Law reform and the legislative process

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This article is an edited version of a paper prepared for the 1980 conference of the Australasian Law Schools Association held at Otago University. Professor Orr, a former Secretary for Justice, here discusses law reform in New Zealand and refers particularly to the role of the Department of Justice in the development of the law.

Any discussion of law reform which fails to take account of the legislative process will be at best incomplete and at worst quite misleading. Well researched and well written reports recommending changes by whomsoever prepared, which lie pigeonholed, constitute a frustrating waste of time and energy and do nothing to reform the law. The critical step is their passage into law. Any appraisal of the relative success or failure of a country's record in law reform must finally be measured in terms of the quality and quantity of enacted legislation. The growing literature on the subject of law reform, both here and abroad, too often tends to overlook or take for granted the crucial role of the executive and the legislature. In the New Zealand context, where private members' Bills rarely advance beyond a first reading, this means that the executive at both ministerial and departmental level plays a key role. If the executive lacks drive and interest, or fails to secure the necessary time on the legislative programme of parliament, law reform will languish. The converse, as I expect to show, is equally true.

What is meant by law reform? Most commentators today see it falling under two broad heads. First, what is conventionally known as "lawyers' law". This is chiefly concerned with updating the Common Law in contract, tort and real and personal property, with equity, the rules of evidence and procedure and with various aspects of public and administrative law. Much law reform in this area has tended until recently to be non-controversial and to occasion little political interest or concern. Increasingly, as lawyers' law comes to be updated, interest is moving to the second broad head, which is concerned with social, socio-economic and administrative matters. By contrast with the first category, these can arouse quite widespread public interest, pressure groups become actively involved and the legislative prospects of proposals for reform are much more uncertain. Clearly,

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if they are to have any chance of legislative approval, they must conform in a broad way with the prevailing political philosophy of the government of the day and, in particular, they must appeal to the minister directly responsible. In turn, the attitude of the minister's departmental advisers can often, but by no means always, be of critical importance to their implementation.

The broad purpose of this paper is to examine and evaluate the adequacy of present institutional and other related procedures for law reform in New Zealand. These are the product of historical evolution and can be fully understood only in the light of such development.[1] In particular, any assessment of the need for New Zealand to fall into line with conventional wisdom which increasingly, in overseas jurisdictions, accepts a full-time Law Reform Commission as an essential instrument for effective law reform, should be made only with a full appreciation of how we have arrived at our present situation.

Long before permanent law reform commissions were thought of, New Zealand was actively engaged in law reform. The first creative period dates from the 1870s into the first decade of the 20th century. B. J. Cameron has fully described these innovations in the field of lawyers' law.[2]

The most remarkable and original legislation of this period was the well known Testator's Family Maintenance Act 1900. The success of this radical innovation, which incidentally was a private member's Bill but passed with general consensus, owes much to the willingness of the courts to interpret it creatively with the result that it has survived, with incrementations, substantially as originally conceived. It has been copied extensively in Australia, in the United Kingdom and in some Canadian provinces.

Not mentioned by Cameron, no doubt because they fell outside the field of conventional law reform, were a number of other legislative innovations of the Liberal-Labour Government which came to power in 1891. Pember Reeves' Industrial Conciliation and Arbitration Act 1894 for the first time anywhere introduced compulsory arbitration. He completely revised factory and related legislation to form a detailed and comprehensive code. Women were granted the franchise in 1893, the only precedent being in three mid-western American states. In 1898 Seddon put through the Old Age Pensions Act, another Empire first. Earlier innovations were a Government Insurance Office and the Public Trustee.

For a time New Zealand aroused the interest of American, French and English political commentators, who visited New Zealand to see for themselves this social laboratory in action. Even that formidable couple Sidney and Beatrice Webb could not resist an inspection.

The reasons for this flowering of innovative legislation over a wide field are complex. André Siegfried, writing in 1914, had this to say in partial explanation:[3]

> The relative simplicity of their social organism, the more than insular isolation of their colony, have led them to persuade themselves that they are capable of solving

1 For a valuable discussion see B. J. Cameron (1956) 32 N.Z.L.J. 72, 88, 106
2 Op. cit. 88 et seq.
3 *Democracy in New Zealand* (Bell, London, 1914) 46.

> their own problems, and that so far from being the disciples of Europe, they are intended to out-distance it in the path of progress and to give it advice and examples. Thus it is that the almost complete absence of conservative forces, the novelty of the problems to be solved, and the claim to be in the advance guard of civilisation, have brought it about that the little English colony of the Antipodes has become the chosen land of the most daring experiments.

Whatever the reasons, the glow of national pride engendered by this period of legistative experimentation has lingered in the consciousness of New Zealanders. It has, I believe, inspired them in more recent decades to emulate the acts of their frontier forefathers. In the meantime, however, for a period of twenty-five years from 1910 to 1935, New Zealanders concentrated on getting through World War I and developing the rural base of their economy. Not until the terminal stages of the great depression of the early 1930s and the coming to office of the first Labour Government late in 1935 did we see a renewal of the latent capacity for reform. I must mention in passing only, the reform in education effected by Mr. Peter Fraser and the monumental Social Security Act 1938 introduced by Mr. Walter Nash. More immediately relevant for our purposes, however, was the appointment of the Hon. H. G. R. Mason as Attorney-General and Minister of Justice. With him began the second period of active law reform which has continued, subject to some marked ebb and flow, under his successors. In 1937 Mr Mason, partly as a result of views expressed at the 1936 Dominion Legal Conference in New Zealand and with the example of Lord Sankey's Law Reform Committee set up in England in 1934 before him, established a New Zealand Law Revision Committee. The Minister of Justice presided and it comprised representatives of the New Zealand Law Society, a representative of each of the four university law faculties, a nominee of the Parliamentary Opposition, the Chairman of the Statutes Revision Committee of the House of Representatives, the Solicitor-General, the Law Draftsman and the Secretary for Justice. The Committee normally met twice a year. It had no formal constitution and its jurisdiction was never very precisely defined. For the most part it was concerned with lawyers' law and eschewed topics of a social or political nature. Proposals for change came from a variety of sources including individual lawyers, the New Zealand Law Society, the Department of Justice and its own members.[4]

In 1956 Cameron[5] was able to claim that the list of law reforms made with or without the sponsorship of the Law Revision Committee during the previous twenty years was an impressive one. They fall broadly into two groups. The first were derived from English initiatives but there is a second important category in which New Zealand acted on its own initiative. A few examples must suffice. Thus the Law Reform Act 1936 anticipated England by abolishing the defence of common employment. The Legitimation Act 1939 completely revised the relevant law on this topic. The Law Reform (Testamentary Provisions) Act 1944 made provision for obtaining relief where work has been done for the benefit of another in return for a promise to leave property by will and that promise is not honoured. The Joint Family Homes Act 1950 (which proved to be a

4 For further details of its operations see Cameron op. cit. 106, and *The Law in a Changing Society* (Department of Justice, Wellington, 1965) 9-12.

5 Op. cit. 107.

widely popular measure) and subsequent extensions provided for the settlement of the family home on both spouses with protection from creditors and automatic transmission to the surviving spouse with a partial exemption from death duties. The Statutes Amendment Act 1951 made provision for an infant to enter into a valid contract with prior magisterial approval.

New Zealand was fortunate in having one Minister of Justice, the Hon. H. G. R. Mason, in office throughout the period of the Labour Government — 1935 to 1949. There is general agreement that his deep personal commitment to law reform was the single most important factor in the substantial advances made during this period. Less well appreciated is the administrative innovation which Mr Mason effected when he took office in 1935. For the first time the Department of Justice, which had been in existence since 1873, was given specific responsibility for law reform.[6] The new minister regularly referred proposals and problems to the department for its views. To assist, an advisory officer was appointed, from which grew the Advisory Branch and, much later, the present Law Reform Division of the department. I will return to this development and its significance later. For present purposes it is important to note that in addition to its responsibility for servicing the courts, administering the prisons and the probation service and a variety of other activities, the Department of Justice now had as one of its prime functions a specific responsibility for law reform.

During the 1950s it is probably fair to say that law reform proceeded rather more sedately. The Hon. P. C. Webb, who was Minister for the first four years of the new National Government, was responsible for a number of the Acts already mentioned. His successor, the Hon. J. R. (now Sir John) Marshall, was generally supportive of the work of the Law Revision Committee. Among other matters he directed a complete revision of the Crimes Act 1908 to be undertaken by the department. This culminated in a new Act in 1961 which, under the influence of his successor, the Hon. J. R. Hanan, abolished capital punishment.

Following the short-lived second Labour Government, National resumed office in 1960. With the appointment of the Hon. J. R. Hanan as Minister of Justice began nearly a decade of heightened activity and notable achievement in law reform across a broad spectrum. With the name of J. R. Hanan is customarily, and most appropriately, listed the name of his permanent Secretary for Justice, Dr. J. L. Robson. They were a formidable couple, skilful at sensing and indeed influencing public opinion over a wide range of matters of public interest. Each was willing to consider and promote radical changes, whether in the field of public administration, censorship or penal reform. Mr. Hanan proved enormously skilful at persuading his colleagues to accept, and the House enthusiastically to pass, a succession of statutes which rivalled, if they did not outshine, the first great period of reform of the late 19th century. To this partnership should, however, be added the name of a third person who has never received the public recognition he merits. I refer to Mr B. J. Cameron, the present Deputy-Secretary for Justice. Cameron joined the small band of advisory officers, some five or six in number,

6 See *The Law in a Changing Society,* op. cit. 5.

in the Department of Justice in 1951. Seven years later he became Chief Advisory Officer and thus was in place for the great challenge of the 1960s. A man of high intellectual distinction, a profound lawyer, and with a strong tinge of iconoclasm tempered by considerable sensitivity to social and political issues, his contribution to law reform over a period of nearly thirty years has been immeasurable. Whenever the names of Hanan and Robson are linked in this context, Cameron's should rightly be joined as a full partner.

There is an air of justifiable pride in the report of the Secretary for Justice for the 1962 year and his claim that "the field of law reform produced an exceptionally abundant harvest in 1962".[7] Indeed it did. One major task was the re-writing and modernising of the outdated liquor laws which, combined with radical changes made in 1961, set a new and contemporary framework for a difficult and contentious social problem. The new Sale of Liquor Act 1962 reflected years of work by advisory officers in the Department in association with a few knowledgeable legal practitioners.

The same year saw a complete re-writing of the copyright law in the light of social, economic and technical changes over the previous fifty years. This was based on a report of a committee presided over by Judge Dalglish. Other notable reforms included the removal of the special privileges enjoyed by the Crown and public authorities under the Limitation Act. A 1962 Amendment assimilated their position with that of private citizens. A new Occupiers Liability Act 1962 updated and replaced the common law on this topic.

Overshadowing all else, however, was the passage of the Parliamentary Commissioner (Ombudsman) Act 1962, which had been introduced as a Bill the previous year. Its genesis and legislative history have recently been fully described in a stimulating and authoritative account by J. L. Robson, a principal participant in the drama. What follows is a bare account only, and those interested are referred to his paper for a comprehensive review of events.[8]

The National Party, then in opposition, as part of its 1960 electoral platform undertook that it would establish a Citizens Appeal Authority to ensure that members of the public in dealing with government departments were able to secure an independent review of administrative decisions. To this end, it proposed to provide a simple review by an independent appeal authority responsible not to government but to Parliament. One of the first acts of the new minister, J. R. Hanan, was to call for an early Departmental report on the proposal.

The department responded quickly and affirmatively and suggested the recent Danish legislation as a basis for discussion. As early as March 1961 the minister authorised the preparation of a draft bill and the following month this was circulating among government departments and selected academics for comment. Dr. Robson points out that three important questions in particular required

7 *Report of the Department of Justice for the year ended 31 March, 1963,* New Zealand. Parliament. House of Representatives. Appendix to the journals, Vol. 2, 1963, H.20, p.17.

8 J. L. Robson, *The Ombudsman in New Zealand,* Occasional Papers in Criminology No. 11, Victoria University of Wellington, 1979.

resolution. Were acts or decisions of ministers to be included? Should Crown privilege be restricted to provide better access to departmental files? And should the Ombudsman adopt an investigatory or judicial procedure? The Department of Justice thought that ministerial acts and decisions should be included and Crown privilege restricted. It was convinced that the new authority should follow an investigatory procedure with appropriate safeguards. The then Solicitor-General, H. R. C. Wild, Q.C. (later Sir Richard Wild, Chief Justice of New Zealand) supported by the then Law Draftsman, was of a contrary opinion on each of these questions. It fell to the Cabinet Committee on Legislation to resolve these differences, which initially it did by accepting the views of the Solicitor-General on the exclusion of ministers and leaving Crown privilege untouched but confirming the Justice Department's view that the procedure should be essentially investigatory.

The Bill, as introduced in 1961, reflected these decisions and as a consequence its public reception was, in Robson's term "lukewarm".[9] This was chiefly due to the exclusion of ministers and the secrecy surrounding Crown privilege. In short, ministers and officials were too protected. Early in 1962 the Department of Justice again sought to have its views on the first two matters accepted. Cabinet was persuaded to do so, subject however to the views of the Legislation Committee of Cabinet being obtained. Notwithstanding a full day's debate on a Sunday when the Committee met with top officials, the questions remained unresolved and were again referred back to Cabinet. This time Cabinet decided to sound out Caucus, which recommended that Crown privilege should be restricted, but acts or decisions of ministers were to be excluded. Recommendations of officials to their ministers were, however, to be included. And so the questions were finally resolved. The principle of ministerial responsibility to Parliament, which had weighed heavily with the Solicitor-General, remained substantially intact, but Crown privilege was sufficiently modified to permit a worthwhile investigation by the Ombudsman. The Bill, duly amended to reflect these decisions, was re-introduced and passed in the 1962 session of Parliament. It has had a remarkable flow-on effect in many Commonwealth countries.

I have referred to the passage of this legislation in some detail because it illustrates a number of significant features of law reform and the legislative process —

1. the origin of the proposal in the party electoral platform;
2. the key role played by senior officials in the development of legislative policy;
3. the interaction between Cabinet and its Legislation Committee;
4. final resort by Cabinet to the party Caucus for an expression of its views which in the event resolved the outstanding issues.

It will be observed that apart from a reference of the first draft Bill to some university teachers, the whole of the process was confined to the political and administrative sphere. Indeed Mr Hanan was to stress some years later that

9 Op. cit. 4.

where important political considerations are present, it may well be best to pursue them through the ordinary political process rather than through the formal law reform machinery. He cited the Ombudsman legislation as a case in point, stressing that it would have been completely unsatisfactory to turn the preparation of legislative proposals for that Bill over to a law revision body, however distinguished.[10]

The momentum of 1962 if anything increased in the ensuing year, The Indecent Publications Act 1963 adopted a radically new approach to the controversial subject of book censorship, and has since proved largely successful in operation. For some years following an amendment in 1954 to the Indecent Publications Act 1910, a number of principles gradually evolved within the Department of Justice as to the shape a new Act might take. The momentum for new legislation was provided by the rather literal conservative approach adopted by the majority of the Court of Appeal in *In Re Lolita* Mr Hanan agreed that a new approach should be tried and his departmental head, J. L. Robson, played a leading role in developing the new Bill.

The same year saw the passing of the Criminal Injuries Compensation Act 1963, the initial inspiration for which came from Mr. Hanan and was likewise developed within the Department, with some help from a report by JUSTICE. During a debate on the Indecent Publications Bill, Mr Hanan gave advance notice of his intention to introduce the Criminal Injuries Bill in these terms:[12]

> The Government will be introducing a Bill next week to provide compensation for victims of violent crime and I understand that no such legislation is on the statute books anywhere else in the world. New Zealand has always been a pioneer in social legislation . . . .

This theme was reiterated on the introduction of the Bill itself, when the minister claimed that, if passed, it would enhance the reputation of New Zealand for pioneering humanitarian reforms.[13] Thus, some fifty years later, Siegfried's findings of New Zealanders' delight in being "in the advance guard of civilisation" remained true!

The same year saw the enactment of two further important statutes, the Matrimonial Proceedings Act 1963 and the Matrimonial Property Act 1963. I will defer comment on this legislation except to note that it reflected the deep-seated interest of B. J. Cameron in the reform of family law. Both Acts were generated within the Justice Department: the latter Act, however, owing much to the initiative of Mr. Hanan and reflecting many of the ideas in an earlier statute of the State of Victoria.

By any standards, 1962 and 1963 stand out as years of quite remarkable legislative creativity in valuable and diverse areas of law reform. A notable feature is that this achievement, almost without exception, was the work of an imaginative Minister of Justice and a responsible, innovative and able department.

10 Hon. J. R. Hanan, "Law Reform" [1969] N.Z.L.J. 365, 369-370.
11 [1961] N.Z.L.R. 542.
12 N.Z. Parliamentary debates Vol. 336, 1963: 1694.
13 Ibid. 1867.

It owed little if anything to the work of the Law Reform Committee, which proceeded quietly and conscientiously with other concerns of a non-political nature. Nor, as we will see, was this an exceptional circumstance; a similar pattern recurs in subsequent years.

Not surprisingly, there was a lull in law reform in the next year or so, but in 1965 Mr Hanan published under the title, *The Law in a Changing Society* a policy and programme for law reform. This paper reveiwed the existing machinery and stressed that responsibility to Parliament for the state of the law lies with the Minister of Justice. In carrying out this responsibility the minister is assisted within the executive government by the Law Drafting Office (now Parliamentary Counsel's Office) and the Department of Justice. He listed the functions of the department as follows:[14]

1. to advise the minister on the formulation of policy and on policy aspects of all proposed reforms;
2. to initiate proposals and (where appropriate) bring them before the Law Reform Committee, to prepare reports and to provide information and secretarial services for the committee;
3. to ensure that recommendations of the committee, if acceptable to the minister and to the government, find a place in the legislative programme;
4. to co-operate with the law draftsman in the preparation of bills and
5. to assist the minister and parliamentary committees during the progress of bills before the House.

In addition the minister explained that the department itself prepares proposals for reform (whether pursuant to government instructions or of its own initiative) that cannot appropriately or practicably be dealt with by the Law Revision Committee. Among these are matters of government policy or public law and matters the significance of which is primarily social rather than legal. The minister described the various approaches to such measures for which there is no typical pattern:[15]

> Sometimes a special committe presided over by a judicial officer or lawyer is appointed to receive submissions and present a report to the Government as was done with the copyright law and the proposals to introduce a rule of strict liability in motor accident cases. Sometimes, as in the case of the revision of the adoption law, there is a formal committee representing the Government Departments involved. Often the work is done by an informal group of departmental officers and others, a method used when the criminal code and the divorce law were revised. The system is in fact characterised by a high degree of flexibility and empiricism.

This account of the responsibilities of the Department of Justice remains broadly true today. The Advisory Branch, then consisting of seven lawyers, is now the Law Reform Division with some fifteen lawyers. In very recent years turnover of staff has markedly decreased and increasing expertise is being developed as a consequence.

14 Op. cit. 9.
15 Op. cit. 9-10.

In his review, the Minister outlined the work of the Law Revision Committee, the value of whose work he acknowledged had not been sufficiently recognised. He then looked at the proposed English and Scottish Law Commission and the New York State Law Review Commission, finding the latter somewhat closer to our pattern. In rejecting the English proposal as suitable for adoption here, Mr Hanan stressed the importance of the presence of the Minister of Justice and an Opposition representative on the New Zealand body. Nor did he think it desirable that the staff engaged on research on proposals for reform should be divorced from ordinary contact with practical administration and the public, or from direct recourse to the specialists available to a department.

He recognised the need to reorganise the institutional structure and foreshadowed in some detail the changes which he, in fact, implemented in December 1965. A Law Revision Commission was constituted under the chairmanship of the Minister of Justice and including the representative of the Opposition, a Judge of the Court of Appeal, practising lawyers and law teachers, the Solicitor-General, the Law Draftsman and the Secretary for Justice. It was given general oversight of the programme, details of which were foreshadowed in Mr. Hanan's paper. More significant, however, was the proposal, also implemented, to appoint a number of Standing Committees. Initially there were four: Public and Administrative Law; Contracts and Commercial Law; Property Law and Equity; and Torts and General Law. Later a fifth Committee on Criminal Law was appointed. Each committee comprises practising lawyers, law teachers and one or more government lawyers including a law draftsman. They report direct to the Minister of Justice.

By 1970, one commentator[16] was able to say that there was general agreement that the quality of research then being undertaken was superior to what had preceded the Standing Committees and that many of the proposals were now broader in concept.

In 1968 the Public and Administrative Law Reform Committee published its first report, recommending that an Administrative Division of the Supreme Court be constituted to hear appeals from administrative tribunals. Legislative provision for this was made in the Judicature Amendment Act 1968. The same year also saw the passage of two major Acts in the family law field, the Domestic Proceedings Act and the Guardianship Act. In a paper on Family Law presented to the New Zealand Law Conference in 1969[17] Dr. B. D. Inglis referred to the almost unprecedented activity in family law in the previous six years. He referred to the two 1963 Acts and those of 1968. He also foreshadowed legislation on the Status of Children (passed in 1969), and the possibility of a further amendment to the Matrimonial Proceedings Act designed to abolish adultery as a ground for immediate divorce. (This is only now before Parliament in Bill form.) In a generous tribute, Dr. Inglis said:[18]

> There may be mixed feelings about these two latter proposals, but looking at the legislation as a whole there can be no doubt that the measures now enacted are bold

16 J. F. Northey "The Mechanics of Law Reform" [1970] N.Z.L.J. 278, 279.
17 [1969] N.Z.L.J. 325.
18 Op. cit. 325.

and imaginative and in some respects unique. The Minister of Justice and the very able advisory officers in the Justice Department who have spent years of research into the background material for the legislation may take some pride in the certainty that it will attract a good deal of favourable interest both here and overseas. On any view the last six years reforms in Family Law amount to a major achievement.

The end of the 1960s was notable for two events. The untimely death in July of the Hon. J. R. Hanan, and the retirement from office in March 1970 of Dr. J. L. Robson.

The Hon. D. Riddiford succeeded the late Mr. Hanan as Minister of Justice. A man of high principle, he was during much of his term of office from July 1969 to 1972 greatly impeded by ill-health. His successor, the Hon. Sir Roy Jack, until the National Government lost office in November 1973, showed little interest in law reform. Nevertheless, with departmental encouragement a number of Law Reform Committee proposals were enacted in this period. Particularly notable in the field of public law was a further amendment to the Judicature Act in 1972, which implemented a recommendation of the Public and Administrative Law Reform Committee for a single procedure for the judicial review of the exercise of, or the failure to exercise, a statutory power — a simple application for review. This was intended to replace applications for the issue of one or more of the prerogative writs or orders, and has proved most beneficial. As a prerequisite to the ratification by New Zealand of the U.N. Convention on the Elimination of all forms of Racial Discrimination, the Race Relations Act 1971 was enacted.

When the third Labour Government assumed power in December 1972, it did so on a manifesto which said very little about law reform except in the area of penal policy. The new Minister of Justice, Dr. Martyn Finlay, assumed office with a marked zeal for penal reform but his interests encompassed other topics, including family law. On the prompting of the department, Dr. Finlay obtained approval for the Matrimonial Property Bill to be included in the 1973 legislative programme. This measure has an interesting and instructive legislative history which merits a brief description.

Since the enactment of the Matrimonial Property Act 1963 its interpretation and application by the courts had been monitored by the department with growing disappointment and concern at what seemed to it, and the minister, Mr. Hanan, an unnecessarily literal and restrictive view of the scope and purpose of the legislation. An effort was made in 1968 to give further guidance to the courts by making it clear that non-monetary contributions could be taken into account even though not of an extraordinary character i.e. the normal performance of domestic duties would suffice. Secondly, conduct should be treated as relevant only if it was shown to have affected the extent or value of the property. Some judges found it difficult to accept these directions, particularly the second. In 1971 the Court of Appeal, Wild C. J. dissenting, delivered a decision[19] the result of which has been criticised as artificial, unreal, and often unlikely to produce results that would be recognised as just.[20] The attitude of the courts during the

19 *B.* v. *B.* [1971] N.Z.L.R. 859.

20 *Matrimonial Property,* Report of a Special Committee to the Minister of Justice, Wellington, June 1972, 10.

1960s is well described by Woodhouse J. in *Reid* v. *Reid* in the course of a judgement on the Matrimonial Property Act 1976:[21]

> The 1976 Act is described as "an Act to reform the law of matrimonial property". It is not difficult to see why. As I have mentioned, under the earlier legislation there was a wide judicial discretion to achieve justice between husband and wife. But it was usually exercised to give an entirely disproportionate weight to monetary contributions, particularly where they had been provided by the husband. Even when marriages had lasted more than 20 years wives who had done their domestic best to support the family purposes were consistently awarded one-third or less of a matrimonial home. A survey of all cases in the Wellington district during one five year period showed that the only instances of a wife being declared 'to have an interest as great as half was where the Courts found implicit or explicit common intention by the parties that the property should be so held' (1971) 4 N.Z.U.L.R. 271, 275. Numerous and representative examples of awards ranging from one-third down to one-tenth will be found in *Reallocation of Property on Divorce*, K. G. Gray (1977) at pp 73-75.

In 1969 Mr. Hanan appointed a special committee comprising two practising lawyers nominated by the New Zealand Law Society and two Justice Department lawyers to examine some specific aspects of the Matrimonial Property Act 1963. Before its deliberations were completed, the Court of Appeal decision in *E.* v. *E.*[22] was delivered. This decision convinced the Committee of the need for a new statute on the subject. But its report which, in the interests of unanimity, was of a cautious nature, side-stepped the critical issue of whether a presumption of equal contribution ought to be created. It considered this to be a question of social policy more appropriate for Parliament to determine.

Although instructions for a new bill were given to parliamentary counsel early in 1974, a Bill did not emerge until late in the 1975 parliamentary session, when Dr. Finlay could do no more than introduce it shortly before Parliament was dissolved for the 1975 general election. At the time of introduction of the Bill a White Paper prepared by the department was issued by the minister explaining the background to and the purpose of the proposed legislation. The Bill, as introduced, contained a presumption of equal ownership of the matrimonial home and family chattels. For other assets, tangible and intangible contributions were to be considered as of comparable worth, but there was no presumption of equal division. Division was to be proportionate to the contribution made to the "marriage assets" as a whole. The Bill included certain categories of de facto marriage within its purview.

In the meantime, a Parliamentary Select Committee on the role of women in society reported in June 1975. It concluded that the law should presume that the husband's and wife's respective contribution to the marriage assets are of equal value, thereby entitling each to an equal share in these assets, but did not envisage that the rule of equal division should be applied rigidly.[23] This report clearly influenced the National Party, then in Opposition, when formulating its policy for the forthcoming election in November 1975. The National spokesman

21 [1979] 1 N.Z.L.R. 572, 581-582.
22 [1971] N.Z.L.R. 859.
23 *The Role of Women in New Zealand Society.* Report of the Select Committee on Women's Rights. New Zealand. Parliament. House of Representatives. Appendix to the journals, Vol. 4, 1975, I.13, 75.

on Justice, the Hon. D. S. Thomson, had been a member of the select committee. Its Election Manifesto proclaimed that the National Party would legislate to provide a rebuttable presumption that when a marriage is legally terminated, matrimonial property acquired during the marriage is to be shared equally between the spouses. The courts would be permitted to override that presumption where considered necessary in the interests of fairness and equity.[24]

Labour lost office in 1975, and early in 1976 the new Minister of Justice, Mr. Thomson, announced that the Bill introduced by Dr. Finlay in 1975 was broadly consistent with National's election policy and it would proceed subject to any changes arising from evidence on the Bill. Accordingly, it remained with the Statutes Revision Committee for public hearings. Over 50 submissions were made to the select committee which sat over several months. These included 15 women's pressure groups, 10 other pressure groups, 19 private individuals, 10 individual lawyers and the New Zealand Law Society.[25] The New Zealand Law Society adopted a generally negative attitude to the Bill, and in confining its submissions to a general statement of matters of principle, forfeited the opportunity of influencing detailed provisions of the Bill. It appeared to anticipate that the government would reject the Bill. In fact the opposite occurred. The Election Manifesto made a major impact on the Bill in that it reflected a genuine conviction that the law should be reformed. In the event the select committee under the chairmanship of an energetic and committed backbencher, Mr. J. K. McLay, created a rule of equal division of the home and family chattels with only two exceptions and a presumption of equal sharing of all other matrimonial property (including farms and businesses) which might be displaced by showing that one party had made a significantly greater contribution, not to the property or the marriage assets, but to the marriage partnership. The substitution of the marriage partnership for property and marriage assets as the basis for assessing contributions was a significant innovation. Out of an abundance of caution the committee made it clear that there is to be no presumption that intangible contributions to the marriage partnership are to be regarded as less valuable than monetary ones. De facto marriages were, however, against the wishes of the Opposition, entirely excluded. Extensive, and in a few cases, fundamental changes were made to many clauses of the Bill with the unfortunate consequence that once these changes were finally decided on by the committee they had to be drafted virtually overnight to secure the passage of the Act in 1976. Some revision will no doubt be necessary in the light of the court's experience in its interpretation of some hastily drawn provisions.

The history of this legislation illustrates the powerful influence of manifesto commitments. Increasingly, governments which fail to honour electoral promises are subject to charges of failing to keep their word. There is a tendency for party electoral manifestos to spell out in some detail proposals for reform; and, if elected, there is a compulsion to honour them. The matrimonial legislation also clearly demonstrates that a parliamentary select committee, in this case the

24 National Party 1975 General Election Policy s.34, p.3.

25 See L. Taiaroa, *The Matrimonial Property Act* 1976, Research Paper for M.P.P. Victoria University of Wellington, 1979, for a detailed discussion of the submissions.

Statutes Revision Committee, is now prepared to make substantial changes to a Bill before it. In the background is the Caucus Justice Committee, which monitors the proposals for change coming before the select committee and which, in association with the minister, settles government policy on such proposals. There may well be common, or at least overlapping, membership of the government Caucus Justice Committee and the government members of the Statutes Revision Committee. On occasions, matters arising before the Statutes Revision Committee will go to the full party caucus which will decide on the attitude government members on a select committee should take to them. This will ensure subsequent support in the House when the select committee reports back proposed amendments.

Dr Finlay's last year in office — 1975 — proved to be an active year for law reform, quite apart from the introduction of the Matrimonial Property Bill. Five reports of the standing committees were implemented along with a minority report of a member of the Criminal Law Committee. Here again the government's Caucus Committee and indeed Caucus itself settled the policy behind the scenes. This proved short-lived, and the provision requiring suppression of the name of an accused until conviction was promptly repealed by the new governemnt in 1976. The jurisdiction of the Ombudsman was extended to local authorities. Dr. Finlay also introduced a Listening Devices Bill and a Privacy Commission Bill, both of which subsequently lapsed.

In 1975, Dr. Finlay took the opportunity to replace the Law Revision Commission with a more compact and informal Law Reform Council. The new body comprises the Minister of Justice as Chairman, the Solicitor-General, Chief Parliamentary Counsel, Secretary for Justice and the Chairmen of the five Law Reform Standing Committees. Its principal function is to facilitate communication between those primarily concerned with law reform. In practice it has met infrequently, but there are indications that it will be more active under the present minister, Mr. McLay.

Another 1975 National Party Electoral Manifesto promise was to establish a Human Rights Commission, which it was proposed would consist of a group of Ombudsmen to consider complaints on the grounds of race, sex, religious belief or ethnic or national origins. It appeared to be the intention of the new National Government to vest the functions of the Ombudsman in the new commission, but in the event they were excluded. On the initiative of the Justice Department, the Human Rights Commission has been given power to report to the Prime Minister on the implications of any proposed legislation (including regulations) or proposed policy of the government which the commission considers may affect human rights In proposing this function the department conceived it as being in the nature of a human rights audit of proposed legislation and government policy generally. It remains to be seen how effective it is in practice.

In his Annual Report for the year ending 31 March 1977, the then Secretary for Justice (the present writer) felt able to say that the last two years had seen significant and heartening progress in the never-ending labour of bringing the law up to date, after a period when the pace of law reform had seemed to falter badly. This momentum if anything increased in the following year and has been maintained since. Given the drive and commitment to law reform of the

present minister, the Hon. J. K. McLay, there seems every possibility that it will continue. Certainly the back-log of unactioned reports of Law Reform Standing Committees has been substantially reduced. The following is a brief outline of the legislative history of standing committee reports from 1967, when the first reports were received, up to May 1980.[26]

Contracts and Commercial Law Reform Committee

Number of Reports: 20
No change recommended: 3
Number of proposals enacted: 14, of which 7 (including 2 in part) were enacted after 1 year or less, 4 after 2 years, 1 after 3 years, 1 after 10 years and 1 (Contractual Remedies) after 11 years. A draft bill is being prepared for the latest report.
No action to date: 2

Property Law and Equity Reform Committee

Number of Reports: 29
No change recommended: 9
Number of proposals enacted: 11, of which 4 (including 1 in part) were enacted after 1 year or less, 2 after 2 years, 3 after 4 years, 1 after 6 years and 1 after 7 years. Legislation is in preparation in respect of 4 further reports.
No action to date: 5

Criminal Law Reform Committee

Number of Reports: 17
No change recommended: 3
Number of proposals enacted: 6, of which 3 were enacted after 1 year or less, 1 after 2 years, 1 in part after 3 years, and 1 after 4 years.
No action to date: 8

Public and Administrative Law Reform Committee

Number of Reports: 15
No change recommended: 2
Number of proposals enacted: 6, of which 5 (including 1 in part) were enacted after 1 year or less and 1 after 2 years.
Number of proposals followed: 1 and 1 in part
No action to date: 5

Note: In addition this Committee has reported on nearly 50 administrative tribunals anl other statutory bodies, some of which are the responsibility of government departments other than the Justice Department. No change was recommended in respect of 18. Recommendations have been implemented in respect of 13. The remainder have not been actioned.

Torts and General Law Reform Committee

Number of reports: 11
No change recommended: 3

26 Source: New Zealand Department of Justice summary as at May 1980.

Number of proposals enacted: Most of 1. A Bill before the House includes 2 others. A draft Bill has been prepared which includes a further 2.
No action now necessary: 1
No action to date: 2

SUMMARY

Total number of reports	92
Less no change recommended	21
	71
Number implemented	40
	31
Bills prepared for implementation	9
No action to date	22

The foregoing analysis demonstrates that out of 71 reports recommending legislative action, 40 have been implemented, 27 of these within 2 years of the report. A further 9 have been drafted into bills preparatory for enactment. This leaves 22 reports so far not actioned. Some of these, how many it is impossible to say, will for a variety of reasons never be actioned. They may simply be unacceptable to any government or they may be overtaken by events. In some few cases they may meet departmental resistance which may or may not be overborne. It is likely, given the present Minister's enthusiasm, that the number of unactioned reports will be further reduced in the next year or two.

It is beyond the scope of this paper to attempt a comparative survey of the relative success of other Commonwealth law reform bodies in securing the implementation of their reports. My impression, and it is no more than that, is that New Zealand's record compares well with overseas results. If looked at in isolation it can on any reasonable evaluation be regarded as successful.

Speedy action has been taken to implement substantial parts of the recommendations of the Royal Commission on the Courts and a major overhaul of matrimonial proceedings is likely to be completed with the passing of the Family Proceedings Bill later this year.

The foregoing account of New Zealand's record in law reform is necessarily uneven and incomplete. A full and detailed account would fill a book. I believe, however, that it is reasonable to claim that over a period of more than forty years it constitutes a solid and at times a spectacular achievement for a country of three million people and limited resources. It is true we have the advantage of being a unitary state unhampered by the constraints of a written constitution and inter-state rivalries. While this has been a favourable factor, it is in my view no more than that.

Starting with Mr. Mason in 1935, we have had in New Zealand (with only one or two exceptions) a succession of Ministers of Justice with a commitment

to law reform in the wider context. It is true that over this period there has been an ebb and flow. When activity has diminished this has for the most part coincided with a period when the encumbent minister lacked enthusiasm or good health. This circumstance, the political will to promote law reform and the political weight and skill to ensure its enactment, I am convinced is the single most important factor in our achievement to date. And it will, I am sure, remain so for the future. Unless the responsible minister can persuade his colleagues first to accept proposals sometimes involving quite radical changes and in recent years with increasing frequency arousing political controversy and the active involvement of pressure groups, and secondly to provide the necessary legislative time, law reform will languish. We are, I believe, tending to run out of relatively non-controversial law reform issues. The role of minister will be even more critical in the future. It is worth noting that in New Zealand the Minister of Justice is Chairman of the Cabinet Committee on Legislation, a member of the parliamentary Statutes Revision Committee (to which all law reform bills are referred), and in his capacity as Attorney-General the political head of the Office of Parliamentary Counsel. This places him in a strong position to implement law reform proposals.

No Minister of Justice can function effectively in this field without adequate backing from his department. Although I am open to a charge of bias, my close association with the Department of Justice over a period of more than four years and my reflection on the preceding years since Mr. Mason assumed office in 1935 has convinced me that the Law Reform Division (as it now is) of the Justice Department has played a key role in law reform. It is a role moreover which has been little understood or recognised outside political circles. In the growing literature on the subject of law reform in New Zealand, it is rare to find any acknowledgement let alone discussion of the very substantial contribution made by the department. I have cited Dr. Inglis. I can recall no other. In the foregoing discussion I have more than once highlighted the innovative role of the department. Family law as we have seen is a conspicuous example. Further, it is the function of the department to advise the minister on the recommendations of Law Reform Standing Committees. Although many of these will be enacted substantially in the terms recommended by the committee, particularly if accompanied by a draft bill, this is not always so. The department takes the view that it should not advise against law reform committee recommendations merely because it does not agree with them. But political or other considerations may require some modification or change. Which brings me to a critically important function. A department with a commitment to worthwhile reform, and a division of that department with specialised knowledge and direct responsibility, is the best guarantee, short of the minister himself, that law reform committee recommendations will be implemented. It is not for lack of effort by the law reform division that some reports have failed to gain a slot on the legislative programme in any given year. Nor indeed, once allotted, is there any certainty, given the hazards and unpredictable nature of a legislative session, that they will be enacted that year. I have known Bills which seemed certain to pass to be dropped at the last minute because the leader of the House decided the session would close sooner than expected. Nothing can be done about this except to

bring them up the following year, with the result that other legislative reforms may be excluded from that year's programme.

This brings me to the work of the five Law Reform Standing Committees. They each comprise practising lawyers, law teachers and government lawyers (generally including a Justice Department lawyer from the Law Reform Division), all with specialised knowledge. Only the Public and Administrative Law Reform Committee has a non-lawyer member. Committees have up to 10 members who are appointed for a term of three years and re- appointed, some would say, indefinitely. My own experience was that members valued the experience and were often reluctant to give way to fresh blood. The output and quality of work of the committees has varied over time and as between committees. In the aggregate, however, and allowing for some reports which have not been of a particularly high standard, they have served well as the basis for legislative reform where this has been recommended. By no means do all committee reports in fact make positive recommendations for legislative action. Some committees are more active than others in monitoring subsequent action, or lack of it, on their reports.

The committees report direct to the minister, and most reports are printed and distributed to interested parties. The minister, either on the advice of the department or the suggestion of a committee itself, refers topics to the committees. Some matters are of quite small compass, others concern relatively broad fields of law. Where there is some urgency this is indicated, and committees respond accordingly. Not all committees work in precisely the same way. Methods are dictated to some extent by the nature of the task and available resources. With a major topic it is usual to commission and discuss a research paper, then to prepare and issue a working paper and disseminate it for comment. A final report is then produced. Sub-committees are appointed where appropriate to do the necessary preliminary work. Each committee has as a member a parliamentary counsel who, depending on his other commitments, may produce a draft bill.

No one could claim that the system is perfect and could not be improved. A long-standing complaint has been the lack of adequate research personnel. The Law Reform Division of the Justice Department has two lawyers available, to undertake research for committees. I understand that no committee called on their services last year. Committees meet at monthly or longer intervals. Critics claim that this unduly protracts the time taken to produce a report. In one sense this is true but given the uncertainty as to when legislative time will be available to implement the report, it is questionable whether this materially delays the total process. Because some practising lawyers have heavy court and other commitments, they are not all able to attend every meeting. This is inevitable if practising lawyers are to be involved. But the advantages of their membership are so great that an occasional absence can be tolerated. Occasionally complaints are made about the low level of remuneration of members. It is rare, however, for members — particularly practising lawyers — to complain on this score. Almost without exception they value the opportunity of being able to make a contribution to a field of special interest and appreciate the break from the routine of daily practice or, indeed, of teaching. They see it as an acceptable form of public service. The contribution to law reform of upwards of fifty lawyers

drawn from private practice, the universities and government serving at any one time on the standing committees has been very considerable.

It is sometimes suggested that the committees would be strengthened by the inclusion of one or more laymen. Given the technical nature of much of the work of the committees I have grave reservations about the value of the contribution they could make. If, in the future, committees are called on to report on matters having a significant social content, laymen could appropriately be added on an ad hoc basis.

Counterbalancing such disadvantages as there may be are a number of positive features. Given their composition, the committees bring together lawyers from the diverse fields of active practice, academic law and government legal service. The various inputs constitute, in the aggregate, an ideal balance. Although not all members have a specialised knowledge of every topic, they have a good knowledge of the broad field to act as a suitable framework for the consideration of particular subjects. A collegiate spirit tends to develop among members, which assists in maintaining enthusiasm and a willingness to share the work. The presence of government lawyers helps to ensure that administrative aspects, where relevant, are not overlooked. Moreover, they can assist with the implementation of reports. Their subsequent appearance as a departmental representative before the Statutes Revision Committee of the House is a very real advantage.

Any review of the diverse sources of law reform would be incomplete without some reference to the proposals which originate from special commissions or committees. These have been frequently used in the past, and they will continue to be used where the nature of the topic calls for special membership often including laymen. A recent example is the special committee on the law of defamation. No New Zealander would be forgiven for failing to mention the unique contribution to law reform in this country made by the Royal Commission under the Hon. Mr Justice Woodhouse which formulated the Accident Compensation scheme.

More recent, if less remarkable instances, are the Royal Commissions on Contraception, Sterilisation and Abortion under the Hon. Mr Justice McMullin and the Royal Commission on the Courts under the Hon. Mr. Justice Beattie.

Finally, I must briefly refer to a quite recent development within the political arm of government. In the past few years government caucus committees have become much more actively involved in the formation of policy, and from time to time in actually initiating legislative proposals. These committees are not formally part of the executive, being comprised, for the most part, of backbench government members of Parliament. Officials appear before them with increasing frequency, a practice once thought to be of dubious constitutional propriety. In some circumstances they act as a check on the responsible minister; in others they actively assist him with matters within his portfolio. Further, as I have already indicated, they exercise a shadowy but none-the-less real influence over parliamentary select committees. It is not unusual, for example, for the Caucus Justice Committee to meet during the consideration of a Bill by the Statutes Committee and to offer advice on submissions being heard by the committee.

Because they meet in secret and for the most part their decisions and recommendations are circulated only within the parliamentary party, it is not possible to be precise about their influence. But I can say from my own experience that they do affect the shape and final content of Bills before the House. Caucus committees use the services of party research officers provided by the Legislative Department who sometimes offer advice which is in conflict with that tendered by the department to the minister. Provided such advice is soundly based, this can have the beneficial effect of providing more options before a final policy decision is made.

It will be apparent by now that the sources of law reform are many and varied. The contribution of the Law Reform Standing Committees and other predecessors has principally been in the area of politically non-contentious lawyers' law. More recently, however, interested pressure groups have tended to be more active particularly in hearings before the Statutes Revision Committee. This suggests a need for fuller consultation before proposals harden into bill form. There is also, I believe, a need for the development of a longer term co-ordinated programme of work for the committees with priorities clearly stated. The work of the committees would also benefit if a suitably qualified person were appointed to act as a liaison between them, the minister and the Justice Department. He could assist in ensuring that necessary research facilities were provided, either from within the department or by the commissioning of experts on a fee basis.

From time to time it has been suggested that New Zealand should fall into line with those Commonwealth jurisdictions which have full-time multi-member Law Reform Commissions. A modified proposal recently put forward by Professor D. L. Mathieson[27] is for the appointment of a single full-time Commissioner with the status of a High Court Judge with a Deputy and a small full-time research staff. The existing standing committees would be disbanded and ad hoc committees would be appointed by the Commissioner. Each such committee would be chaired by the Commissioner or his deputy. Detailed procedures for the preparation of working papers, consultation with interested parties and the preparation of a final report are elaborated by Professor Mathieson. The Chairman would present each report to the Minister of Justice and discuss with him what priority is to be afforded its implementation on the legislative programme. He would have direct access to the Cabinet Committee on Legislation. The Department of Justice, it seems, is to be side-stepped, indeed largely ignored in the whole process.

Implicit in this proposal is an assumption that once the Law Reform Commissioner has presented a report on any topic to the minister, it will be implemented — the only question being when. The Department of Justice, which since 1936 has had as a prime function that of advising the Minister of Justice on all proposals for law reform wherever they may originate, is it seems to be excluded from an important aspect of this work. Given the record of the Law Reform Division of the department over a long period of years, I consider this proposed emasculation of its role to be unfortunate. It could also be counter-productive.

27 D. L. Mathieson "Revised Law Reform Machinery — A Practical Proposal" [1978] N.Z.L.J. 442.

A likely consequence would be rivalry between the two bodies, the department and the Commissioner in the promotion of law reform proposals. The present harmonious arrangement between the department and the five standing committees, on most of which the department is represented, would go, to be replaced by a network of ad hoc committees. In any competition between the two for places on the annual legislative programme, I have little doubt which would prevail; it is unlikely to be the Commissioner. The proposal fails to appreciate that a principal reason for our achievement in law reform has been the close and continuous involvement of the Justice Department in all phases of the law reform process. Any suggestion that the department has not actively promoted the implementation of standing committee reports, where these proved acceptable to government, is in my experience quite unfounded. The record can speak for itself. Given the very substantial costs inherent in the appointment of a full-time Commissioner and Deputy-Commissioner, five or six research officers, supporting staff and accommodation, it would need to be apparent that more and better law reform proposals would be implemented year by year. I do not believe this would follow; the contrary is if anything more likely. given the exclusion of all involvement and responsibility of the department. I also believe that the dismemberment of the existing standing committees and the substitution for them of ad hoc committees would be a mistake. The present committees provide a continuity of experience which I consider invaluable; they are reasonably productive — although some admittedly more so than others. This, however, is partly a factor of their respective membership which can be adjusted from time to time.

For the foreseeable future (subject to a qualification I will mention later) I would retain the existing system, including the present involvement of the Department of Justice. When the necessary resources are available a suitably qualified person should be appointed to the Law Reform Division, say as Director to the Law Reform Council. He would assume responsibility for the development and supervision of a co-ordinated law reform programme and for acting in a liaison capacity between the committees, the department and the minister. He should ensure that the necessary research facilities are made available either from within or without the department. He would be full-time, with a background of experience in law reform work and have senior standing within the division. If this were done I believe most of the frustrations at present experienced by committee members would be removed. We would have a co-ordinated programme of work, and the department would continue to play an active and creative role in law reform.

So far in New Zealand there has been little pressure for codification of whole branches of the law. Were this to eventuate then a full-time Commission would almost certainly be required. Such a task would be beyond the resources of the standing committees as at present organised and also of the department.

It remains now to state in very summary form the main features of this paper.

1. New Zealand's involvement in law reform spans more than 100 years, subject to a 25 year period of relative quiescence early this century.

2. New Zealanders are aware of the early reputation for legislative innovation

established by their late 19th century forebears, and continue to take some pride in maintaining this reputation. Siegfried's comments are still valid.

3. Commencing with the Hon. H. G. R. Mason in 1935, successive Ministers of Justice (with relatively few exceptions) have shown a commitment to law reform in its comprehensive sense and have succeeded in persuading their respective governments and the legislature to enact a steady stream of proposals into law. Their contribution has been the single most important factor in the whole process of law reform.

4. Since 1935, the Department of Justice has played a major part in both the formulation and implementation of law reform proposals in New Zealand. This role, although receiving little public recognition, has been of key importance over a period of some 45 years. The fact that no other Commonwealth country has a precise counterpart to our Department of Justice in part explains why New Zealand has been relatively successful in transforming proposals for law reform into legislation.

5. The active involvement since 1956 of balanced teams drawn from upwards of 50 lawyers in active practice, university teaching and government has resulted in the production by the five Law Reform Standing Committees of some 70 reports recommending changes to the law, of which all but 22 have been implemented or are currently being implemented.

6. It is unlikely that the disbanding of the standing committees and their replacement by a full-time Law Reform Commission would result in more or better legislation. On the contrary, there is a danger that the pace of reform would diminish.

7. An uncertain factor in the legislative process is the growing influence of caucus committees which, while not part of the executive, are manifesting signs of emerging as a fourth arm of government. It is too soon to assess their long-term effect on existing ministerial and departmental responsibilities for law reform. They may serve merely to complicate the whole process or, hopefully, they may make a positive and worth-while contribution to improving the quality of legislation. I am sure the latter is their intention.