

# Te Aka Kōrero

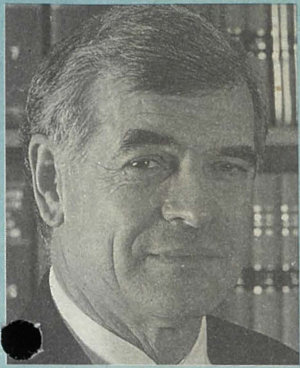
THE LAW COMMISSION QUARTERLY NEWSLETTER

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From Justice Baragwanath, PRESIDENT



THE HIGHLIGHT OF THIS EDITION is the Commission's entry into the world of the internet. We do this to make our work more readily accessible and thereby to attract comment and alternative ideas. We believe this is an important step, and welcome your views and suggestions. Our internet address is <http://www.lawcom.govt.nz>; this newsletter, which will no longer be issued in hard copy, our reports, preliminary papers and other documents will be accessible on it. We will be able to put some of our printing budget to better use.

Recently we finalised our work programme for 1998/1999, and we note some aspects here. Others we will return to in future issues.

The Minister of Justice has invited us to examine aspects of the law of adoption; our reference is in the course of refinement. In addition to Ministerial references, we are exploring the question of systemic fault: how New Zealanders' physical safety can be better protected from the kind of risk that was realised in the Cave Creek disaster and others such as the Kings Cross and Zeebrugge disasters. This will build upon work already completed in the Legal Status and Liability of the Crown reference, most recently our preliminary paper, *Compensation for Wrongful Conviction or Prosecution*, published in April (see article this page).

Following discussion with the Secretary for Justice and Dr Palmer we have proposed terms of reference to review the Judicature Amendment Acts 1972 and 1977 and the common law and to advise how the law may be amended to remove anomalies and increase efficiency in proceedings for judicial review of administrative action.

We are also continuing work in the area of retirement villages, embarked upon at the request of the Securities Commission. Our work will be directed to marketing and to such other issues of concern as ongoing prudential management. We also have in train shared-ownership projects including cross-leases and unit titles.

We continue to monitor current and proposed work against the criteria established last year: Is it of real importance to improving the lives of New Zealanders? Are we the body best able to handle it? We believe our current programme meets these criteria but would value others' views.

In work completed recently we note two recent reports by the Commercial Law team. *Some Insurance Law Problems* (NZLC R46, \$24.95) and *Apportionment of Civil Liability* (NZLC R47, \$19.95) were tabled in the House in May (see page 2 for details).

Forthcoming publications include the Criminal Procedure team's prosecutions report, following on from submissions received on last year's preliminary paper, *Criminal Prosecution* (NZLC PP28). The team are also concluding the first part of the juries preliminary paper. We have reviewed this paper in the light of current research by Professor Young of Victoria University's law faculty and now propose to publish it in two parts: the first part, which will not be affected by that work, will be published in June, and the second will follow Professor Young's report.

## COMPENSATION PAPER WELL RECEIVED

IN APRIL WE RELEASED *Compensation for Wrongful Conviction or Prosecution* (NZLC PP31, \$19.95). This preliminary paper drew a positive response and we are currently analysing submissions. The closing date for submissions is 22 May 1998 and we hope to publish our final report in July.

The paper considered whether, and if so how, compensation should be paid to those who have been wrongfully convicted of, or prosecuted for, an offence. Our system of criminal justice has developed powerful safeguards to prevent the conviction or prosecution of the innocent. But sometimes charges are brought and determined against someone who is in fact innocent, in what is perceived to be the public interest. And occasionally, innocent people are convicted and sent to prison.

Current practice in New Zealand is that compensation is paid, on an ex gratia basis, in accordance with interim criteria adopted by Cabinet in November 1997. To be eligible, claimants must have

- been pardoned, or
- following a referral to the Court of Appeal under s 406 of the Crimes Act 1961, been acquitted or had the conviction quashed without an order for retrial.

The criteria also require claimants to prove that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, and to prove their innocence on the balance of probabilities. In practice this latter requirement places a heavy burden on claimants, as the evidence supporting a verdict of not guilty may not affirmatively establish innocence.

We have considered four options as to the scope of a compensation scheme:

*Continued on page 2*



## WORKPLAN 1998

### Current projects to be completed

EVIDENCE – final report (due August; see cartoon)  
PRIVILEGE – covered under the Evidence report  
LEGAL STATUS AND LIABILITY OF THE CROWN  
PROSECUTIONS – final report  
JURIES – preliminary papers  
ALTERNATIVES TO PROSECUTION – preliminary paper and final report

WOMEN'S ACCESS TO JUSTICE – final reports

INSURANCE – final report

CONTRIBUTION – final report

RETIREMENT VILLAGES – preliminary paper

### Medium priority projects

JUDICIAL REVIEW – new reference, preliminary paper

MAORI CUSTOMARY LAW – final report

MAORI: CORONERS – preliminary paper

DEFAMATION – possible reference after the conclusion of the Lange proceedings

HUMAN MEMORY – miscellaneous paper in conjunction with Evidence report

ELECTRONIC COMMERCE

CROSS BORDER INSOLVENCY – final report

ADOPTION

SYSTEMATIC PROTECTION OF THE PUBLIC

- the current law and practice
- the civil and potential criminal liability of the Crown
- corporate criminal liability
- how the civil law may be used to encourage safe conduct

### Compensation – continued from page 1

- To provide compensation to all who satisfy the Minister of Justice beyond reasonable doubt, either before or after conviction and appeal, that they are innocent.
- To again require claimants to satisfy the Minister of Justice of their innocence beyond reasonable doubt, but to confine eligibility to those who have been pardoned, acquitted or had their conviction quashed with no order for retrial outside the normal appeal process (post-appeal claimants). Those acquitted at trial or on appeal would not be eligible for compensation. The prerogative right to award compensation in cases falling outside the option would, however, remain.
- To confine payment of compensation to post-appeal claimants, but without a requirement to prove innocence. Claimants would have a right to apply to an independent tribunal, whose assessment of compensation would take account of the whole of the case, including the likelihood of innocence. The prerogative right to award compensation

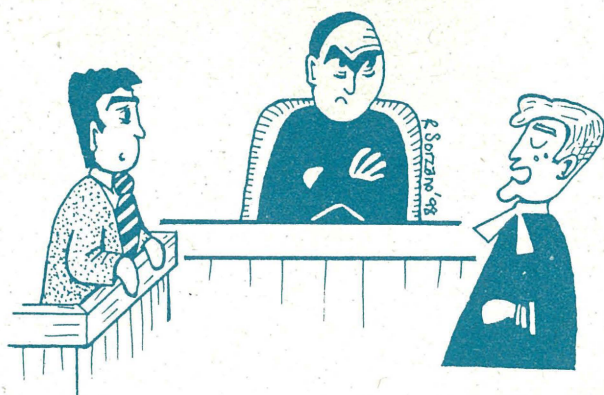
sation in cases falling outside the option would again remain.

- The status quo, ie, to retain an ex gratia scheme and the Cabinet's interim criteria.

The preliminary paper also addressed the following issues concerning a compensation scheme:

- Who should decide issues of eligibility and quantum?
- What losses should be compensated?
- What factors should influence quantum?
- What powers and procedures does the decision-maker require?
- Should awards of compensation be subject to review?
- Is a statutory scheme necessary?

To make a submission or to receive a copy of the paper or report, contact Padraig McNamara, Senior Researcher, PMcNamara@lawco.govt.nz.



*No need for evidence, Your Honour. Seventy-five percent of cases result in conviction, therefore on the balance of probabilities the defendant is guilty beyond a reasonable doubt.*

## COMMERCIAL TEAM REPORTS

TWO REPORTS from the Commercial Law team were tabled in the House in May, one dealing with insurance law and the other, civil contribution.

*Some Insurance Law Problems* (NZLC R46, \$24.95) examines the following:

- insurers' remedies for non-disclosure of material circumstances
- the Insurance Law Reform Act 1977 s 9 in relation to time limits under claims made policies
- the Insurance Law Reform Act 1977 s 11 in relation to problems arising from the way the section has been applied
- the Fires Prevention (Metropolis) Act 1774 (Imp)
- Part III of the Law Reform Act 1936.

The report recommends enacting a draft Insurance Law Reform Amendment Act to address the problems identified.

*Apportionment of Civil Liability* (NZLC R47, \$19.95) suggests some long overdue solutions to the many problems that arise where the same loss is caused by a number of defendants (and perhaps also contributed to by the plaintiff). What answers and equations the courts can use in determining such cases is the subject of proposed legislation in the report – the draft Civil Liability and Contribution Act.

For copies of either report contact Nick Russell, Researcher, NRussell@lawcom.govt.nz.



# PRELIMINARY HEARINGS AND CRIMINAL DISCLOSURE

IN NOVEMBER 1997 the Ministry of Justice and the Department for Courts published a consultation paper on proposed changes to preliminary hearings and criminal disclosure. We made a detailed submission on the proposals based on recommendations in our 1990 report, *Criminal Procedure: Part One – Disclosure and Committal* (NZLCR14). The paper generally favours the type of reform advanced by the 1990 report, but differs in some respects.

## Preliminary hearings

Our 1990 report recommended limiting preliminary hearings by ensuring that evidence is generally presented in written form and limiting cross-examination of witnesses to four specified situations: if the witness

- is to give evidence concerning identification of the defendant;
- is to give evidence of an alleged confession of the defendant;
- is alleged to have been an accomplice of the defendant; or
- has made an apparently inconsistent statement.

The consultation paper proposes that there be an additional ground of "exceptional circumstances" in which cross-examination of witnesses can occur at preliminary hearings. This category is proposed to cover witnesses whose credibility is an issue, and

witnesses who are reluctant to give evidence and have not provided signed written statements. We agree that it is important to be able to call witnesses in these situations but instead propose a better formulation: that it is in the *interests of justice* for the witness to give oral evidence. The interests of justice category would be wide enough to cover the two situations of concern to the Ministry and the Department. It would also meet our concern to safeguard an important source of information for the defence: to allow full information for considering a guilty plea or making a s 347 Crimes Act 1961 application.

In our submission we also drew attention to recommendations in our forthcoming report on the prosecution system which will affect the conduct of preliminary hearings:

- That Crown solicitors should take over all indictable proceedings from the police and other prosecuting agencies as soon as an indictable information is filed, or the defendant has elected trial by jury. Crown solicitors, or counsel appointed by them, would then conduct the preliminary hearing. Efficiencies gained from the proposed changes restricting preliminary hearings would then be enhanced by efficiencies gained from Crown solicitors conducting committal proceedings.

- If preliminary hearings are restricted in the way suggested by the consultation paper, or by the Commission, s 347 of the Crimes Act 1961 is likely to assume greater importance as a filter. We may recommend amending s 347 to include a test that where a judge believes that a reasonable and properly directed jury would find it unsafe or unsatisfactory to convict (or words to that effect), he or she can discharge a defendant. This would clarify the grounds under which a s 347 application can be considered by the court.

## Criminal disclosure

Our 1990 report recommended a tailor-made statutory criminal disclosure scheme, applying to both summary and indictable cases. We also recommended that defence disclosure of alibi evidence should occur in summary as well as indictable cases and that notice should be given of an intention to call an expert witness. That remains our view. The Ministry of Justice and Department for Courts proposal was along the same lines, and raised practical issues of timing and scope of disclosure.

For information contact either Sharon Opai, Senior Researcher, [SOpai@lawcom.govt.nz](mailto:SOpai@lawcom.govt.nz), or Christine Hickey, Senior Researcher, [CHickey@lawcom.govt.nz](mailto:CHickey@lawcom.govt.nz).

# CROSS BORDER INSOLVENCY

THE COMMISSION'S COMMERCIAL TEAM is examining the implications of internationalisation on commerce, especially issues of cross border insolvency.

Cross border insolvency is particularly pertinent given the recent financial crisis in Asia. Asian countries provide much of New Zealand's trade, however very few of them have well-developed insolvency laws – Hong Kong and Japan being the notable exceptions.

In May last year the United Nations General Assembly approved the UNCITRAL Model Law on Cross Border

Insolvency. As part of this examination the Commission will consider whether the model law should be enacted in New Zealand. Issues include:

- Is the model law the right framework for New Zealand to adopt? In other parts of the world treaties have been negotiated between states (eg, the 1933 Nordic Bankruptcy Convention between Denmark, Finland, Iceland, Norway and Sweden). Would a bi-lateral treaty with Australia, either combined with or separate from the model law, be useful?
- Which other countries propose to

adopt the model law? The United States has introduced legislation but it will be necessary to see how many of our other major trading partners do the same.

Attention will also be given to domestic concerns, particularly

- the applicability of public policy issues and their synthesis with the model law, and
- whether key industries (eg, banking) should be dealt with outside the model law.

We plan to release a report in October. Contact Paul Heath, Consultant, [PHeath@lawcom.govt.nz](mailto:PHeath@lawcom.govt.nz).



# MAORI SUCCESSION LAW

LAST YEAR SAW THE PUBLICATION of three final reports on succession law: *Homicidal Heirs* (NZLC R38); *A Succession (Adjustment) Act* (NZLC R39); and *A Succession (Wills) Act* (NZLC R41). Work is, however, continuing on the development of a law of succession for Māori ancestral property in respect of which widespread consultation with Māori has taken place.

The main focus of the work is to identify ways of enabling Māori to succeed to the properties of ancestors who have died without a will. Land is the most obvious form of ancestral property, and is principally held under Crown grant (or its equivalent) following a determination of ownership by the Māori Land Court as Māori freehold land. In most cases, such land is not held under the general title system which applies to land owned by other New Zealanders but is recorded instead at the Māori Land Court. As each

owner dies, the successors can be noted against the records held in the Court. These records are known to be in a less than perfect state, partly because of administrative difficulties in the Court registry, and partly because not all successors take steps to have their succession recorded.

The existing system, however, is based on individual share holding. The result, as property descends to numerous successors, is shares of less and less value. There are also administrative difficulties in this system including complications about who should pay rates. Absentee owners create further confusion: although they retain legal ownership they may take no responsibility for running the land and might even pose an obstacle to major decisions which need to be taken by other owners. In this respect the existing law does not recognise the customary principle of *ahi kaa*, whereby

a family that has not been involved with the local community for a long period of time cannot continue to assert full rights in the land.

Our consultation with Māori revealed major criticism of the existing system. But not all Māori would necessarily endorse a system of customary law. Of those who would, some would have reservations about the practicalities of putting it into effect. In the end, the Commission hopes to outline a system where indigenous succession law might be given appropriate expression, with a view to focusing constructive debate on very important general concerns for the protection and development of New Zealand's indigenous culture.

More detail, including the timetable for the publication of a discussion paper, will follow in a later issue of *Te Aka Kōrero*. Contact Sharon Opai, Senior Researcher, [SOpai@lawcom.govt.nz](mailto:SOpai@lawcom.govt.nz).

## STAFF NEWS

OUR DIRECTOR OF 3 YEARS, Robert Buchanan, left in April to take up a position with the Auditor-General as Assistant Auditor General (Legal). As Director, Robert was responsible for the link between our law reform role and its administrative functions.

As the long-running evidence project comes to a close several people leave the Commission. Judge Margaret Lee (Commissioner) and Elisabeth McDonald (Research and Policy Manager) were both seconded to the Commission for the project and now return to the Wellington District Court and the Victoria University School of Law respectively, to resume their chosen vocations. Both have agreed to continue to advise the Commission on implementation of the code. Two other members of the evidence team have departed: researcher Brigit Laidler leaves the Commission at the end of May. During her 2 years here Brigit also worked for the criminal procedure team. Karen Belt, also a researcher, is leaving temporarily to complete her studies at Victoria, and will return in August.

Michelle Vaughan, a senior researcher at the Commission for 5 years,

has taken up a commercial litigation position at Rudd Watts and Stone in Wellington. Michelle worked on property law, the review of the Official Information Act and, most recently, was project manager for the women's access to justice project.

Philippa McDonald, a senior researcher, returned following a period of cultural leave to resume working on *te ao Māori*. Philippa has now accepted a position with Te Puni Kokiri as Senior Legal Adviser (Law Reform), commencing there in mid-May.

March saw the departure of our senior PA Secretary, Christine Kleingeld, after 5 years. Christine performed a dual role as PA to our director, and co-ordinator of secretarial workloads. Also during March René Trussell-Cullen completed a period of temporary employment as a researcher in the commercial law team.

The contribution of all to the work of the Commission during their respective times here has been greatly valued. They leave behind many friends at the Commission and we record our gratitude for their labours.

The Commission welcomes two

## INTERNET GOES LIVE

The Commission would like to announce that our internet site, [www.lawcom.govt.nz](http://www.lawcom.govt.nz), is now up and running. As a consequence, and because we must limit expenditure to essentials, this is the last issue of *Te Aka Kōrero* that will be printed. It is now available on the internet.

recent additions to the staff. Helen Bradshaw replaces Christine Kleingeld on the secretarial staff. Helen comes to us from Alan Burns Insurance Brokers and has worked for, among others, the Wellington District Law Society and Swan, Davies, McKay and Co, Solicitors. Megan Leaf, a Waikato graduate, joined our commercial team in May, having spent 2 years as a litigator for Hamilton firm, Stace Hammond Grace and Partners.

In other news, the Minister of Justice appointed Christine Hickey, a senior researcher in the criminal team, to the Wellington District Legal Services Committee. Christine will represent the interests of community law centres.