NZCPL Public Officeholder Series:

The changing roles of law commissioners

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Introduction

Since this is part of an officeholder's series, I thought I would concentrate on aspects of the office of Law Commissioner, rather than on any particular substantive issues that we are working on in our current projects. It's an opportunity to share some reflections about the role of President, a role which I have held since May last year.

Law Commissioners are appointed by the Governor General on the advice of the Minister Responsible for the Commission, which is usually the Minister of Justice (but could be an associate minister for example). We normally hold office for a term of five years, although we can stay in office until replaced under statutory carry over provisions. One of our new commissioners, Justice Christian Whata, has recently been appointed for a term of only one year, to lead a particular project (on tikanga).

There is very little in our Act by way of job description. I have indicated in the title that the Law Commissioner role is a changing one, and what I mean by that is the role has changed and continues to change, reflecting its modernisation, changes in administrative responsibilities, law reform processes and other factors.

If I were to describe my role in a nutshell it is that I normally wear four 'hats', and currently four and a half. So, I will begin by describing these hats.

1. Management

- My first hat is that, as President of the Commission, I am the Commission's chief executive, and carry management responsibilities that attach to that office.
- The General Manager of the Commission is one of my direct reports, and we meet weekly to discuss budgets, any issues in the provision of corporate services – IT,

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information services and office management, health and safety matters, staffing, and so on.

- I said I currently wear four and a half hats, and the temporary half hat I wear is that of general manager, since the position is currently vacant. We have two people on part time secondment from Deloitte who are taking care of the financial aspects of the GM role and some of the more general management tasks. Some other tasks currently fall to me.

- I should say also that all Commissioners 'muck in'. We're very small, so embedding our values, and achieving our mission, means doing work that in a bigger place might be taken care of by others.

- Our new commissioner Geof Shirtcliffe for example represents the Commission in a Ministry of Justice-led 'governance steering group'. I recently developed a koha policy, and last year wrote a te reo development plan for the Commission. I represent the Commission at the ICE forum, which is a forum for chief executives (and chairs) of the different independent crown entities that meets about twice a year to discuss common issues and share best practice.

2. Governance

- My second hat is a governance one. As President, I am also Chair of the Board although unlike many chairs I do not appoint the chief executive nor have a formal role in holding her to account. My remuneration, for example, is determined by the Remuneration Authority not the Board and is not directly connected to performance on the job. As I mentioned earlier, all Commissioners are appointed on the advice of the Minister responsible for the Commission. We're not able to be voted off in the way a trustee or director might be. Nonetheless the essential tasks of governance are more or less the same, but without the usual levers.

- I present a 'President's report' at each Board meeting, outlining progress on our strategic goals. As all commissioners are board members, this is not so much an executive report in the usual sense but an opportunity for all of us to record and reflect on our progress and agree on any actions.

3. Law reform role

- My third hat is the Law Commissioner role. As a Law Commissioner, I currently manage a team of five advisers working on two related projects, the reviews of

class actions and litigation funding. These reviews are taking place in a wider context of access to justice initiatives and are running in parallel because of their overlap in content.

- We have published two consultation documents so far, a 380-page issues paper last December and, last week, another 180-page supplementary issues paper. Commissioners may contribute to some writing but the vast majority of the writing of these papers is undertaken by the team. We all review each other's work within the team. We have a flat structure within teams – in my experience, it makes little difference to advisers if you are the Law Commissioner; if they think you are off-piste they will say so and why! We might work through two or three iterations of drafts within the team before providing those drafts to the other Commissioners for review and Board sign-off.

- That is the other law reform role of Commissioners, to work together as a Commission and agree on the broad policy direction of each project. We review the drafts of all publications and can have a significant influence on them through this process.

- The Commissioner-level peer review is also one of the most enjoyable aspects of the role for me, as it's an opportunity to work collegially across some very interesting and often difficult law reform questions. When working within a project, you can become a bit wedded to one position or another, so the opportunity to discuss these with Commissioners helps promote the thoroughness of our work, test our thinking, and promote consistency across the work programme.

4. President

- The fourth hat I wear is the President's hat. Apart from the roles I've described above, which are provided for in our Act, the job of President is really defined by the person who has it.

- I think there are two key responsibilities. One is promoting a good working relationship among Commissioners and (with all Commissioners) a positive tone for everyone within the Commission. The second is representing the Commission in official settings, including as one of four Certifiers of revision bills under the Legislation Act, and through community and professional engagements such as this.

It might seem odd that, as a Law Commissioner, I described the Law Commissioner role as my third hat. The reason I listed the roles in the order I did is because that broadly reflects the time I spend on each. I will often spend more time on governance and administration than I do on law reform work. The President hat/role is harder to quantify in terms of time, as part of it is just trying to set a good example, but generally it does not occupy too much time.

For the other Commissioners the balance is different, but as I said, all Commissioners do have management and governance responsibilities. I should also add that it is a great privilege to have these roles and work with the talented people we have at the Commission.

Establishment of the Law Commission

There is much I did not know about the Commission before becoming a Law Commissioner. For example, I did not know that the Commission was an independent Crown entity, or what that even meant. I knew it had produced an excellent report on arbitration law in 1991, and on reforms to the land transfer system in 2010.[1] Both these reports informed my research and teaching on those subjects in my time as an academic. I think this may be a common perception of the Commission: we produce substantial reports that lead to major reforms on core areas of law.

Early reform institutions and their replacement

The Commission was established by the Law Commission Act 1985 with an ambitious overarching purpose to "promote the systematic review, reform and development" of the law.[2] In further explaining what we do, I thought I might now turn to say something about what we replaced, and why, through a potted pre-history of the institution.

Semi-formal law reform institutions have been in place in Aotearoa since 1937, when the then Minister of Justice and Attorney General Rex Mason established and chaired what was called the *Law Revision Committee*. There was no formal constitution for the committee and its membership comprised people invited by the Minister to join it. Proposals for reform projects were generated by committee members, the New Zealand Law Society and the Department of Justice. Papers and reports were prepared by members or co-opted lawyers and academics.

[1] Te Aka Matua o te Ture | Law Commission *Arbitration* (NZLC R20, 1991); and Te Aka Matua o te Ture | Law Commission *A New Land Transfer Act: In Conjunction with Land Information New Zealand* (NZLC R116, 2010).

[2] Law Commission Act 1985, s 3.

This system was replaced in 1965 by a new *Law Revision Commission*, which was later renamed the *Law Revision Council*. The Commission / Council was established as an oversight body, which allocated law reform projects to new specialist committees covering particular fields of law. These included, for example, a Property Law and Equity Committee, and a Public and Administrative Law Committee. The new committees were more specialised and were therefore viewed as more effective, but as with the predecessor model, membership was part-time and voluntary.

In addition to the work of these reform committees, law reform was also achieved through other committees, government departments and special commissions. But the generally voluntary and ad hoc nature of the law reform institutions had some serious limitations. The committees were not supported by their own research capacity, consultation could be very limited, and they were limited to work of a technical nature. There was no clear mandate or institutional purpose. There was no real institutional accountability either, except that any reforms would need to pass through the ordinary parliamentary process.

Overseas, law reform agencies were being established in places like Canada (for example, in Ontario, 1964), the United Kingdom (the English and Scottish commissions, in 1965) and Australia. These developments highlighted limitations in New Zealand's committee-based approach. Other factors also contributed to the sense that better machinery for law reform was required. These included better recognition of the complexity of our society and that we are not homogenous, the increase in the volume of statute law (that would benefit from some general oversight and consistency in its development), and the growing influence of international law on domestic law.

In light of these issues, the Labour Party included the creation of a law reform agency in its 1984 manifesto. A Law Commission Bill was introduced and then passed in 1985 through the leadership of Sir Geoffrey Palmer, and the Commission began operations in 1986. (Sir Geoffrey also served as President from 2005 to 2010.) The Public and Administrative Law Committee survived in a modified form to become the Legislation Advisory Committee, which is now called the Legislation Design and Advisory Committee or LDAC. The other committee infrastructure was dismantled, although the Contracts and Commercial Law Reform Committee and the Evidence Law Reform Committee were continued in an informal form within the Commission for a time.

Against this background we can see why the Commission was established as a permanent body with high expectations for a systematic approach to law reform.[3] How we go about doing this has changed over the years.

Then and now

The early annual reports (and conversations with Commissioners from the time) suggest that initially Commissioners had a greater hands-on role in law reform projects, there were more Law Commissioners relative to policy advisers, and more projects on the go at any given time. For example, in 1987, there were five Law Commissioners and five legal staff – at the time, the legal staff were called research officers. There were 18 projects on the Commission's work programme.[4]

Today, we have three Commissioners – next week it will be four. We have 14 policy advisers. We have seven (or eight, if class actions and litigation funding are split) projects on our work programme, five of which are active (six from next week).

Some of this difference is due to the Commission establishing itself in its early years with a very wide-ranging work programme and a phased approach to recruitment of research officers. But I think other factors are also at play.

Administration work

The first concerns the accountability and compliance obligations imposed on the Commission under the Crown Entities Act 2004. It is of course important that the Commission is accountable for the money we receive, and you could say it's a price of our independence. But the obligations are also quite onerous. I believe one of my predecessors argued against the Commission falling under the Act for this reason but was unsuccessful. We have the same reporting obligations as the Commerce Commission, for instance, but are less than a tenth of the size.

One of the more interesting exercises under the Act is the development of our Statement of Intent (SOI). I worked with the other Commissioners on our current SOI early last year. A statement of intent is essentially a medium-term strategic plan which is delivered to the Minister every three years. We whittled down our long list of ideas to three areas of focus, which are broadly:

[3] The Commission has a broad statutory function to "take and keep under review in a systematic way the law of New Zealand" and may initiate studies for this purpose. See Law Commission Act 1985, ss 5(1)(a), 6(2)(a) and 6(2)(b).

[4] See Te Aka Matua o te Ture | Law Commission, Annual Report (1987-88).

- te ao Māori,
- promoting a good workplace culture, and
- stakeholder engagement.

One of the more vexed issues concerns how our performance should be measured and audited, as required under the Act. There is no internationally agreed methodology for evaluating law commissions and practices overseas vary. (As I discovered as part of the SOI process, there is no rule that the measures should apply to the strategic objectives either.) Our projects can be very different, which also makes uniform measurement difficult.

In the past, we have tried various things – for example, independent peer review. We have spent a lot of time over the past 16 months working to embed new performance measures that we instituted last year as part of the SOI, and creating new data gathering mechanisms for the things we need to measure. We have adopted a mix of new measures. Some are quantitative – for instance, did we receive the expected number of submissions in response to our issues papers, and did we publish our target number of publications over the year.

Some measures are qualitative, for example, feedback from members of our expert advisory committees on the quality of our reports. We use a sliding scale system where we are 'graded' on a scale of 1-5 – this may sound familiar, as it is the same type of system we had for lecturer evaluations at Auckland law school.

The other set of measures we have developed are impact measures. For example, we count the number of judicial citations to our work in a given financial year. Which also brings back memories of PBRF!

As another impact measure, we now also measure the implementation of our reports over a rolling ten-year period, with a target rate of sixty per cent implementation. Whether our reports are implemented or not is a matter for the Executive and then Parliament: we have little or no control over this. At the same time if few of our reports are implemented over a ten-year period then we should ask what the point of a law commission is. We have to be careful though that we do not become beholden to the audit process when deciding what to recommend. For example, in our alcohol project, almost all recommendations were implemented except some of the most important.[5] There is a balance to be struck but we

[5] Marty Sharpe and others "Major report into reducing alcohol harm ignored for almost a decade" (stuff.co.nz, 13 August 2019); Te Aka Matua o te Ture | Law Commission Alcohol in our Lives: Curbing the Harm (NZLC R114, 2010).

should of course keep making bold and progressive recommendations when they are called for. Happily, our count for the current annual report is sitting at about 75 per cent.

Apart from these accountability responsibilities, management responsibilities in a workplace have increased generally– for example, changes to laws on health and safety in the workplace, and yet again, we are not big enough to warrant having a large corporate staff to deal with them.

So, what I am saying is that Law Commissioners, but most especially the President, now spend a fair amount of time on administration.

Self-initiated work

Another change is that we now do far less self-initiated work. In fact, we hardly do any at all. By way of contrast, some of the Commission's early big projects were self-initiated, for example, the review of arbitration law.[6]

When the Commission was created, there was deliberate choice not to include the word "reform" in our name (in contrast to the names of some overseas agencies). This was to make clear the intention that the Commission would have wider constitutional responsibilities, including through advice on how legislation should be written, and through contributions to the general development of the law.[7]

As part of this we have the power to self-initiate projects (again, in contrast to some overseas agencies).[8] In addition to arbitration, another example of self-initiated work, as well as our wider law-development role, is the Commission's 2001 Study Paper *Māori Custom and Values in New Zealand Law*.[9] This is one of our most highly cited publications, and it has made a significant contribution to the understanding of tikanga Māori as a legal system. We have recently initiated another study paper project concerning the country's legal and institutional framework for emergencies. Professor Janet McLean has been engaged to lead this work. It will focus on pandemics, but we expect it will guide responses to other emergency threats as well.

[6] See Te Aka Matua o te Ture | Law Commission, Annual Report (NZLC R2, 1987).

[7] Geoffrey Palmer *Evaluation of the Law Commission* (Ministry of Justice, 28 April 2000) at 38. The Australian federal agency is called the Australian Law Reform Commission, although the reference to 'reform' in its name does not seem to have disinclined the ALRC to engage in interesting conversations on constitutional matters.

[8] Law Commission Act 1985, ss 6(2)(a) and 6(2)(b). In contrast for example with the situation of the ALRC, which works solely on projects referred by the Attorney General.

[9] Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

However, the power to initiate our own work is seldom exercised mainly due to resource limitations. Self-initiated reform projects have also been less successful than government referred reform work in terms of implementation.[10] It is probably stating the obvious that work which is wanted by government is more likely to be implemented, although there is always the chance of a change in government and a future government wanting it less.

Almost all of our work therefore is referred by government or occasionally Parliament. An example of a Parliamentary reference is s202 of the Evidence Act which requires the Commission to undertake 5 yearly reviews of the Act. We expect to be referred the next review over the next few months. If anyone has ideas about hot topics for reform of evidence law please let me know. (One area we thought in the last review that still needed more attention was the right to silence.)

When deciding what laws really need reform, it can be difficult to separate out legal, social and political issues from each other. To help determine what projects should be referred to the Commission, potential projects are assessed against criteria included in a Cabinet Office circular. They include whether the project requires fundamental review, or independent consideration to promote informed debate or because of a significant difference of views. At the other end of the scale, another criteria is that the work is of such a technical 'lawyers' law' nature that it might otherwise be overlooked.[11] Keeping this general law up to date has been a major part of the Commission's work.

Our current programme reflects a good mixture of these concerns. Apart from the emergencies work, on our current work programme, we are reviewing:

a. class actions and litigation funding,

b. succession law,

c. surrogacy, and

d. adult decision-making capacity.

e. Work on a tikanga project will begin next week.

With the exception of the emergencies project, this work has been referred to us by the Minister. In the case of the tikanga project, this is a reference that we worked hard to receive.

[10] Geoffrey Palmer *Evaluation of the Law Commission* (Ministry of Justice, 28 April 2000) at 60.

[11] Cabinet Office "Law Commission: Processes for Setting the Work Programme and Government Response to Reports" (24 April 2009) CO 09/1 at [8].

The kinds of work we do and how we do it have changed

A third change of note is that the kinds of work we do and how we do it have changed. The Commission has always been involved in doing big law reform projects. Again, the arbitration review for example. The reviews on companies law and Māori fisheries are other early examples. But the Commission often also did some relatively small-scale work on discrete issues. Some early reports are around 20 pages long.

Today, a small project is one that would take 12 to 18 months. Overall, we work on bigger reform projects and produce longer reports. Our most recent report was well over 500 pages. I think this may reflect a range of influences, including:

- The maturity of policy development infrastructure across government. Work can be done elsewhere.
- Difficulties in finding space on the legislative agenda, so working out what is the best use of our limited resources might also suggest that doing fewer but larger projects may make more sense (although I am not sure about this one).
- There are high expectations of wide engagement. This also impacts the scale of the work required and lengthens the reform process. One early(ish) report does not mention consultation, for example.[12]

For example, on the class actions and litigation funding reviews, we received 51 submissions – from the usual sources such as NZLS and the big law firms, but also Te Hunga Rōia, the insurance council, NZX, the Financial Markets Authority, MBIE and the Commerce Commission, Consumer NZ, the Solicitor General and so on. Te Hunga Rōia did not exist when the Commission was created (although it was established soon after, in 1988). Receiving regular submissions from Te Hunga Rōia is an important and noteworthy change in law reform practice. For Ngā Huarahi Whakatau, our review of adult decision-making capacity law, we will have to undertake engagement and consider how we might publish in multiple accessible formats. The terms of reference for this project are available in easy read, braille, NZ sign language, and large text.

Conclusion

Our Māori name, Te Aka Matua o te Ture, was given to the Law Commission many years ago but I am yet to discover exactly by whom or how. It translates as the 'parent vine of

[12] *Acquittal Following Perversion of the Course of Justice* (NZLC R70, 2001).

the law'. Within the Commission we regularly, or maybe even ordinarily, now use our Māori name.

Some of you may be familiar with the pūrākau of the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother, Karihi, find their grandmother Whaitiri, who guards the vines that form the pathway up to the sky. Karihi was impatient and tries to climb the vines first but makes the mistake of climbing up the aka taepa, a hanging vine. He is blown around by the winds and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua, reaches the heavens and receives the three baskets of knowledge. I recently came across a Ngāti Whātua manuscript. It was translated in the 1950s but was written sometime earlier. It varies the script. In this version, Tāwhaki instructs his brother to return home to care for their families.[13] It is less dramatic, but the same messages are clear – the path to true knowledge can be long and difficult. It may be important to hear from others when deciding which path to take. And it may also be important to check in with stakeholders along the way. Some things do not change then, because this was all true for the Commission at the outset and it remains true today.

[13] Hauraki Paora *This was the beginning* (transl 1958) 26. Original held in the Alexander Turnbull Library collection.