislation along the lines of that produced by the Victorian Parliamentary Counsel Office.²⁵ This provides users with an index similar to that of the Iowa Code.
- 55 Whether it would be possible in such a New Zealand Code to integrate references to the relevant statutory regulations and “deemed regulations” is worth seriously considering. Probably the attempt should be made. The Regulations Review Committee has delivered some heroic reports on the subject of deemed regulations and the Government response has been reasonably positive.

²⁵ Office of the Chief Parliamentary Counsel *Index to Subject Matter of Victorian Legislation* (6 ed, Victoria, 1 Jan 2005).

- 56 Modern computer technology should certainly allow greater facility with the rearrangement and presentation of our laws. This technology needs to be taken advantage of in ways that are novel, imaginative and promote efficiency.
- 57 New Zealand is not the only country that suffers difficulties regarding access to its statute law. The Statute Book in the United Kingdom is much bigger and goes back much further in history than our own. It is even more inaccessible than ours. It does seem to me that the State has an obligation to make laws accessible if it expects citizens to obey them. There are many practical difficulties that flow from a lack of accessibility. Probably first among them is the cost of locating the relevant provisions. Very few people in New Zealand other than lawyers can find their way around the statute book, and many of them have problems. Our statute law is not fit for human consumption.
- 58 The problem causes difficulties for our public discourse on matters. Journalists in particular have great difficulty being able to say in any clear way what the law is, and they tend to veer away from trying to do so. In a democracy as small as New Zealand, where public debate is continuous and volatile, much of it is conducted on a daily basis in complete ignorance about what the law may be on the topic under discussion. And often, that law is highly relevant to what is being debated.
- 59 There are civic as well as legal virtues in improving the accessibility of New Zealand's law. The task seems even more important given the quite rapid rate in which statute law is overhauling common law as a source of legal principles. Statute is not so much King as emperor. As Lord Steyn remarked, quoting Guido Calabresi, we are overwhelmed by "an orgy of statute making".²⁶
- 60 In Iowa, business people, bankers and even farmers can have the Iowa Code on their shelves and they can use it. And it is all readily accessible online. There is no need to resort to a lawyer to be able to locate and read relevant statute law.

²⁶ Guido Calabresi *A Common Law for the Age of Statutes* (Harvard University Press, Cambridge, 1982) 1, quoted in Johan Steyn "Dynamic Interpretation Amidst an Orgy of Statutes" (2004) 35 *Ottawa Law Review* 163, 164.

- 61 To achieve order and accessibility in law made by Parliament and the Executive would be hard enough. But why stop there? Should an attempt be made to integrate both the common law and judicial decisions rendered interpreting statutes. It can be said, after all, that the common law and statute coalesce into a single legal system.
- 62 If we are to remove some of the accessibility problems, why not remove the rest? The common law and judicial decisions interpreting statutes are inaccessible to ordinary citizens so it may be asked, is it safe to give them access to statutes? People may come to grief advising themselves. There is a tendency in some quarters to think that the law is a mysterious science that should be only revealed to those who are initiated, namely lawyers. But is this defensible in a democratic society?
- 63 One might fairly argue that the statute law, even in its present form, is quite accessible compared with the mass of judicial decisions. The American commercial legal publishers offer annotated codes at both the state and federal level that attempt to cite the relevant case law. Whether the state has a responsibility to present this law in a digestible manner is open to debate. These are worthwhile issues for exploration and I am interested in taking up a proposal by Richard Clarke QC.²⁷

²⁷ Richard Clarke QC while at the New Zealand Law Commission proposed an “Outline of New Zealand Law” to be available free of charge on the internet. It was to be prepared with the following purposes:

- To present in a clear and accessible way the structure and principal content of New Zealand law; and in this way assist in the proper application and appropriate development of the law;
- To provide quick free access for the public to the principal content of New Zealand law and signposts to more detailed legal information;
- To provide an educational and research tool for teachers of and commentators on the law.

It would be of great value to, among others, –

- Members of the public who wished to have a broad understanding of a particular area of law;
- Teachers and others responsible for educating the community about legal matters;
- Lawyers who wished to get a quick overview of an area of the law they were not familiar with;
- Law schools and lecturers;
- Courts and others who apply the law;
- Legal academics and commentators;

Delegated legislation: A cautionary tale from the United Kingdom

64 The contents of this portion of the lecture relate to those of the previous portion more directly than may be apparent. Statutory bulk leads, it seems, to unbridled pragmatism. On a recent visit to the United Kingdom, I was briefed by First Parliamentary Counsel and the Law Commission in England on the Legislative and Regulatory Reform Bill. This Bill makes provision for reforming legislation on a wide scale and implementing recommendations of the United Kingdom Law Commissions. It was introduced on 11 January 2006.

65 The breadth of the measure can best be understood by quoting its purpose clause, clause 1(1):²⁸

A Minister of the Crown may by order make provision for either or both of the following purposes –

- (a) Reforming legislation;
- (b) Implementing recommendations of any one or more of the United Kingdom Law Commissions, with or without changes.

66 In effect, this is law-making by delegated legislation. There may be a case for dealing with recommendations of the Law Commissions in the manner suggested, but I do not advocate it.²⁹ It is even more difficult to see the case for reforming legislation on a broad front by way of delegated legislation.³⁰ The powers under this Bill could also be used to amend itself.

67 The Bill contains a number of checks and balances against invoking the procedure. There are a number of pre-conditions set out on exercise of the power. Indeed, satisfaction of these conditions may make judicial review on the exercise

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- Government departments and agencies, Ministers and Members of Parliament responsible for the development and enactment of new legislation, and those who make submissions on Bills.

²⁸ Legislative and Regulatory Reform Bill 2006 (UK) cl 1(1).

²⁹ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Oxford, 2004), ch 11 “Regulations and Red Tape”, 202–227; see also Michael Taggart “From ‘Parliamentary Powers’ to Privatisation: The Chequered History of Delegated Legislation in the Twentieth Century” (2005) 55 U Toronto LJ 575; and Caroline Morris and Ryan Malone *Regulations Review in the New Zealand Parliament* (2004) Macquarie LJ 7.

³⁰ Michael Taggart, above n 29.

of this Act, should it become law in its present form, a frequent occurrence. Such measures cannot impose or increase taxation. There are also restrictions on the creation of new offences, although new indictable offences with imprisonment for a term not exceeding two years can be created by the new procedure. There are also restrictions on creating new rights of forcible entry, search or seizure. A Minister must be satisfied that legislation is required to secure a policy objective. The proposed order must be “proportionate” and strike a fair balance between the public interest and the interests of any persons adversely affected. It does not prevent anyone from exercising rights and freedoms they “might reasonably expect to continue to exercise”.

- 68 There are three ways by which resolutions made under this proposed legislation can be approved by Parliament. The first is a negative resolution, in which case a draft order is laid on the tables of both Houses of Parliament, and the order can be made, unless within a 40 day period either House of Parliament resolves that the order may not be made.
- 69 The second method is an affirmative resolution procedure which requires the approval of the House in order for the draft order to come into effect. For some matters, there is also a super affirmative resolution procedure set out in clause 16 of the Bill. Here, the Minister has to have regard to representation recommendations of a Committee of either House of Parliament. The Minister then lays before Parliament a statement giving details of the representations received. This procedure goes on over a period of 60 days.
- 70 Each draft order must contain a recommendation by the Minister as to which of the above procedures should be followed in the particular instance.
- 71 The Bill itself may not be enacted in its present form, since it has been subjected to criticism in the United Kingdom. This is not the first occasion on which legislation of this sort has been considered in the United Kingdom. The impetus for it came from the Regulatory Reform Act 2001. A review of that Act’s operations concluded that there were too many hurdles for its use.
- 72 It would be deleterious to New Zealand’s existing constitutional arrangements to follow a procedure like that contained in the Bill in my view. It should be noted

at this point that the New Zealand Parliament has developed a practice to fast-track legislation by use of Order in Council. This is the affirmative resolution procedure that has grown up in relatively recent times.³¹ The procedure delegates to the Executive the power to amend certain statutes by Order in Council on condition that the order is confirmed by resolution of the House of Representatives. First introduced in 2000, it has been used for the changes to the Misuse of Drugs Act and the Dog Control Act.

73 The Regulations Review Committee has published an interim report questioning the procedure. The Select Committee pointed out that in a situation of real emergency, the urgency procedure for primary legislation would be a better solution than affirmative resolutions. It said secondly that confirmation Bills may be a more suitable way of providing enhanced Parliamentary control of regulations.³²

74 The Government's response to this report was interesting. It was:

The Government does not want to see the proliferation of the affirmative resolution procedure. At the same time, however, there are some limited and exceptional circumstances where the affirmative resolution procedure is justifiable.³³

75 The struggles that the Regulations Review Committee has had with "deemed regulations" over many years now is a further example of the problems that delegated legislation can cause.³⁴ The difficulties with deemed regulations are that they are not drafted by Parliamentary Counsel. They are not published in the statutory regulations series. They are not approved by Cabinet. Often they contain material incorporated by reference which gives rise to problems.

³¹ Rebecca Prebble *The Trouble with Convenience: Problems Arising from the Use of the Affirmative Resolution Procedure to Amend Legislation* (LLM Research Paper, Victoria University of Wellington, 2005).

³² Regulations Review Committee, "Interim Report on the Inquiry into Affirmative Resolution Procedure" [2004] AJHR 1 I6F.

³³ "Interim Report on the 'Inquiry into Affirmative Resolution Procedure'" presented to the House of Representatives in accordance with standing order 251A(5) (29 September 2004).

³⁴ Regulations Review Committee *Inquiry into instruments deemed to be regulations – an examination of delegated legislation: Report of the Regulations Review Committee* (Wellington, July 1999); *Inquiry into principles determining whether delegated legislation is giving the status of regulations* (Wellington, June 2004).

- 76 But what emerges from the 2004 report of the Regulations Review Committee is the increasing use of notices, codes of practice and orders that escape the jurisdiction of the Regulations Review Committee. The definition of “regulation” in the Regulations (Disallowance) Act 1989 and the Interpretation Act 1999 should be amended in line with the definition of “legislative instrument” set out in the Australian Legislative Instruments Act 2003. There should be an amendment to the 1989 Act in New Zealand to include provisions that relate to the establishment of a register of legislative instruments as set out in the Australian Legislative Instruments Act 2003.
- 77 What all this material suggests is that New Zealand needs to take account of the trend to find ways of avoiding its legislative processes becoming overwhelmed.
- 78 It is clear that the quantity of primary and secondary legislation has increased markedly in New Zealand in recent years.³⁵ Much of this is inevitable. The complexity of issues with which Governments must now deal has altered enormously over a period of 30 years.
- 79 New Zealand has an unfortunate history in relation to delegated legislation – witness the number of examples of regulations that were made under the Economic Stabilisation Act 1948, where it was found that constitutional practice and theory diverged alarmingly. Those excesses led to the passage of the Regulations (Disallowance) 1989 Act itself.
- 80 With the development of deemed regulations, affirmative resolution procedures and increasing use of notices, codes of practice and orders, New Zealand could be considered to be travelling back towards the place from which it came.
- 81 A former Chair of the Regulations Review Committee, the Honourable Doug Kidd, discussing the Committee’s constitutional watchdog activities, said its work shows:³⁶

³⁵ George Tanner “Access to Justice: Rhetoric or Reality” (paper presented to Australasian Law Reform Agencies Conference, Wellington 13–6 April 2004).

³⁶ Hon Doug Kidd *Executive v Legislature: The Struggle Continues – observations on the work of the Regulations Review Committee* (Occasional Paper No 3, New Zealand Centre for Public Law, Victoria University of Wellington, 18 May 2001).

The ongoing tendency of all Governments to stray from the powers of constitutional righteousness seduced by the sirens of power, efficiency and convenience. We are here to educate, guide, persuade, correct, chastise and reform Government – a congenital sinner. Above all, we are here to protect and promote the rule of law”.

82 Legislation, like water, finds its own level. The difficulties reviewed here have their origins in the difficulty of passing primary legislation. Consideration needs to be given to whether it is possible for Parliament to find ways to control and influence matters that are dealt with by delegated legislation in its many variants.

83 One source of assistance may lie in alterations to the legislative process. Among possible solutions to the problem may be:

- a wider Standing Order regarding Omnibus Bills;
- a main Committee type procedure similar to that employed in Australia.

84 The Legislation Advisory Committee only this week invited the Regulations Review Select Committee to look more closely at the issue of the dividing line between primary and delegated legislation.³⁷ The Digest prepared by Ryan Malone of the Victoria University of Wellington Centre for Public Law is an excellent resource.³⁸ It is a great starting point for getting some useful principles backed by specific examples of what is appropriate for delegated legislation, and what is not. The Centre for Public Law Project is jointly sponsored by the Parliamentary Counsel Office and the Office of the Clerk and funding is committed to continuing for three years.

85 It is essential to find and define a dividing line between primary and delegated legislation, so that Government, the Parliament and, in particular, public servants know where that line lies. The intellectual effort by such an inquiry ought not to be underestimated.

³⁷ Legislation Advisory Committee *Briefing for the Regulations Review Select Committee from the Legislation Advisory Committee* (Wellington, March 2006).

³⁸ Ryan Malone *Regulations Review Committee Digest* (New Zealand Centre for Public Law, Wellington)
<http://www.law.vuw.ac.nz/vuw/fca/law/files/RRC_Printer_Friendly_Digest.pdf> (last accessed 30 March 2006).

Pre-legislative scrutiny and the Legislation Advisory Committee

- 86 Statutes are often not required and should be avoided if possible. Legislation is not the answer to every problem and New Zealanders need a lot of education to that effect. We tend to pass laws for which there is no legal reason.³⁹ A fundamental threshold question needs to be asked much more often and much more rigorously than it is – is legislation required at all? We have to avoid cluttering up an over-full statute book with unnecessary laws.
- 87 Last year I was appointed Chair of the Legislation Advisory Committee. This is the successor to the old Public and Administrative Law Reform Committee. It has been kept in use to allow a group of academic lawyers, along with a retired judge and a serving judge, two economists, private practitioners and Government lawyers to provide advice continually to the Government on good legislative practice. Its most important work product has been the Legislation Advisory Committee Guidelines, which have been adopted by Cabinet as appropriate benchmarks for legislation to meet.⁴⁰
- 88 Seminars conducted by the Committee on the guidelines last year attracted 400 public servants. The Guidelines themselves are under review. It has occurred to me in relation to this work that an early warning system would be helpful. Where agencies are planning legislation, the architecture of it needs to be settled early and in accordance with sound legal and constitutional principles.
- 89 At present, the Law Commission analyses all Bills introduced for the Legislation Advisory Committee and reports to the Committee on them. The Committee then takes the issues up with Parliamentary Counsel, the appropriate Minister, officials or itself makes submissions to a Select Committee. It all depends on what seems to be the most appropriate in the circumstances. Agencies and departments are also coming to consult with the LAC in advance of framing their legislative proposals, and there is considerable benefit in that practice.

³⁹ For instance, the Music Teachers Act 1981.

⁴⁰ Legislation Advisory Committee *Legislation Advisory Committee: Guidelines on Process and Content of Legislation* (Legislation Advisory Committee, Wellington, 2001) <<http://www.justice.govt.nz/lac/index.html>> (last accessed 30 March 2006).

90 Early discussion about the choice of legislative vehicles and the methods of complying with the Guidelines would improve the quality of legislation a great deal. It is often too late once the measure has been drafted.

91 Ongoing discussions about how this can be achieved have been commenced between the Law Commission, the Ministry of Justice, the Department of Prime Minister and Cabinet, Treasury, Chief Parliamentary Counsel and the Solicitor General. The desire is to find better ways of defining and analysing the optional architectures available for Government Bills, how they fit in to the rest of the statute book and what the balance will be between primary and delegated legislation.

Post-legislative scrutiny

92 As I have made clear in the earlier part of this lecture, we have been adding to the bulk of the law on a continuing basis. What we do not do is to stop and conduct an inquiry into the effects of what we have done. There are murmurings now that perhaps some mechanisms should be developed to look rigorously at the effect of legislation that has been passed and to ensure that it achieved the objectives upon which it was based and did not achieve unforeseen consequences of a deleterious kind. It seems a sound idea to do this examination before rushing in with amendments as occurs so often in New Zealand. The English Law Commission has recently published a Discussion Paper on post-legislative scrutiny.⁴¹

93 The case in favour of carrying out some post-legislative scrutiny is put at 6.2 of the paper.

The primary reason which has been recurrently suggested to us is that legislation should be reviewed after it has been brought into force to see whether it is working out in practice as intended and if not to discover why and to address how any problems can be remedied quickly and cost-effectively. This driver for post-legislative scrutiny is based on a concern that every year a huge and increasing amount of legislation is poured onto the statute book, most of which is not thoroughly digested. Much of this generates further regulation either in the form of secondary legislation or in the form of codes and guidance. There may also have been a number of amendments introduced with little time for scrutiny during the

⁴¹ Law Commission *Post Legislative Scrutiny* (consultation paper no 178, London, 2006).

passage of the Bill. In 2003, Parliament passed 45 Acts which ran to a total of over 4,000 pages. There were also 3,354 Statutory Instruments, running to 11,977 pages. There is a perceived need to take stock of this by providing a mechanism that will enable Parliament to look back and review the effects of legislation once it has been implemented. We do not suggest that review of this kind would have any impact at all in stemming the flow or volume of legislation, rather that the fact of the flow necessitates looking back to see what lessons may be learnt. Post-legislative scrutiny should translate into better regulation. If there is to be public commitment to better regulation, an obvious part of that is the examination of legislation once it has been brought into force; it may be that wider lessons can then be learnt on the method of regulation and the necessity for legislation.

- 94 There seems to be a lot of support for the concept of post-legislative scrutiny in the United Kingdom. The difficulty with it is to provide an effective set of intellectual tests as to what it comprises and how it can be delivered. The first issue is whether Parliament itself should engage in this activity. In New Zealand, Select Committees can conduct inquiries on a very wide range of matters. But Parliament is busy, and there are resource restraints.
- 95 Furthermore, there are many different types of legislation. A one size fits all concept would not be workable, as the English Law Commission's paper makes clear. Indeed, the paper makes it clear that post-legislative scrutiny could be governmental, Parliamentary, or external. Or it might involve all three. The English Law Commission charts two avenues by which the goal may be achieved. The first is a pre-planned post-legislative scrutiny for which a positive commitment to review is made in advance of the enactment.⁴²
- 96 In New Zealand it would always be possible to put within a statutory provision the requirement for a review of the statute to be tabled in Parliament within a specified time period, after it has been in operation.
- 97 The second avenue proposed by the Law Commission "contemplates post-legislative scrutiny for which there was no prior commitment and therefore relies on post-enactment triggers for review". The process could be started by the Executive Government, a Select Committee, or indeed, possibly by external agencies like the Law Commission.

⁴² Law Commission (consultation paper no 178) above n 36, 35.

- 98 It seems unlikely that legislation will flow from the project underway in England. But the project is worth following closely because the legislative problems in the United Kingdom are very similar to those in New Zealand.
- 99 Obvious questions that need to be examined in post-legislative scrutiny exercises would be the following:
- What interpretative difficulties have been encountered in the legislation?;
 - Has the legislation had unintended legal consequences?;
 - Have the policy objectives been achieved?;
 - What have been the economic costs imposed by the legislation, and what does it cost to administer?;
 - Has it been cumbersome and bureaucratic?
- 100 Such scrutiny could be as narrow or as broad as was desired. How much legislation should be scrutinised, and when, where and how such scrutinising should occur are obviously issues of importance. The Consultation Paper gives no definitive answers to those questions.
- 101 The English Discussion Paper makes it clear that the case for post-legislative scrutiny of delegated legislation is also strong. The problem here is that in the view of the Law Commission, the sheer volume of secondary legislation means that, practically speaking, post-legislative scrutiny would be “an extremely difficult task”.
- 102 Indeed, proper assembly of data at the pre-legislative scrutiny stage and making plans to monitor legislation after it goes into effect should be carried out much more than it is. There is a direct and dynamic relationship between pre-legislative and post-legislative scrutiny. Consideration needs to be given in New Zealand to imposing some requirements in both phases to avoid the common syndrome “we have a problem, let’s pass a law”.

103 While post-legislative scrutiny may be difficult and expensive, it is impossible to see why it should not be carried out. How much do we really know about the effects of all the laws that have been passed? In a rational society committed to the rule of law, even in a post-modern world, we should know more. Passing more legislation without knowing is like whistling in the dark. It seems to combine the worst features of both modernity and post-modernism.

Conclusion

104 The time has come to draw the strands of this paper together and state the conclusions. I am here endeavouring to find a way of implementing some of the important goals contained in the Law Commission's statute.

105 The bulk of legislation and its various forms poses a problem to the coherence of the legal system as well as access to its principles and rules. Attention needs to be given to providing some overall coherence and imposing a pattern on the statute book, so that it is both orderly and accessible. This will require changes in the way we present our laws, and changes in the way we index them.

106 When renovating the shape of our statute book and the methods governing access to it, attention needs to be given to both statutory regulations and deemed regulations, so that it is apparent what delegated legislation has been made under the authority of the primary law. This object is by no means as simple to achieve as it is to state.

107 In considering the balance between primary legislation and delegated legislation, greater effort has to be made to determine what is appropriate for delegated legislation and what is not. At present we have no clear bright line rule in New Zealand about the proper balance. Securing one will require a lot of intellectual effort.

108 The temptation to download a lot of policy into regulations and other delegated legislation, needs to be carefully controlled by Parliament. We must not return to the days when delegated legislation was out of control. We need to pay more attention to the balance between different forms of legislation. If it is too difficult to pass primary legislation, resort will be had to delegated legislation, regulations,

as well as deemed regulations, codes of practice, notices and ministerial directions.

- 109 Before Government Bills are introduced, more effort needs to go into the initial design of legislation, particularly its architecture and the relationship of the proposed law to the established body of laws as a whole. Similarly, post-legislative scrutiny of Government Bills that are passed needs to be undertaken to ensure that the stated objectives were met, and that unexpected consequences did not ensue. There needs to be a retreat from the pattern of wholesale amendments that over the years so distort and destroy the logic and pattern of a statute that it becomes unrecognisable. The best example of this currently on the statute book is the Social Security Act 1964. In other words, we need better pre-legislative scrutiny and better post-legislative scrutiny of legislation.
- 110 If we do not address these difficulties, it is my view that more and more law will find its way into delegated legislation through measures of the character of the Legislative and Regulatory Reform Bill in the United Kingdom that I have outlined. For a constitution like New Zealand's, that is unacceptable. Parliament must remain in control.⁴³

⁴³ For the sake of completeness, I should record the current orthodox law reform projects that the Law Commission has in front of it. At present, the Commission has on its work programme a review on Access to Court Records which is really unfinished business left over from the Official Information Act. It has a project on Custom and Human Rights in the Pacific. It has a long running project on reforming the law on Entry, Search and Seizure. It has another reference relating to Criminal Defences. It has recently completed a review of the Customs Act. And it has a project concerning a Maori Entities Bill to give Maori organisations the choice of a new legal framework for the purpose of managing communally owned assets, or giving effect to communal rights and responsibilities on behalf of the members of the group.