A NEW ZEALAND PERSPECTIVE ON LAW REFORM

John Burrows*

I have been asked to speak specifically on law reform in New Zealand but since the subject matter of this conference is trans-Tasman legal relations I shall take the opportunity at various points of comparing the arrangements in the two countries.

I. What is a Law Commission?

I belong to the New Zealand Law Commission. There are Law Commissions in Australia too, both at State and Federal level. They are called Law Reform Commissions but they are in essence the same creatures as our New Zealand Commission.

Law Commissions have the same essential characteristics everywhere. They are government funded, but they are independent in the sense that they do not receive direction from Ministers and are able, and indeed expected, to exercise their own independent judgment. They are research-based in that their recommendations normally follow from a process of detailed consultation and comparative research. They also have the luxury of being able to see across the whole legal system, and are tasked with keeping the law as a whole under review.

Those are the similarities. There are differences between the New Zealand and the Australian models, but they tend to be operational rather than conceptual. In Australia, most Commissioners are part-time. A typical model is for there to be a full-time Chairperson with a number of part-time Commissioners. While New Zealand has had its share of part-timers over the years, our current Commission comprises five full-time Commissioners. That follows the English model.

The types of appointments are a little different too. In Australia, university academics have traditionally played a strong role. So have judges and law practitioners. The chairpersons of the Australian Commissions have tended to be either judges or law professors. In New Zealand we have had our share of judges and practitioners, but the links with academe have been rather less. A number of Commissioners have been university academics at some time in their past, but it has been rare for a law professor to take time out from the university to be a Commissioner for a term, and then return to the university, a pattern which is common elsewhere. Richard Sutton was a notable exception. For much of its life the New Zealand Commission has had no one with active and continuing links with a university. I do not think there is any deliberate policy about this. It is just the way things have worked out. I think it would be good to have greater institutional links between the Commission and the university system. There is currently not as much interaction as there might be.

* Law Commissioner, Wellington, New Zealand.

The current composition of the New Zealand Commission stands in considerable contrast to its Australian counterparts. Four of the five Commissioners have had close links with the government sector – Sir Geoffrey Palmer as a former Minister of Justice and Prime Minister, Warren Young as former Deputy-Secretary of Justice, Val Sim with experience in both Crown Law and the Ministry of Justice, and George Tanner as former Chief Parliamentary Counsel. I, a former academic, am in a sense the odd man out. The knowledge and experience of my fellow Commissioners in relation to the inner workings of government – a mysterious and arcane subject at best – has been of very great benefit to the Commission.[1]

The New Zealand Commission also differs from its Australian counterparts in the number of projects on its work programme. Perhaps it is the respective numbers of full-time Commissioners that dictates this. Most of the Australian Commissions have three or four projects in train at the present time. New South Wales, with seven, has the most. We at the New Zealand Commission have a work programme of 15 active projects, with additional run-off responsibility in relation to a few others where our reports have been completed. That is a workload equivalent to that of the United Kingdom Commission.

The kinds of project differ a little, too. It is fair to say that the Australian Commissions (and the United Kingdom one too, for that matter) tend to be involved with law at the "lawyer's law" end of the scale, although I note that from time to time they tackle a few hot social issues such as family violence. But not often have they been thrown into such contentious social and political areas as the sale of liquor and misuse of drugs, both of which the New Zealand Commission has recently had to grapple with.

One further difference is that the New Zealand Commission has taken on the role of scrutinising all Bills coming before Parliament and reporting on them to the Legislation Advisory Committee which then decides whether or not to make submissions to Parliament. This scrutiny and reporting assignment involves considerable resource, but adds value within the Commission in that it keeps us abreast of what is going on across the whole spectrum of legislation. It enables us to note, and take stock of, any new trends in law-making and any departures from traditional principle. We hope that our efforts add value to the Legislation Advisory Committee as well.

II. The Commission is Only One Law Reform Body

In no country is a Law Commission the only law reform body. In fact everywhere most of the work of law reform is done by other bodies, in particular government departments. Currently in New Zealand there is underway a review of our consumer laws being carried out by the Ministry of Consumer Affairs. A Bill to reform the law relating to the financial markets originated in the Ministry of Economic Development. A new Food Bill has

1 Since this paper was delivered there have been changes: Justice Hammond, the new president, was once Dean of the Auckland Law School, and new Commissioner Geoff McLay is currently a Professor at Victoria University of Wellington.

resulted from the work of the Food Safety Authority. All of these involve substantial review and reform activity. Some of them, particularly the first, might have been done by the Law Commission.

So, the question is what topics are more appropriately allocated to the Law Commission, and which to these other organisations? There are no watertight criteria, but in general the work allocated to the Law Commission should reflect those essential characteristics which I outlined at the beginning of this talk.

In New Zealand a Cabinet Office Circular, CO (09) 1, specifies that projects allocated to the Law Commission should meet one or more of the following criteria. They should:

1. involve issues that span the interests of a number of government agencies and professional groups;
2. require substantial long-term commitment or fundamental review;
3. involve extensive public or professional consultation;
4. be done independently of central government agencies because of the existence of vested interests or a significant difference of views;
5. require independent consideration in order to promote informed public debate on future policy direction;
6. involve technical law reform of what is often called "lawyer's law" but would be likely otherwise to escape attention.

The items currently on the Law Commission's programme by and large reflect those criteria: the review of sale of liquor reflects (1); the review of the law of privacy is an example of (2); the addition of the subject of information sharing between public agencies to the privacy reference happened because of (4). It is quite true that in a number of cases other agencies might equally well have undertaken any one of these, but the Law Commission got the job.

However, in addition to those Cabinet mandated criteria, a number of other factors also influence the decision as to what work we take on.

First, while the New Zealand Commission has from time to time undertaken topics of significant social controversy and political sensitivity (sale of liquor perhaps being the most notable of those), governments will often prefer to have such matters dealt with by their own ministries or departments. There is always a risk that an independent Commission may come up with recommendations that spark considerable party political differences. Governments may sometimes wish to have more control over the outcome. There is of course no clear line here. Sometimes what may seem to be the driest and most technical legal subject can raise a contentious social issue – for instance the review of the Limitation Act raised the fraught subject of historic sexual abuse.

Secondly, New Zealand's international relations are within the control of the New Zealand Government. It would be unusual to give a Law Commission a project which involved such relationships.

Thirdly, urgency can be a factor. Sometimes governments need to respond to a problem with considerable speed, never more obviously than in the recent case of the disastrous Christchurch earthquake. It is not in the

nature of Law Commissions to come up with immediate solutions. Longer term commitment is part of their *raison d'etre*. For quicker solutions special targeted task forces are a possibility. More often a department is asked to fashion a rapid solution.

Fourthly, and very obviously, Commissioner expertise can be an influencing factor. If a particular Commissioner is well-known for his or her expertise in a certain subject, it may make sense for a review of that subject to be referred to the Commission. I note by way of comparison the style of the United Kingdom Commission which has five subject-matter teams, each headed by an expert Commissioner.

III. Independence

Independence is a hallmark of a Law Commission. The Minister responsible for the Law Commission settles our work programme, and can request us to adjust our priorities, but Ministers cannot, and do not, try to influence our recommendations. We are truly free agents. However, the exercise of that independence is not absolutely straight-forward. Almost every area of law and social policy is overseen by a government department or ministry. Every Act of Parliament bears an italicised legend that it is "administered" in a named department or ministry. Our health legislation is the preserve of the Ministry of Health. Our crimes legislation is administered by the Ministry of Justice. Our legislation about schools and universities is administered by the Ministry of Education. Sometimes the administration is shared: for example the Land Transfer Act is administered by the Ministry of Justice and Land Information New Zealand.

Whenever the Law Commission has a project referred to it, there will be a government department in the picture. In the distant past the Commission sometimes did not take proper advantage of that, and worked on its own – independence in the purest sense. Yet there are great advantages in consulting closely with relevant departments. The first is simply that they have considerable knowledge of the topic. The second is that if we do not consult with them, we may well find that when our report is produced they do not agree with it. That will affect its acceptance.

The Commission now makes an effort to work with the relevant government department. The Cabinet Office Circular on the Law Commission makes that clear. It says: "If a project is approved, departmental resources should be made available to work on the project so that officials are kept in touch with the development of the project and can provide advice on it."

Usually the department concerned is happy for us to do the work, keeping itself available for consultation when required. But sometimes there is much closer collaboration. We have recently had some very successful collaborations with government departments. Our report on the Presentation of Statute Law was prepared in conjunction with Parliamentary Counsel Office. Our report on the Review of the Land Transfer Act was the result of fruitful collaboration with Land Information New Zealand and the Ministry of Justice. The review of the tribunal structure in New Zealand was a joint exercise between the Commission and the Ministry of Justice.

Of course it can sometimes happen that the Commission and departments take a different view on what should be done. It would be remarkable if such differences did not sometimes arise. When they do we strive, if we can, to reach a common view. Sometimes the points taken by the department can genuinely enable us to reach a position different from the one we took at the outset, and vice-versa. Sometimes both sides end up by modifying their initial standpoint. But if in the end we hold strongly to our view, and it differs from that of the department, the Government will be informed of that difference, and there may end up being a split recommendation. On no occasion has the Commission compromised its independence.

I understand that in some other jurisdictions Commissions keep more of a distance from government departments for fear that their independence might be jeopardised. I believe that such fears are overstated.

Law reform is a pragmatic process. What we want our reports to come up with solutions that will work in practice.

IV. Law Commissions Only Recommend

I turn to another matter which is related to this question of independence.

Law Commissions recommend law. They do not make it. Government and Parliament make law. So in a sense when a Law Commission has produced its report and made its recommendations, it ceases to control the topic. Government and Parliament will decide what to do. There are three hurdles which a Law Commission report must clear before its recommended legislation is passed.

First, the Government must decide whether or not it will accept the recommendations. The process for determining this has changed several times in New Zealand. Initially the report was simply presented to Government and far too often nothing happened for a very long time. There are cases of reports sitting idle for more than 10 years before being taken up, if indeed they were taken up at all. Then a requirement was introduced that the Government must respond to a Law Commission report within six months of its presentation. That worked somewhat better, but still imperfectly. Sometimes the response was that some of the recommendations required further and closer scrutiny.

The process currently in force is thus described in the Cabinet Circular.

> Once a Portfolio Minister has received a Law Commission report a draft Cabinet Paper will be prepared as soon as reasonably practicable reflecting the views of the Minister and all relevant agencies, and incorporating split recommendations where there is no consensus. … The relevant Minister will submit the paper to a Cabinet Committee seeking Cabinet's approval of the recommendations in the Law Commission report to the extent that the Minister considers appropriate.

The Circular provides that the Minister will decide, on a case by case basis, which agency will prepare the draft Cabinet Paper. It can be the Law Commission, or the relevant department or agency, or the Law Commission jointly with the department or agency. Practice differs from case to case.

Whichever method is adopted, the Law Commission in recent years has had a good record of implementation of its reports. Sometimes some of the recommendations are varied. Sometimes not all of them are accepted. But it

is rare these days for a Commission report not to be actioned at all. The New Zealand Law Commission can currently be pleased with the government uptake of its reports. It was not always so in the past.

The second hurdle which a proposal must overcome is to obtain a place on the government's legislative programme. Proposals are given a priority ranking from 1, the most urgent, to 5, the least urgent. These priorities are determined by Cabinet and are not something over which the Commission has any direct control or influence. Once on the legislative programme a Bill will be drafted.

The third hurdle, as it were, is Parliament itself. Once a Bill is introduced Parliament assumes control of it. It may be much amended in Select Committee and Committee of the Whole. Sometimes the Commission is an adviser to the Select Committee, but not often. Very few Bills indeed escape attention in these Committees. They often emerge at the end of the process with a number of their clauses changed. Bills resulting from Law Commission reports are no more immune than any others.

This is all part of the democratic process of which we in New Zealand can be proud. In few other jurisdictions are the public able to have their say as much as they can in submissions to Select Committees in New Zealand. Even the driest technical legal matters such, for example, as the Limitation Bill which recently passed the New Zealand Parliament, can be subject to amendment in the House. And that can be because members of the public or an organisation such as the New Zealand Law Society has spotted a gap or flaw which needed fixing just as much as because the politicians take a different view. Even Law Commission recommendations are not always perfect!

The other significant feature of the legislative process is the Order Paper. It is always something of a mystery to outsiders how a Bill's position on the Order Paper is determined. Bills can sometimes sit low on the Order Paper for months or even years. Paradoxically it is sometimes the least contentious and most straightforward of measures which undergo this fate. That technical measure, the Limitation Bill which I referred to earlier, took 15 months to wend its way through the process. The Inquiries Bill, an apparently uncontroversial measure which attracted very few submissions to Select Committee, has been in the House for over two years. Sometimes Bills resulting from Law Commission reports fall into this category. It has prompted commentators from time to time to wonder whether there could not be a fast track process to hasten the progress of non-controversial law reform Bills – not just Law Commission Bills but also others in this category. Not only would this mean reform happened more quickly, it would also reduce the extremely high workload of the House of Representatives.

The Australian Parliament has a "main committee" which serves this purpose. By all accounts it works. A special procedure has recently been introduced into the Upper House in the United Kingdom for uncontroversial bills: it involves a "second reading committee" and a "special public bill committee". To introduce this or some other fast track process in New Zealand would no doubt not be straightforward because it would

require determining which Bills are likely to be non-controversial. But it should be possible to devise a method of removing a Bill which has been initially assigned to the fast track back into the normal process if objections are raised at any stage. So far proposals for this kind of expedited process have not met with a favourable response in New Zealand.

V. What is the "Law" in Law Reform?

I wish now to ask what may sound like a meaningless question – what is the "law" in law reform? Much of the work I as a Law Commissioner do would not be regarded by some people as "law" at all. The law consists of legislation and case law. If in a particular area that law is not working as it should, the question is how it should be changed. When those changes have been settled and adopted by Parliament they become new "law". But in between the old and the new law is a process of devising and determining the policy of that new law. Much that goes into the policy process goes well beyond "law" as commonly understood.

When I was involved in a project on the law relating to private schools, some of the questions I had to ask were pure social, educational and economic policy. How should a school's curriculum be determined? Should patriotism still be taught in New Zealand schools? If a school is not measuring up to the required standard, what steps should be taken to improve it? One does not have to be a lawyer to answer questions such as this. Almost any informed and intelligent citizen could have an opinion worthy of consideration.

In much the same way, the Law Commission's project on reform of the Sale of Liquor Act involved some questions of deep social significance. How far should liquor advertising be controlled? What should be the drinking age? Should the local community have input into decisions about the granting of new liquor licences? Once again you do not have to be a lawyer to ask and answer questions such as those.

It is surprising how often even projects that may strike an outsider as pure "lawyers' law" can raise sensitive policy issues. For instance the reform of the Limitation Act – ostensibly a technical measure – raised the difficult issue of historic sexual abuse. The review of the Judicature Act 1908 has already provoked the question of whether there should be a judicial interests register.

There are no bright lines between lawyers' law and other sorts of law. This leads me to ask two questions. The first is, why are Law Commissioners here and elsewhere almost invariably lawyers? Why are the great majority of their research and policy advisers also lawyers? (It is not inevitably so. In the New Zealand Commission at the moment we have two research staff who have degrees in the humanities rather than law.) I answer this question by saying that some of what the Law Commission does is more towards the lawyers' law end of the scale. But, even where there is a considerable non-legal policy element, that policy will eventually have to be contained in a legal vehicle, namely an Act of Parliament. And that legal vehicle must fit securely into the legal system as a whole. It must not conflict with other

Acts, and it must not offend against basic legal principle. The processes and remedies it prescribes must be recognised by the law, and be in accordance with best legal practice. So we lawyers have a critical role to play.

Nevertheless, as I have said before, much of what I do is in the realms of policy rather than law and it requires much delving into other people's disciplines and much learning about things other than law. We Commissioners spend a great deal of our time consulting others on matters which are outside our immediate experience. Law Commissions have to be deeply consultative organisations. If they proceed with blinkers on, not looking outside their own discipline, their proposals will quite simply not be workable. So we are often taken outside our comfort zone.

For my own part, I think there is room in Law Commissions for more than just a few people who are not lawyers – people with different knowledge and different perspectives.

My question "What is the law in law reform" has another aspect. It is related to the first. Sometimes the best solution to a problem may not be a legal solution at all. We are coming across that in our project on the Official Information Act. People seem to have trouble understanding certain aspects of that Act. But is the solution to engage in amendment of the Act? In the case of a few provisions perhaps, but in the case of others I think more can be achieved by training and education, and by providing guidance manuals.

It is much the same with the Privacy Act which we are also reviewing. A question we have from time to time to confront there is whether amendments to the Act, or a system of guidelines sitting outside it and supporting it, is the better way to go.

At times I wonder what the boundaries of law are. There are many ways of influencing human behaviour, and the law is only one of them. Acts and regulations, which we may call "hard law", shade into various sorts of tertiary rules, codes of practice, and guidelines, made under delegated authority, which are sometimes called "soft law". Some of them are not really law at all. Yet in their own way they can all prescribe and determine how people ought to behave. Law Commissions can get into that territory too.

VI. The Trans-Tasman Context

My final topic returns me to our trans-Tasman context. Whenever the Law Commission is given a project, one of the first things it does is to see how that topic has been handled in overseas jurisdictions – in Australia particularly, and also in other common law jurisdictions such as Canada and England. We are often delighted to find that there have been recent reforms in those countries which we can study. When we were looking at a new structure for tribunals in New Zealand, we were much attracted to VCAT in Victoria and to SAT in Western Australia. When we were looking at the Land Transfer Act we found some of the State reforms to the Torrens legislation in Australia were of helpful and persuasive interest. At other times we find that Law Commissions in these other jurisdictions are working concurrently on the same projects as we are. So in our recent work on Privacy we have been delighted to meet and hold discussions with, and to

share drafts with, members of the Australian Law Reform Commission and the Victorian and New South Wales Law Reform Commissions who were working along parallel lines. This cross-fertilisation has been very useful to us. At least we discovered that we had common problems even if we did not know all the answers to them.

Here, however, we need to be careful. New Zealand used to borrow shamelessly from the United Kingdom. It has also from time to time based its legislation on similar models from Australia. Our Land Transfer legislation is just one example. But each jurisdiction has grown in its own way, and there can be dangers these days in blindly assuming that is what is right for one jurisdiction is therefore right for the other. Often it will be, but we need to be sure that our circumstances are the same. That can sometimes be quite a difficult question to answer. The Privy Council, when it used to decide to let the New Zealand Court of Appeal go its own way, would sometimes say it was doing so on the basis of "local conditions". It was never absolutely clear what this meant. Sometimes it seemed to mean not just social conditions, but rather that the law had developed in a different way for whatever reason.

Sometimes New Zealand's small size makes it different. Problems which have become serious in a larger jurisdiction may not assume quite the same proportions here. A government department in New Zealand has recently been consulting on cartel criminalisation. We really need to ask whether cartels are such a problem in this country that they need the heavy-handed solution which has been resorted to in Australia. (It may be, of course, that the impetus for reforms like this comes from elsewhere than Australia. There may be international pressure, and it may be difficult to resist).

Sometimes we simply cannot afford reforms of the kind which may have worked successfully overseas. The VCAT tribunal structure requires large expenditure of resource. The simultaneous arrival in New Zealand of a new government and an economic recession meant that a solution of the VCAT kind had to be taken off our tribunal reform agenda.

At other times things have just developed differently in the two countries. When we were looking at the degree to which government regulation is acceptable in private schools, we had to look with caution at the Australian model where the environment is rather different. Many more students go to private schools in Australia than in New Zealand, and the level of government subsidy is higher. What is therefore appropriate by way of legal controls in the one country may not be in the other.

In similar vein we have to ask carefully whether we should be following the Australian models for developing our official information legislation. They have moved there to an Information Commissioner model. But it is probably fair to say that open government has grown more effectively in New Zealand than in Australia. Our Official Information Act covers more types of information than does the Australian Federal one. So perhaps we do not have quite the same need in this country for an independent champion to push the principles of open government forward. Or do we? We must not rest on our laurels.

In yet other areas our legal constructs have just developed differently. We have in New Zealand an accident compensation system. That is not replicated in many other places. Our system of crown entities is very much our own. We have a Treaty of Waitangi and a Bill of Rights which are not replicated in some other jurisdictions. Any new piece of legislation which law reformers recommend has to be a good fit with the system we have. It becomes part of a much larger jigsaw. What fits the Australian system may sometimes not fit so well here.

There is quite a lot of historical scholarship about legislation which New Zealand copied from other jurisdictions. Less work has been done to clarify the areas where New Zealand is different.

So, while we can learn a great deal from Australia and other jurisdictions, and while in many areas harmonisation is the way to go, there are other areas where we have to sit back and ponder whether what works in Australia will work quite as well here. But even in cases like that, we learn much by examining the other jurisdiction's model. We never quite fully understand our own system until we contrast it with another.