Te Aka Kōrero

THE LAW COMMISSION QUARTERLY NEWSLETTER

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From Justice David Baragwanath, LAW COMMISSION PRESIDENT

FUNDAMENTAL RIGHTS – PARLIAMENT, THE JUDICIARY AND JUDICIAL ACCOUNTABILITY

FOR MĀORI THE TREATY OF WAITANGI expresses fundamental rights; until this generation most other New Zealanders have failed to recognise it as our basic constitutional document. The pragmatism of English "unwritten" constitutional law – judge-made apart from a fragment of Magna Carta, the Habeas Corpus Acts and one or two others – has generally been seen as enough. But times have changed. The Treaty aside, the unentrenched New Zealand Bill of Rights Act 1990 is becoming steadily more influential. The Court of Appeal's judgment in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA), which recognises a cause of action for damages for breach of the Act, is the subject of the next Law Commission report, *Crown Liability and Judicial Immunity* (see page 4).

The Commission recommends acceptance of the *Baigent* decision, and goes further. The Commission sees the decision as a proper discharge by the judiciary of its function to construe legislation and mould the common law, in accordance with policy determined by New Zealand's elected representatives. The report emphasises the educational and normative aspects of the Bill of Rights Act which should in time become as well known to New Zealanders as its equivalents in France and the USA. It mentions the jurisprudence of the European Court – in particular, the *Factortame* and *Brasserie du Pêcheur* cases – which treats European rights as of such moment as to warrant a cause of action for failure to discharge them even though that failure has resulted from legislative inaction. The overall theme of the report is to subject all breaches of citizens' rights caused through public sector conduct to a court-enforced remedy, unless a necessity test for exemption is met. It recommends that existing statutory ouster clauses be subjected to that test; and that where necessary powers should be modified to ensure that citizens can as far as practicable be free of interference with their rights, while nevertheless enabling public sector work to be performed without undue fear and restriction.

There is an important exception in respect of judicial immunity. Judges of the High Court and Court of Appeal are immune at common law for conduct in their capacity as judges. Because of the increased responsibilities of the District Court, we propose that the immunity be extended to its judges also. The effect would be to reverse the decision in *Harvey v Derrick* [1995] 1 NZLR 314. The reason lies in the public interest of avoiding revisiting decided cases, except by way of appeal. The Bill of Rights remedy should not therefore be available in respect of the conduct of such judges. The recommendation does not extend to other courts and tribunals, although their members should be free of personal liability if they have acted in good faith.

This recommendation leaves a gap in the case of those who suffer as a result of judicial breach not curable by appeal. We therefore propose an extra-judicial remedy for those who are wrongly imprisoned as a result of a miscarriage of justice.

Implementation of the report by Parliament would further strengthen the position of the citizen in relation to the State in New Zealand.

WORKPLAN 1997

THE COMMISSION has recently reviewed its role in reforming and ensuring proper access to the law of New Zealand. The pending appointment of two new Commissioners has allowed us to accelerate existing projects and take up, within a tight time-frame, others of particular importance.

Judge Margaret Lee and her team are examining onus and standard of proof, and prior statements of witnesses, en route to completion of the Commission's draft evidence code. We are also considering what warnings should be given to juries in respect of "repressed memory" and stale cases, or whether a more radical approach should be adopted. Our proposals on legal professional privilege may be affected by the prospect of mergers with partners of other professions. The options include narrowing or even removing the absolute nature of the privilege, but we wish to understand the consequences of the options in the light of expected future patterns of professional practice.

In the area of criminal procedure, Les Atkins QC and his team have reached the critical issue of majority verdicts and the fundamental question "Why a Jury?". We are proposing the administration of jury exit polls, adopting the recommendation of the High Court judges' committee, in order to get some hard evidence as to how juries actually work. We are also looking at identification and the contentious issue of keeping silent which was the subject of Preliminary Papers 21 and 25. Another topical and difficult issue we are turning our

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Workplan 1997

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attention to is witness anonymity. It has become apparent that there is a gap in the Crimes Act 1961 which prevented the Court of Appeal in *R v Coleman* [1996] 2 NZLR 525 from reviewing the decision at first instance, reported at (1996) 14 CRNZ 258.

Our statutory function to advise the Minister "on ways in which the law of New Zealand can be made as understandable and accessible as possible" is the focus of our project on Women's Access to Justice: He Putanga Mō Ngā Wāhine ki te Tika, which is revealing the critical nature and extent of the problem. The next step for Joanne Morris and her team is to consider and consult about what needs to be done. Currently the team is focussing on access to legal information, representation and advice, the cost of legal services, and the education of lawyers. Future areas of concern may include reviewing some aspects of public interest litigation.

In a related area, we have begun to identify problems in giving effect to quite specific rights of children which are not being enforced under existing procedures; we are examining a simple procedure analogous to habeas corpus, which itself should be made readily available to non-specialists. We are also considering whether the present law about evidence of children should be fine tuned.

Following on from the report on *Baigent's Case* will be a reform of the law of Crown liability which the tragedy of Cave Creek exposed as defective. We are also taking up work on the making and implementation of treaties, with particular reference to the need for more Parliamentary involvement in treaty-making processes. In private law, there is an urgent need to follow up the reforms of the insurance contracts statutes, especially in relation to non-disclosure.

Of ever-increasing importance is establishing a framework for the balanced handling of Treaty of Waitangi issues, which the Commission is inevitably encountering in a range of areas. In the criminal sphere, these issues arise within the terms of our latest preliminary paper, *Criminal Prosecution* (NZLC PP28), and a proposed project on alternatives to prosecution; they are also evident in our work in Māori custom law, Women's Access to Justice, and Māori succession. The last is part of the succession project where we are reviewing the vigorous responses to our discussion paper, *Succession Law: Testamentary Claims* (NZLC PP24). In the same general area of the law, we are considering the topic of homicidal beneficiaries, as well as the profoundly difficult question of succession in de facto relationships, which bears on the Court of Appeal's decision in Z v Z (unreported, CA 197/96, 20 December 1996).

Overall, we are anxious to ensure that we are focussing on issues that matter, and that warrant the application of public resources. We value comment on and criticism of all aspects of our work, and the contribution of others, inside and outside the legal profession, is crucial to it. Comments are invited and may be forwarded to the Director, Law Commission, PO Box 2590, Wellington, New Zealand.

HOMICIDAL HEIRS – REFORM PROPOSALS IMMINENT

THE COMMISSION is nearing completion of a project to reform and codify the law which debars killers from benefiting from the estates of their victims. The work, which falls within the succession project, emerged as a high priority late last year following the case of *Farrell v Public Trustee* (High Court, Auckland, M505/94).

Why is this area of the law in need of reform? The principle – an application of the more general maxim that people should not be allowed to profit from their own wrongdoing – is well settled, and the occasions on which it is applied may be thought to be infrequent.

In fact, situations in which the principle applies are by no means rare. Between 1982 and 1992 the number of culpable homicides in New Zealand almost doubled; from 53 to 103. The application of the principle has arisen in eight estates administered by the Public Trustee alone in the last decade. It is a sobering fact that about half the murders committed in this country occur in a domestic context.

Although the basic rule is clear enough, its edges are undeniably fuzzy. To what killings should it apply? Should the unhappy husband who kills his passenger wife by his careless driving be treated in the same way as Dr Crippen? What of the murderers for whom some sympathy may be felt, the mercy-killers for example, or battered women?

There is a 1982 United Kingdom statute which has its genesis in a private members bill drafted in an impromptu manner, which left the bill technically defective in many respects. This Act gives the courts the discretion to modify the forfeiture rule in cases where it seems to them just to do so. This measure, although criticised by some English commentators, has been imitated in the Australian Capital Territory. Should we follow suit?

Then there is the question of how widely the principle should be applied? The paradigm situation is a benefit conferred on the killer by a deceased's will or to which the killer would be entitled on deceased intestacy. Such situations are easily dealt with. But should a killer be entitled, by virtue of survivorship, to acquire the victim's share in property owned by killer and victim as joint tenants? And there are a myriad of other situations which will occur to those versed in the law of trusts. A killer with interest in remainder may benefit from killing a

HĒPORA RAHURUHI YOUNG 1925 – 1996

He Poroporoaki

I te rima o ngā rā o Tihema ka wehe atu tērā kuia rangatira o Te Arawa i tāna kāinga ki Horohoro. He wahine i puta mai te ao Māori mai i ōna mātua tīpuna ki te ao hurihuri puta noa ki te ao o nāianei.

He wāhine tikanga rua, he wāhine reo rua a i rite tahi ki a ia te ao Māori me te ao Pākehā. He kuia i āwhina i ngā mahi katoa i pā ki te iwi, ngā mahi marae, me ngā mahi mō tana hāhi.

Kāpiti hono tātai hono kua tae koe i a rātou.

Kāpiti hono tātai hono kei te tangi tonu mātou mō a koutou.

A tribute

ON THE FIFTH DAY OF DECEMBER last, Te Arawa suffered the loss of one of its most outstanding women. Hēpora Rahuruhi Young of Ngati Kearoa and Ngati Tuara died at her home at Horohoro near Rotorua at the age of 71 years, one of our last links with the traditional world of the Māori.

Hēpora was born into a situation where families were still closely involved, not only with their whānau and marae, but also with the extended network of kinship ties and leadership responsibilities based on whakapapa and traditional alliances. Hēpora's family valued education, both in te ao Māori and in English. One of her tupuna attended Hadfield's school at Otaki in the 1840s, and her father was sent to be educated at Waotu as there was no school in Horohoro in those days. After primary and secondary schooling, Hēpora graduated from Wellington Teachers College and spent many years as a primary teacher.

Family influence and personal ambition set new goals for Hēpora. In the early 1970s, she and her husband transplanted themselves and their children from their farm at Horohoro to Palmerston North where they both completed degrees at Massey University. Returning to Rotorua, Hēpora taught for 12 years at Rotorua Boys High School before moving to Wellington where she began a new career as a historian and writer. She wrote the Māori language version of the history of the Department of Māori Affairs, and then wrote and edited stories in Māori in the Te Matawai books – a series designed for more fluent readers of Māori.

Hēpora became a much sought after adviser, counsellor and mediator, giving service as a member of many national organisations such as the Fisheries Task Force, the Waitangi Tribunal, as well as the Māori Committee of the Law Commission. Closer to home, she was a member of the Te Arawa Mataatua Forestry Accord and the Kaumatua Council of the Te Arawa Trust Board. She also gave service unofficially to many other organisations and private individuals until the closing months of her life. All these activities testify to her special qualities.

Her passing leaves a vacuum difficult to fill. She had a rare combination of talents and skills as well as a strong sense of duty and of service to others. The Law Commission was privileged to have Hēpora serve on its Māori Committee, and also as kaiārahi (leader) in the project Women's Access to Justice: He Putanga mō ngā Wāhine ki te Tika. To both roles she brought great wisdom and compassion and a quick sense of humour. We sorely miss Hēpora's guidance and friendship. Our sympathy goes to her husband and family, and to her whānau, hapū and iwi.

Moe mai e te whaea
i te moenga roa

Homicidal Heirs

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prior life tenant, for example, or one member of a class may benefit from killing another member. The possibilities are endless.

And if a killer is barred from taking an interest, who is to benefit instead?

There is no doubt that over time the courts would have produced the answers to all these questions. However, the Commission believes that there is a clear case for a code which is both comprehensive and capable of assisting administrators and trustees to perform their functions without the expense and delay involved in an application to the Court. In many cases the property in question may be of no great substance, and there is no point in frittering trust assets away in legal costs if this can be avoided. The Commission will propose the use of certificates of criminal convictions to avoid the need for the expense and distress involved in proving, in civil proceedings, the homicides already carefully examined in criminal trials.

Using research undertaken at an earlier stage of the succession project, the Commission has been able to act quickly on this topic, and it will be reporting to the Minister of Justice shortly with its proposals and a draft statute.

More detail will follow in a later issue of *Te Aka Kōrero*.

REVIEW OF THE OFFICIAL INFORMATION ACT RESUMED

THE COMMISSION is now completing its review of aspects of the Official Information Act, which it began in 1993 but was unable to complete because of other priorities. We took the opportunity at two seminars, held in February by the Legal Research Foundation in Auckland and Wellington, to raise a number of questions and listen to concerns being expressed about the Act.

We hope to publish a report before the end of June. Please forward any enquiries to Padraig McNamara, Researcher.

CROWN LIABILITY AND JUDICIAL IMMUNITY
A RESPONSE TO *BAIGENT'S CASE* AND *HARVEY V DERRICK*

IN THE CONTEXT OF ITS WORK on the liability of the Crown the Law Commission was asked by the Minister of Justice to advise on what legislative response, if any, should be made to *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA). In that case the Court of Appeal held that damages could be awarded against the Crown for breaches of the New Zealand Bill of Rights Act 1990. Since issues of public sector liability and immunity lay at the heart of the Commission's task, it included the Court of Appeal's decision in *Harvey v Derrick* [1995] 1 NZLR 314 – a case concerning the immunity from suit of a District Court judge – within its examination. The Commission reported to the Minister of Justice last December, and will publish the report, *Crown Liability and Judicial Immunity: A Response to* Baigent's Case *and* Harvey v Derrick (NZLC R37), by the end of April.

The Commission has concluded that there should be no general legislation removing or circumscribing the remedy for breach of the Bill of Rights Act which *Baigent's Case* held to be available. The Crown is, and should be, liable under s 3(a) of the Act for breaches of the Act by the executive, insofar as those breaches may be considered acts of the Crown (for example, breaches by Ministers, ministries and departments). Public bodies, other than the Crown performing "public functions" in terms of s 3(b) of the Act, should have primary responsibility for their own breaches of the Act and those of their personnel. The Commission prefers the continuing judicial development of principles governing remedies – in particular awards of monetary compensation for breaches of the Act – rather than legislation imposing rules or guidelines in this area.

The Commission considers that legislation should, however, be enacted to prevent actions against the Crown (or judges themselves) for breaches of the Act by Court of Appeal, High Court and District Court judges. The policy reasons underlying the current law of judicial immunity – in particular the need for finality in litigation and the availability of adequate rights of appeal – also weigh against allowing litigation under the Act in respect of judicial conduct. One such case has already been decided by the courts: *Upton v Green* (unreported, High Court Christchurch, CP 91/94, 10 October 1996), in which $15 000 was awarded for an alleged breach of the right to natural justice in s 27 of the Act by a District Court judge during sentencing. The Commission also recommends that the present immunity from civil suit of High Court judges should be extended to judges of the District Court.

"You're right, this search warrant should have been for No 5, not No 6. Oh well, I've started so I'll finish . . . got a licence for that dog, have you?"

Legislation should also be enacted to specify that the Crown is liable for breaches of the Act by Justices of the Peace, registrars, bailiffs, and other officials participating in the judicial process. It should relieve those persons of personal liability for breach of the Act if acting in good faith. Consideration should also be given to enacting legislation providing compensation to citizens who have suffered a miscarriage of justice.

In *Baigent's Case* the Crown sought to rely on a number of different statutory provisions protecting the Crown or individual officers from liability or suit. The Commission recommends that there be a systematic review of existing legislation conferring on the Crown and public bodies powers not enjoyed by citizens, as well as immunities from liability to which citizens would be subject, to ensure that these provisions are no wider than necessary to attain their purpose. The review should extend to existing Crown prerogative powers and immunities. The Commission suggests starting the review process by inviting departments to review their own statutory powers and immunities, and all similar provisions in legislation they administer.

Since the decision in *Baigent's Case* there have been only two cases in which the courts have awarded damages for breach of the Act. Nevertheless, claims for breach of the Act represent a substantial contingent liability for some government agencies, in particular the police. Before such claims are heard and a substantial Bill of Rights Act jurisprudence is developed, there will be much uncertainty as to the scope and effect of the *Baigent* remedy and its effect on public powers and immunities. The Commission hopes that its report clarifies some areas of uncertainty, and contributes to the development of this emerging area of law. For copies of the report please contact Padraig McNamara, Researcher.

WOMEN'S ACCESS TO JUSTICE
HE PUTANGA MŌ NGĀ WĀHINE KI TE TIKA

THE PROJECT TEAM has just released its third consultation paper, *Women's Access to Civil Legal Aid* (NZLC MP8). The consultation paper is part of the project team's examination of the cost of legal services. The Commission's consultations with women throughout New Zealand have identified the cost of legal services as most women's greatest barrier to accessing legal services. *Information About Lawyers' Fees* (NZLC MP3) and *Women's Access to Legal Information* (NZLC MP4) were released late last year and a number of very helpful submissions have been received.

Civil legal aid is granted under the Legal Services Act 1991 to applicants who meet a strict financial test so that they can pursue litigation. Approximately 80% of civil legal aid is spent on litigation in family law matters, for example, matrimonial property, custody and access, and domestic violence. The Commission's consultations with women have shown that women usually come into contact with the legal system after a breakdown in family relationships. Women are over-represented in the low income bracket and make up over 80% of family litigants using civil legal aid.

The problems described by women and addressed in the paper include:

- a lack of information about the civil legal aid scheme, including the fact that civil legal aid is a loan and not a grant;
- the difficulty which women on low incomes have paying the initial $50 contribution;
- the costs of applying for civil legal aid;
- the limited eligibility criteria;
- the fear of incurring further debt through the imposition of the statutory land charge; and
- the difficulty many women have repaying the statutory land charge.

The purpose of the paper is to seek comment on the issues identified by the Commission rather than proposing solutions at this stage. Please contact Michelle Vaughan on 0800 88 3453 if you would like to receive a copy of the paper. The closing date for submissions is 18 April 1997.

Further consultation papers will be released this year. In June/July a paper presenting the results of the consultation process with Māori women will be distributed for comment. Papers to be released before June will cover lawyers' education, women's access to legal advice and representation, pro bono–free legal assistance, and costs in the Family Court.

CRIMINAL PROSECUTION – A DISCUSSION PAPER

WHO SHOULD DECIDE whether to prosecute offenders?

How should they make those decisions?

Do we need a Crown prosecution service in New Zealand?

How far should the prosecution of offences remain a State function?

Should private prosecutions be retained?

The Criminal Procedure team, left to right, Philippa McDonald, Moira Thorn, Christine Hickey, Les Atkins QC, Janet Lewin, Diana Pickard, Susan Potter and Ian Murray.

As part of its review of the law of criminal procedure the Commission has published *Criminal Prosecution – A discussion paper* (NZLC PP28), which examines these and other issues related to the prosecution system. Prosecution is an integral part of the criminal justice system, and many of the issues raised in the paper have implications for the whole system – not just the prosecution system.

The paper sets out a number of objectives of the prosecution system including:

- subjecting offenders to the processes of the law;
- protecting human rights;
- economy and efficiency;
- ensuring victims' interests are secured; and
- the need for fairness and consistency in prosecution decision-making and public accountability of the system.

Proposals

The Commission's proposals include:

- further separating investigation and prosecution functions, in particular by establishing an autonomous, national prosecution section within the police;
- increasing the oversight, review, and direction of the prosecution system (including the police and other prosecuting agencies) through Crown solicitors and the Crown Law Office, and ultimately by the Solicitor-General;

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Criminal Prosecution

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- ensuring that all prosecutors exercising a discretion whether or not to prosecute take into account both evidential sufficiency – or a reasonable prospect of conviction – and public interest factors;
- ensuring that all prosecutions – except private prosecutions – are brought in the name of the Crown;
- clarifying the law to ensure that all prosecution decisions, including those of the Serious Fraud Office, are subject to an effective form of judicial review;
- retaining preliminary hearings although in a modified form;
- making greater use of minor offence and infringement notice procedures;
- further examining the concerns that Māori have with the criminal justice system; and
- improving the situation of victims.

Most of the changes proposed do not require legislation and can be brought about through administrative reforms. The option of establishing a Crown prosecution service was examined but is not proposed. The Commission considers that the proposed reforms – which build on and strengthen the present structure – will assist the prosecution system to meet its objectives, particularly in the area of increased control over and public accountability of the system.

The Commission seeks your views on its proposals and would like to receive them by Friday, 2 May 1997. For a copy of the discussion paper or for further information please contact Christine Hickey, Senior Researcher.

NEWS FROM THE EVIDENCE TEAM

THE EVIDENCE TEAM has started 1997 on a busy note, and has acquired two new researchers: Nick Russell will be with us full-time, and Karen Belt, previously a summer vacation worker, will be employed part-time. Both appointments have been made to help the Commission reach the target of April 1998 for producing a complete draft evidence code.

The discussion paper *Evidence Law: Character and Credibility* (NZLC PP27), outlined in the December issue, appeared at the end of February. The team is also finishing internal papers on a number of topics including warnings and corroboration, burden and standard of proof, and how witnesses identify themselves in court.

The New Zealand Law Society has set up a committee of senior practitioners to assist in getting the legal profession's input to the final stages of the evidence project. This is a welcome development from the Commission's point of view.

Meanwhile, the Commission has received many helpful submissions on the discussion paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26). It welcomes comment on other work in the evidence area. Anyone interested in receiving papers and making submissions should contact Elisabeth McDonald, Senior Researcher. The closing date for submissions on *Evidence Law: Character and Credibility* is 28 April 1997.

PUBLIC LAW INSTITUTE – NEW DIRECTOR

AUCKLAND SENIOR LAW LECTURER and former Law Commission researcher, Janet McLean, has been appointed Director of the Public Law Institute of Victoria University of Wellington. She will replace the founding director, Paul Walker, who has returned to the United Kingdom. Janet takes up the position in mid 1997.

1997 SUBSCRIPTIONS

ANNUAL SUBSCRIPTIONS are available for the Law Commission's 1997 publications. Subscribers receive copies of *Te Aka Kōrero*, all publications in the *Report* and *Preliminary Paper* series, and (upon request) publications in the *Miscellaneous Paper* series. For information on subscriptions please contact Matthew Oliver, Publications Officer.

STAFF NEWS

MEMBERS AND STAFF of the Commission farewelled Professor Richard Sutton (pictured below) at the end of his term on the Commission in January. Richard was appointed as a Commissioner in 1991, and served as Deputy President (and briefly as the acting President) from the middle of 1996. At his farewell Justice Baragwanath spoke of Richard's major contribution not only to the work of the Law Commission but also as a law reformer over a period of many years. As one of New Zealand's leading academic lawyers the Commission had benefited hugely from his presence, which would now be greatly missed as he returned to Otago to teach at the law school.

Three members of the research staff departed the Commission at the end of February. Bill Sewell, one of our longest serving senior researchers, has left to pursue his interests as a writer. His contribution to the redesign of the Commission's publications last year, and the launch of *Te Aka Kōrero*, as well as his editorial and writing expertise, has been greatly valued.

Another senior researcher, Janet Lewin, has left to join the policy team at the Department for Courts as a senior adviser. For the past 3 years Janet led the team of researchers on the criminal procedure reference, and was responsible in particular for the Commission's work on the privilege against self-incrimination which was published last year.

Ian Murray, for the past 3 years a member of the criminal procedure and evidence teams, has left to join the prosecution team at Luke Cunningham and Clere in Wellington.