THE LAW COMMISSION

a Kōrero

QUARTERLY NEWSLETTER

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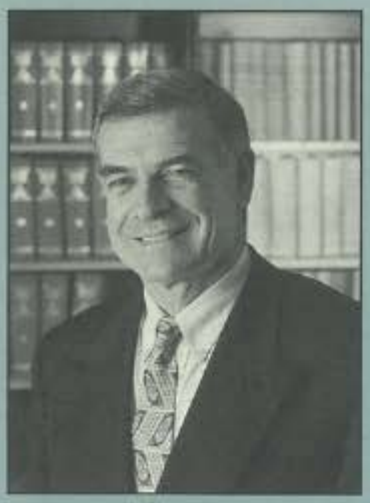
From Justice David Baragwanath, LAW COMMISSION PRESIDENT



Justice David Baragwanath, President of the Law Commission

THE ONLY GOOD REASON for reforming the law is that we hope it will improve people's conditions in the future.

> If the law cannot actually reverse time – bring us back to the good time before the bad event – it tries to make us believe in a future worth wanting; or a future that will be even better. (Adam Phillips, "Getting Even", *London Review of Books*, 19 September 1996)

The New Zealand public believed this when it voted for a new electoral system. The Law Commission has special links with that event – the Royal Commission which looked into the matter was chaired by Justice Wallace (formerly Deputy and Acting President of our Commission). Another of its members was Sir Kenneth Keith, formerly President of our Commission. It is a privilege to follow them and their colleagues.

Even a change like the introduction of MMP can only be effective if there is stability. As always, the politicians (whatever their personal doubts) accepted the public's will and obeyed it. Well-known political practices helped achieve a calm move to an interim regime.

Much of the time the Law Commission adapts and improves the existing law, rather than making root and branch changes. We are often concerned to improve legal procedures, rather than the substance of the laws. Our work on an Evidence Code and on Criminal Procedure are examples.

But some problems require a much deeper review of the law and its values. This may occur within a project (as with succession to Māori ancestral property) or as part of a separate enquiry (as with the Women's Access to Justice Project). When dealing with such issues, we need to remember the philosopher Jeremy Bentham's advice

> . . . that error lurks in generalities; . . . that abstractions are not realities . . . but an abridged mode of expressing facts, and that the only practical mode of dealing with them is to trace them back to the facts . . . of which they are the expression. (John Stuart Mill, "Bentham", *London and Westminster Review*, August 1838; reprinted in *Utilitarianism*, ed Mary Warnock (Fontana, 1972) 86)

Heeding this warning, we must not only look in books, but also visit and speak with people and groups. This gives us valuable insights into social values and future policy, and throws up new issues. Our role is to help reform take place, by offering considered, balanced, and principled advice which takes these insights into account.

The coming of MMP emphasises the differences within the New Zealand community, and the need to deal with them in a practical, good-humoured way. The work of the Commission is most valuable when it seeks out opportunities to help that happen. Many people, both in New Zealand and overseas, contribute to its work, and I am most grateful to them for their support.

ANNUAL REPORT

THE LAW COMMISSION'S ANNUAL REPORT for the year ended 30 June 1996 was published at the end of September. As well as summarising progress on all its projects, the Report identifies a number of strategic issues seen as relevant to the Commission over the next three years. These include the need for co-ordination of law reform activities across the justice sector (particularly the Ministry of Justice and the Department for Courts), the growing agenda of constitutional issues, the methods used in law reform work, the changing technological environment, and the new political environment.

In its three-year work plan the main priority for the Commission is the completion of three large projects:

- women's access to justice, by December 1997,
- the evidence reference, by March 1998,
- the succession project, by June 1998,

as well as advancing its work in criminal procedure and other areas of its work programme. Copies of the Annual Report are available on request from the Commission.

NEW ZEALAND LAW COMMISSION • TE AKA MATUA O TE TURE

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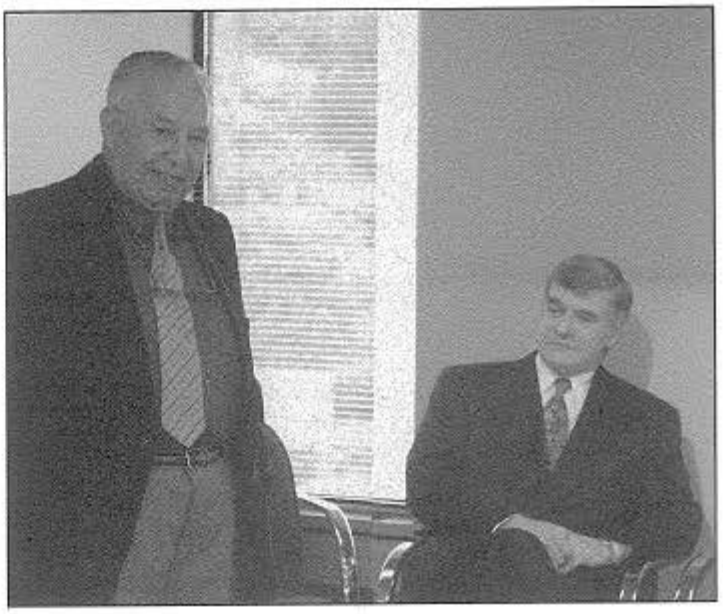
TE KOMITI MĀORI I POWHIRI A TE PEREHITINI HOU

NĀ TE AKA MATUA me tana Komiti Māori, me ētahi o ngā māngai tari kāwanatanga me ngā whakahaere Māori i pōwhiri a te Tiati Baragwanath i tētahi hui i tū ki Te Aka Matua i te 16 o Oketopa/Whiringa-ā-nuku.

Nā te Ahorangi nā Sutton i tīmata ki tētahi mihi poto me ētahi kupu whakamārama. I puta i a ia ngā kōrero mō ngā tūmomo mahi whānui ā-ture kua mahia e te kaiwhakawā i mua i te whakanohonga i a ia hei Tiati.

Ko Pīhopa Manuhuia Pēneti rāua ko te Tiati Matua Durie ngā kaikōrero mō te taha ki te Komiti Māori. I whakaaturia mai tō rāua āhuareka i te whakatūranga i tērā hei Tiati. I kōrero a Tiati Durie ki te kakama i whakaaturia e te Perehitini hou i ana tohenga ā-ture mō te taha ki ngā kaikerēme Māori. E Mātau tahi ana rāua, arā, mā ngā mahi a te Tiati me te Komiti Māori, ka kitea tētahi huarahi e rangona ai ngā whakaaro o te Māori e pā ana ki ngā take whakahirahira ā-ture.

Ka tū a Tiati Baragwanath ki te whakautu, me te hoki mahara i runga i te ngākau atawhai i a rāua ko Ahorangi Sutton e mahi tahi ana hei karaka ā-ture mā te umanga kotahi. Hei tāna, ko te ara whakamua i roto i ngā mahi whakatikatika i te ture ko tērā o te āta whakamātautau i ngā meka me ngā rangahautanga kua roa kē e tū ana. Hei tāna, he tino tauira momoho Te Rōpū Whakamana i te Tiriti e pā ana ki taua āhuatanga. E rika ana ia i runga i te wairua āhuareka, ki te mahi tahi ki Te Aka Matua me te Komiti Māori.



Bishop Bennett addressing Justice Baragwanath

LAW OF EVIDENCE: PROTECTION FOR CHILDREN AND OTHER VULNERABLE WITNESSES IN COURT

WITNESSES WILL RECEIVE greater protection from intimidation in the court room under proposals recently published in the Commission's discussion paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26). A number of significant reforms are proposed. They are aimed at reducing the trauma experienced by witnesses and making it easier for them to give evidence.

The Commission's proposals include:

- a total bar on the personal cross-examination by a defendant of any child complainant; and all other witnesses, including women alleging domestic violence, may apply to the court to prevent any other party cross-examining them in person;
- any witness may be eligible to give evidence on videotape, from behind a screen or from outside the courtroom on closed-circuit television;
- witnesses, especially child complainants, may also be cross-examined on videotape before the trial begins, preventing the need for a court appearance; and
- no witness will be required to be tested for "competency" prior to giving evidence.

"Our reform options are motivated by a desire to get as much relevant and reliable evidence before the judge and jury," says Judge Margaret Lee, the Commissioner in charge of the evidence law reform project. "As early recording of evidence results in better evidence, we believe pre-trial videotaping is an idea worthy of serious consideration. The same arguments support our proposals on the increased use of support people and intermediaries, and the need to take into account the witness's preference. Why add unnecessary stress? It almost always results in less evidence being heard."

The Law Commission is also currently considering how to preserve witness anonymity in cases of potential violent retaliation against the witness. "Preventing an accused knowing the identity of the accuser is also an issue of fairness. But we have to consider the public interest in addressing witness intimidation."

The Commission is seeking submissions from the public on its proposals, and Judge Lee is hoping that a wide range of people will comment on their value. The closing date for submissions is 6 January 1997. For copies of the paper or further information, please contact Elisabeth McDonald, Senior Researcher.

MĀORI COMMITTEE WELCOME FOR THE NEW PRESIDENT

THE COMMISSION and its Māori Committee, with representatives of government departments and Māori organisations, held a welcome for Justice Baragwanath at the Commission on the 16 October. Professor Sutton began with a brief mihi and some words of introduction. He spoke of the wide variety of the Judge's legal work before his appointment to the bench.

Bishop Manuhuia Bennett and Chief Judge Durie each spoke for the Māori Committee. Both expressed their pleasure at the Judge's appointment. Judge Durie referred to the acumen the new President had displayed in legal argument on behalf of Māori claimants. Both were confident that, through the Judge's work with the Māori Committee, a way would be found for the Māori voice to be heard on important constitutional issues.

Justice Baragwanath responded, mentioning warmly his early association with Professor Sutton when both were law clerks in the same firm. He felt that the way forward in law reform must come through the meticulous examination of facts and well-substantiated research. He thought that the Waitangi Tribunal was an excellent model in that respect. He looked forward with pleasure to working with the Commission and the Māori Committee.

WORK ON 'COSTS IN CRIMINAL CASES'

THE LAW COMMISSION is considering the payment of costs in criminal cases as part of the Criminal Procedure Reference. A defendant in a criminal case may be acquitted but still be left with substantial costs from the case. Under the Costs in Criminal Cases Act 1967, successful defendants can apply to be paid a "just and reasonable" sum towards the costs of their defence. In civil cases, the rule is that the loser must pay successful parties' costs.

Different principles apply in criminal cases because prosecutors act for the public, unlike plaintiffs who act for personal gain. The judge must balance

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LAW OF EVIDENCE: CHARACTER AND CREDIBILITY

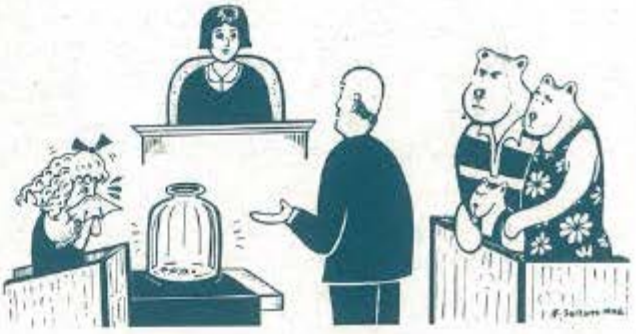
SHOULD THE SORT OF PERSON you are be allowed to affect whether a jury thinks you are guilty or believes your evidence? Should a jury know that a defendant already has convictions? These are two of the fundamental questions considered in *Character and Credibility* (NZLC PP27), another discussion paper by the evidence team which is to be published early in 1997.

The concepts of character and credibility are not easy to define. By character we understand not only a person's disposition, their inherent personality, but also their reputation, what other people think of them. By credibility we mean their truthfulness, whether they intend to tell the truth. The concepts overlap to a large extent, because the sort of person you are often influences whether or not you are to be believed.

The law has developed a set of rules to help a judge decide whether evidence of character and credibility is admissible. On the one hand the rules protect both defendants in criminal cases and witnesses from questions and evidence which might be unnecessarily damaging, and, on the other, they ensure that a court has the opportunity to hear useful evidence. For instance, a court does not need to know that a defendant has convictions for shoplifting when the charge is one of assault; but it does need to know that a witness has an earlier conviction for perjury. The problem is that the current rules are overly complex and not always logical.

The Commission is taking a two-pronged approach to reforming the rules. On the understanding that in New Zealand the current rules do not in practice cause too many difficulties, the first approach proposes simply to remove any anomalies and bring the rules up to date.

The second approach is more radical: it proposes to reduce the law relating to character and credibility to a few basic rules which rely on tests of relevance, a balancing of probative value against prejudicial effect, and "substantial helpfulness" to determine whether the evidence should be admissible. The Commission will be seeking the views of practitioners and others in choosing the more suitable of these two approaches for its evidence code.



"Very well, your Honour, Ms. Goldilocks admits to the porridge incident. But in no way does it follow that she stole the Cookie from the Cookie Jar."

The Evidence team, left to right: Judge Margaret Lee, David Calder, Bill Sewell, and Elisabeth McDonald

LAW AND ECONOMICS ASSOCIATION

THE LAW AND ECONOMICS ASSOCIATION of New Zealand (LEANZ) began its life in 1994. It has more than 180 members. In 1995–6, Commissioner Richard Sutton was its President, a position now held by Terence Arnold, a Wellington barrister.

The role of LEANZ is to stimulate debate on legal and policy issues which economic insights may help to resolve. It has organised regular seminars, and occasional lectures by major exponents of the discipline, such as Roberta Romano and Richard Epstein. It offers a monthly newsletter to members, and in 1995 it edited a special Law and Economics issue of the Victoria University Law Review.

The Commission provides administrative support to the Association, and has co-sponsored lectures and seminars. Anyone wishing to join may enquire through the Commission (ask for Alison Johnston).

Work on 'Costs in Criminal Cases'

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this with the fact that a defendant can incur substantial costs in defending a case. The Commission will be distributing an issues paper to people who are interested in this area. If you would like to receive and make submissions on the issues paper, please contact Ian Murray on 0800 883 453.

NEW PUBLICATION SERIES

THE LAW COMMISSION has launched a new series of publications to accompany its reports, preliminary discussion papers and issues papers. The new series, Miscellaneous Papers (NZLC MPn), will capture material written and circulated by the Commission as part of its projects and advisory work, which does not necessarily feature in the more formal publications. Papers issued in the miscellaneous series to date include:

- *Succession Law: Wills Reforms* (NZLC MP2), which addresses key aspects of the Wills Act 1837 (UK) – which is in effect in New Zealand – and possible reform of certain of its provisions.
- Two papers from the Women's Access to Justice: He Putanga mō ngā Wāhine ki te Tika project: *Information about Lawyers' Fees* (MP3) considers whether information should be provided to clients and potential clients about the cost of legal services and the cost revision process; and *Women's Access to Legal Information* (MP4) focuses on access to information in three areas which women identified as of particular concern – custody and access, domestic violence and civil legal aid.
- *Parliamentary Privilege: New Zealand's Evolving Law – A Reference Paper* (MP5), which examines an issue of topical interest in New Zealand.

COMMONWEALTH LAW REFORM AGENCIES MEET

THE TRIENNIAL MEETING of Commonwealth law reform agencies took place in Vancouver in August, in conjunction with the Commonwealth Law Conference. Representatives of almost 20 agencies attended, including Robert Buchanan (the Law Commission's Director) from New Zealand.

Independent law reform bodies face common issues and problems, as well as frequently being involved in reforming common areas of the law. The triennial meeting has become an important forum for the exchange of ideas and perspectives on law reform. As would be expected these days, one topic of discussion in Vancouver was the potential for the Internet to be used to increase the frequency of exchanges. The Victorian Law Reform Committee in Melbourne has recently established a home page and list server for exchange of ideas between law reform agencies in Australasia and the Pacific, and there is potential for this to be used by other countries as well.

Other topics discussed at the Vancouver meeting were the involvement of law reform agencies in social inquiry (as opposed to "black letter" law reform), and the implementation of law reform recommendations. A paper giving New Zealand perspectives on the former issue was presented by Robert Buchanan.

STAFF NEWS

PADRAIG MCNAMARA was appointed to the Commission staff in September, as a legal researcher in the public law area, after spending three years at Simpson Grierson.

Pippa Fraser, who worked with Justice Baragwanath for many years when he was in practice, joined the Commission in October as the Judge's PA.

Matthew Oliver started work in late November as publications and information officer, a new position created to handle the growing volume of Commission publications.

Nick Russell arrives at the Commission in early December as a legal researcher for the Evidence Project team. Nick has previously worked at the Commission, as a student researcher over the summer vacation.

Trina Dyall (Ngati Maniapoto) has been appointed as a temporary research assistant, undertaking Mana Wahine research as part of the Māori Custom Law Project.

The Commission has also taken on five summer vacation student researchers this year: Louise Tomlins, Karen Belt and Sarah McKenzie from Victoria University, Michael Taia from Auckland University and Kersti Hanson from Otago University.

Secretary Jacqui Kellett was farewelled in October, after 15 months' work for the Commission.