The Emperor's Servant (i.e. The Unruly Statute Book And What The Law Commission Is Or Could Be Doing About It)

AMOKURA KAWHARU*

I Introduction

In 1985, Sir Geoffrey Palmer moved that the Law Commission Bill be read a first time. In so doing, he sought to establish a body with "the time, the resources, the autonomy, and the standing to carry out a systematic and ongoing review of our law".[1] The Bill passed into law and, on the 1st of February 1986, Te Aka Matua o Te Ture | the New Zealand Law Commission was born. Put simply, the Commission's job was to give independent advice to the government of the day on how to improve the statute book.

It started off strong. In March 1987, the Commission delivered its first report, which led to the enactment of the Imperial Laws Application Act. Over the next few years, the Commission would publish reports leading to the Interpretation Act, Limitation Act, Companies Act, Evidence Act, and — a personal favourite — the Arbitration Act. In the years following, statutes resulting from the Commission's work include the Property Law Act, Land Transfer Act, Privacy Act, Incorporated Societies Act and Trusts Act, to name a few.

In 2007, Sir Geoffrey told us that statute law is "not merely King; it is Emperor".[2] In bestowing this title, Sir Geoffrey was not personifying Parliamentary sovereignty, nor attempting to capture the truism that statutes represent the words and the will of the reigning monarch which must be interpreted and applied by judges. He was actually referring to the fact that statute had become the major source of state law in Aotearoa New Zealand, overtaking the common law.

In the late 1970s we had around 600 principal Acts.[3] In 2007, at the christening of the Emperor, it was 1096.[4] But the growth did not stop there: we now have

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* President, Te Aka Matua o te Ture | New Zealand Law Commission. I gratefully acknowledge the assistance of Law Commission Law Clerk, George Curzon-Hobson, in preparing a draft of this speech.

1 (22 August 1985) 465 NZPD 6583.

2 Geoffrey Palmer "Improving the Quality of Legislation – The Legislation Advisory Committee, the Legislation Design Committee and What Lies Beyond" (2007) 15 Wai L Rev 12 at 12.

3 Kenneth Keith "A Lawyer Looks at Parliament" in John Marshall (ed) *The Reform of Parliament: Contributions by Dr Alan Robinson and Papers Presented in his Memory Concerning the New Zealand Parliament* (New Zealand Institute of Public Administration, Wellington, 1978) 26.

4 Geoffrey Palmer *Law Reform and the Law Commission in New Zealand After 20 Years – We Need to Try a Little Harder* (New Zealand Centre for Public Law, Occasional Paper 18, 2006) at 7.

approximately 1900 principal Acts.[5] This expansion in legislation reflects both an accumulation of new law resulting from policy making by successive governments, as well as a failure by those same successive governments to weed out or refresh old law.

Passing legislation is one of the principal methods by which governments seek to change behaviour and achieve their policy goals.[6] Typically, a new Act will be designed to be effective in any given fact situation that is captured by the relevant policy. This wholesale application gives legislation its rule of law appeal, since — according to almost all rule of law theories — people must be able to know, in advance, the laws that will govern their actions. Lon Fuller, for example, said laws and law-making should aspire to several things, including generality, public promulgation and non-retroactivity.[7] But let's not get too carried away — Fuller also cautioned that the appeal of statute law should not be overstated. Sometimes, he said, statute law is a poor fit for specific fact situations that arise after enactment:[8]

> If we view law as serving the purpose of putting in order and facilitating human interaction, it is apparent that the making of law involves the risk that we may be unable to foresee in advance the variety of interactional situations that may fall within the ambit of a preformulated rule. A statute that reveals itself as a patent misfit for situations of fact that later come to court – situations plainly covered by the language of the statute, but obviously misunderstood or not foreseen by the draftsman – such a law certainly has no special claim to praise simply because it is clear in meaning and announced in advance.

It is well established that legislation should only be used when necessary to achieve the desired policy outcome.[9] A whole new Act should also only be used when amending existing legislation is not an available choice. This principle has, however, been imperfectly observed in practice. A brief scroll through the New Zealand legislation website will turn up myriad small Acts covering issues that seem to fall within the range of bigger ones, as well as some interesting but completely obsolete statutes. The Wellington City Milk Supply Act 1919, for example, imposes licensing requirements on people wishing to sell milk in Wellington. While the requirements are still in force, it is no longer possible to

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5 I browsed all Acts on www.legislation.govt.nz and the total hits returned on 31 May 2024 was 1894. If secondary legislation is included the number increases to more than 4500.

6 Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 8.

7 Lon L Fuller *The Morality of Law: Revised Edition* (Yale University Press, 1969) at 46–62.

8 Lon L Fuller *The Principles of Social Order* (Kenneth Winston (ed), Hart Publishing, Portland, 2001) at 256-257.

9 Legislation Design and Advisory Committee, above n 6, at 15–16.

obtain the licenses.[10] In some cases an Act is so heavily repealed it can be hard to work out whether any of it remains practically operative.[11] The quality of old legislation varies too, and some earlier Acts have not aged well. For example, s 2A of the Maori Housing Act 1935 defines "Maori" as including "any Polynesian" with a prescribed connection to New Zealand. (In contrast, the Maori Community Development Act 1962 defines "Maori" as "a person of the Maori race of New Zealand".[12])

Against this background, it is clear that our statute Emperor is no longer a young, lean, energetic figure. The Law Commission was, in a sense, established as a servant of the Emperor. Now, it often feels like we are but a foot soldier in the fight to contain it.

The purpose of my lecture today is to reflect on the Commission's core functions, examine what the Commission is or could be doing to promote legal renewal through the development and reform of legislation, and conclude by discussing what comes next for our mighty Emperor.

II Establishment of the Law Commission

To understand further why we have a Law Commission it is useful to start, briefly, with what we had before: essentially a system of ad hoc and voluntary law reform committees.[13] These committees made a substantial and important contribution to reforming the law.[14] One example is the Law Reform (Testamentary Promises) Act 1949 — to which I will return. But the system had serious limitations. The committees were not supported by their own research capacity, and they were limited to discrete work of a technical nature. They had no clear mandate or institutional purpose. None were formally independent of government, and there was no real institutional accountability either, except

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10 See Joel MacManus "Milking it: The man behind New Zealand's weirdest legal cases" (17 May 2024) The Spinoff <www.thespinoff.co.nz>.

11 See, for example, the Animal Control Products Limited Act 1991.

12 In full, s 2A of the Maori Housing Act 1935 defines "Maori" as "any Polynesian who is a native of any island of the South Pacific Ocean and any person who is a descendant of such a Polynesian if, in either case, — (a) he is a New Zealand citizen; or (b) he has lived in New Zealand for 3 years and is permanently resident in New Zealand". Section 2 of the Maori Community Development Act 1962 defines "Maori" as "a person of the Maori race of New Zealand; and includes any descendant of such a person".

13 Semi-formal law reform institutions have been in place since 1937, when the then Minister of Justice and Attorney General Rex Mason established and chaired what was called the Law Revision Committee. This was replaced in 1965 by a Law Revision Commission, which was later renamed the Law Revision Council. The Council was established as an oversight body, which allocated law reform projects to new specialist committees covering particular fields of law. These included, for example, a Property Law and Equity Committee and a Public and Administrative Law Committee. The new committees were more specialised and were therefore viewed as more effective, but as with the predecessor model, membership was part-time and voluntary.

14 Between 1937 and 1965 for example, around 160 proposals for legislative reform were made through the Law Revision Committee, most of which were taken up: Geoffrey Palmer *Evaluation of the Law Commission* (Ministry of Justice, 28 April 2000) at 16–17.

that any reforms would need to pass through the ordinary parliamentary process.

Quite understandably, there was a sense that more formal machinery for law reform was required. Factors driving that feeling included, in particular, greater recognition of the complexity of our society, the increase in the volume of statute law, and the growing influence of international law on domestic law.[15] And in fact, New Zealand was a relative latecomer to the Law Commission world; comparator jurisdictions including Canada, the United Kingdom, and Australia had already established specialist law reform bodies.

So, a Law Commission Bill was introduced and passed in 1985. When moving the Bill for a second time, Hon Jonathan Hunt laid out a vision for localised legal renewal. He said:[16]

> I pause to emphasise that New Zealand society is not a carbon copy of societies in other countries. It never has been. Until recently, however, we have sometimes been slow to appreciate the implications of that. We are now shaking off the derivative tendency that has so dominated our legal thinking in the past. Our law and our law reform procedures should be tailored to our own special conditions and needs.

III The Law Commission's functions

The Commission's statutory purpose is to promote the systematic review, reform, and development of the law.[17] In so doing, the Commission is required by s 5(2)(a) of the Act — which was something of a legal novelty at the time of enactment — to take into account te ao Māori and give consideration to the multicultural character of New Zealand society. Beyond this broad purpose, the Commission has four distinct statutory functions. These are to:[18]

a. take and keep the law under review in a systematic way;

b. make recommendations for the reform and development of the law;

c. advise on the review of any aspect of the law conducted by a government agency; and

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15 See Palmer, above n 14.

16 (3 December 1985) 468 NZPD 8643.

17 Law Commission Act 1985, s 3.

18 Section 5(1).

d. advise on ways in which the law can be made as understandable and accessible as is practicable.

My focus now turns to whether, and how, the Commission is achieving its functions. Undoubtedly, overlap exists, but for convenience I will address them one after the other, with a focus on the first.

Systematic Review of the Law

1 Development of the Work Programme

As mentioned, the Law Commission's first statutory function is to take and keep the law under systematic review. The main way the Commission does this today is through the development of its work programme.

The Commission has a statutory duty to submit proposals for its work programme to its responsible Minister (currently the Minister of Justice), at least once a year.[19] What this usually means in practice is that the Commission will write to the Minister each year with several potential projects for the Minister's consideration, and an assessment of expected capacity for new work. The Commission maintains a register of possible law reform topics that records suggestions from members of the legal profession, judiciary, media and the public, as well as suggestions from Commissioners and staff. A public version of the register is accessible on the Commission's website.[20] The Commission uses the register as a starting point for identifying potential projects, which can then be scoped up into draft proposals and assessed against criteria listed in a Cabinet Office Circular.[21] Proposals can also be tested with relevant government agencies before proposing to the Minister.

In parallel with the Commission's internal process, the Minister consults with Cabinet colleagues about possible projects. The Commission's work programme is then set as a result of these two processes. Although the number varies each year, typically around nine or ten potential projects might be considered, and depending on capacity, just one or two might be confirmed.

Developing the Commission's work programme therefore only addresses a very small number of reform issues and these issues have been identified mostly by people who are external to the Commission. It is systematic in the sense that we have a process by which we can go through potential reform issues systematically, but it does not involve a systematic consideration of all law for potential law reform issues; this would be a huge job.

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19 Law Commission Act, s 7(1).

20 Te Aka Matua o te Ture | Law Commission "Law reform suggestions made to us" <www.lawcom.govt.nz>.

21 Cabinet Office Circular "Law Commission: Processes for Setting the Work Programme and Government Response to Reports" (9 April 2009) CO (09) 1.

2 Pre-legislative Scrutiny

The Commission has also been involved in the work of legislative scrutiny. This is the review of legislation both before and after enactment, with a view to improving both the quality of its expression and its effectiveness at achieving its policy goals. That said, the level of the Commission's involvement in the work of legislative scrutiny has decreased significantly over time.

When the Commission was first established, the Public and Administrative Law Committee survived in a modified form to become the Legislation Advisory Committee or LAC, which is now the Legislation Design and Advisory Committee or LDAC. The LAC was carried forward to provide advice on legislative proposals, and in particular, on any public law aspects of them. The President of the Law Commission chaired it. Other members included other Law Commissioners, judges, lawyers, academics and the Chief Parliamentary Counsel. A second committee, the Legislation Design Committee or LDC, was later established to perform the complementary function of providing advice on the development of legislative proposals, covering basic design issues, choice of instrument, and impact on the coherence of the statute book. Like the LAC, the LDC was chaired by the Law Commission President, but unlike the LAC, its membership was limited to government officials.

The Law Commission's involvement in this work was for a time relatively significant. In addition to the President's formal role, Law Commission staff prepared reports on Bills that might raise issues of compliance with the LAC's legislation guidelines. Members of the committee, including Law Commissioners, would take responsibility for taking any steps needed to give effect to the advice in these reports, including meeting with relevant agencies or Ministers and making submissions to select committees. The Law Commission provided administrative and research assistance to the LAC and LDC and supported education efforts, for instance, by chairing seminars for officials and lawyers on the application of the legislation guidelines.

This is all said in the past tense because the Law Commission's involvement came to an end several years ago, in March 2015.[22] One month later, the LAC and LDC were replaced by a single committee, the LDAC. The reason for ending the Commission's involvement apparently related to resourcing. In effect, the Commission could no longer afford to maintain the same level of productivity in its core law reform work and support the LAC and LDC at the same time. From the Commission's perspective, withdrawing from the LDAC work allowed the Commission to refocus resources to its core law reform projects. Consequently, though, the Commission is no longer contributing its law reform expertise into LDAC, expertise that has been developed over nearly four decades of carefully

22 Te Aka Matua o te Ture | Law Commission *2014/2015 Annual Report* (2015) at 7–8.

reviewing areas of law and making recommendations for modern, fit for purpose legislation. Other downsides are harder to measure but include less regular contact between the Law Commission and other government agencies, and less work variety for Law Commission staff.

3 Post-legislative Scrutiny

At the other end of the parliamentary process is post-legislative scrutiny. This can range from a narrow review of an Act's legal consequences, to wider consideration of whether its policy objectives are being met in practice. Despite calls for formalisation,[23] New Zealand's post-legislative scrutiny regime is still best characterised as "ad hoc".[24]

The Law Commission is often asked to review legislation, but in the more general sense of reviewing whether the law remains well suited to current and future circumstances rather than whether the Act is working as was intended when passed into law. I can think of only two examples of the Law Commission undertaking post-legislative scrutiny, and both relate to legislation that resulted from the Commission's own work. The first is the 2003 review of the Arbitration Act 1996. The second example covers the three reviews of the Evidence Act 2006, the third of which I recently oversaw. The Law Commission was also involved in the joint operational review (with the Ministry of Justice) of the Search and Surveillance Act 2012.[25]

Occasionally, legislation will specify when its operation must be reviewed. This was the case in the Evidence Act, where s 202 — now repealed — required the Commission to review the Act's operation every five years. Similarly, s 30 of the End of Life Choice Act 2019 requires regular review of the Act by the Ministry of Health.[26] There are clear reasons why reviews of these particular Acts were deemed necessary.

In the case of the Evidence Act, the 2006 legislation codified common law rules on evidence that had developed over centuries. It also codified some recently established rules. Rules developed through the common law do not necessarily have (and do not need) the combination of precision and general application required of good legislation. The requirement for 5-yearly operational reviews was included in the Evidence Bill at the select committee stage to meet

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23 See, for example, Te Aka Matua o te Ture | Law Commission *Briefing Paper for the Minister Responsible for the Law Commission* (November 2008) at 64.

24 David Wilson (ed) *Parliamentary Practice in New Zealand* (5th ed, Clerk of the House of Representatives, Wellington, 2023) at [37.13].

25 Search and Surveillance Act 2012, s 357.

26 Other examples include review provisions in the Local Government Act 2002 (s 32); Veterans' Support Act 2014 (s 282); Prostitution Reform Act 2003 (s 42); Oranga Tamariki Act 1989 (s 448B); and Intelligence and Security Act 2017 (s 235).

concerns about the "relatively radical and unique nature of the substantial codification" of the law of evidence represented by the Bill.[27]

The End of Life Choice Act was enacted following significant public and political debate and a referendum. It addresses conscience issues on a subject matter that was new to the law on its enactment. Again, it makes good sense to review how the Act is working and have the opportunity to iron out problems with its operation.

While reviews of these Acts can be justified in light of their particular histories, there is also a case for more routine operational review of legislation. The England and Wales Law Commission published a report in 2006 supporting a more systematic approach to post-legislative scrutiny. It suggested that such scrutiny has several benefits:

- Policy makers can check a new Act is working as was intended. If it is not, the reasons can be identified, and solutions developed.[28]
- Relatedly, scrutiny can focus attention on the practical and administrative implementation of the legislation. An Act could be sound in terms of its broad policy and expression but the way it has been put into practice may be raising issues of concern, which can be identified through formal post-enactment examination.[29]
- Scrutiny can improve the quality of regulation.[30] The England and Wales Law Commission suggested that scrutiny would be likely to reveal lessons relating to the content of legislation as well as whether legislation was the most appropriate mode of regulation for the subject matter.
- The fact of future scrutiny can maintain pressure on the agency responsible for delivering the aims of the legislation.[31]
- More generally, it can help with identifying best practice.[32] Scrutiny can enable governments to learn from experience how to avoid poor use of legislation and strengthen the future development of legislation.

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27 Evidence Bill 2005 (256-2) (select committee report) at 14. The requirement for regular reviews was not recommended by the Law Commission in its 1999 original report or in the evidence code it prepared.

28 The Law Commission *Post-Legislative Scrutiny* (LC302, October 2006) at 8.

29 At 9.

30 At 9.

31 At 10.

32 At 10.

Te Kāhui Ture o Aotearoa | the New Zealand Law Society has also noted with concern the increasing use of urgency to pass legislation, and the consequent decrease in proper pre-legislative scrutiny.[33] It suggested that greater post-legislative scrutiny is a sensible way to combat this issue.

There are several downsides, too. One relates to cost. In 2019 and at the end of its second review of the Evidence Act, the Law Commission recommended the repeal of s 202 of the Act, which was the provision requiring 5-yearly statutory reviews. As I mentioned, s 202 was eventually repealed, in late 2022. The Commission concluded that the codification exercise had been successful and no further mandatory statutory reviews were needed. It also stressed the drain on resources and that fact that no other area of law is subject to regular operational review by the Law Commission.[34] Similarly, I once wrote to the Commission with a colleague to highlight areas in the Arbitration Act that were not working well and suggest the Commission might wish to review them. The reply we received was that there were insufficient resources to undertake the suggested review.[35]

A second issue is that post-legislative scrutiny can risk the unnecessary replay of arguments. This was identified by the England and Wales Law Commission, which reported submitter concerns that scrutiny may reopen debates on the merits of an Act's purpose rather than focus on whether its purpose is being achieved.[36] Sometimes, the difference between an operational issue and a policy one can also be difficult to make out. This risk can be mitigated through the design of the review process. For instance, in the third review of the Evidence Act, the Law Commission applied criteria to help assess whether an issue fell within the scope of an operational review and was of sufficient importance to justify inclusion. We were pressed by some submitters to address issues of concern to them but if the issues were outside the scope of the review they were not considered.

A third issue involves who should take responsibility for any review. The England and Wales Law Commission consulted on two procedural options for post-legislative scrutiny. The first involved including a positive commitment in a Bill that, after an appropriate period post-enactment, the relevant government department would undertake an initial review.[37] Its report would be published

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33 Te Kāhui Ture o Aotearoa | New Zealand Law Society "Submission to the Standing Orders Committee on the 2023 review of standing orders".

34 Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at [1.52]–[1.53].

35 Some of the issues we identified were picked up through the Judicature Modernisation Bill 2013 (178-2) and then the Arbitration Amendment Act 2019 albeit without independent review and public consultation.

36 The Law Commission, above n 28, at [2.15]–[2.17] and [2.24].

37 At [3.5].

and laid before Parliament. The appropriate select committee would then review the report and consider what follow up action might be taken. In other words, review would be built into the new legislation. The second option contemplated a more reactive, post-enactment model whereby an agency or Parliamentary committee might decide review is needed.[38] Ultimately, the Commission proposed creating a dedicated parliamentary committee to undertake post-legislative scrutiny, but this was not accepted — instead, a version of the first option, involving departmental reports to relevant select committees, has been adopted.[39]

The New Zealand Law Commission does not presently have resourcing to take on all the work of post-legislative scrutiny itself. The third review of the Evidence Act alone consumed about a quarter of the Commission's capacity for over 18 months. Our statute Emperor is much too big.

However, building on the work of the England and Wales Commission, one potential project — in fulfilment of our systematic review function — is to design new avenues for the regular scrutiny of legislation post-enactment. An expanded Law Commission might also be able to undertake a coordinating function, by independently assessing initial ministry or departmental reports, in order to form a view whether further scrutiny is needed and by whom. These are at least important conversations to have.

4 Excision and Revision

Beyond scrutiny, systematic review can also be achieved by taking a scalpel to old legislation and removing it from the statute book. As foreshadowed, the Law Commission's very first report addressed the application of imperial laws. It proposed an Imperial Laws Application Bill to definitively state what imperial legislation enacted before and after 1840 would, and would not, continue as part of our law.

> The introduction to the Commission's report notes:[40]
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> The Law Commission is to keep under review in a systematic way the law of New Zealand. Our first report looks back to the beginnings of a major part of our legal system. It reminds us that the ongoing review of the law begins with our historical inheritance.

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38 At [3.5].

39 See Richard Kelly *Post-Legislative Scrutiny* (House of Commons Library, SN/PC/05232, 23 May 2013).

40 Te Aka Matua o te Ture | Law Commission *Imperial Legislation in Force in New Zealand* (NZLC R1, 1986) at [1].

It could be added that imperial laws were an obvious place to start. Identifying redundancy based on age alone is usually more difficult, because a lot of our current law — despite being nigh on archaic — is still relied on, every day.

An old Act might thus be a candidate for revision, instead of excision. Revision is a process for improving the accessibility of legislation, targeting Acts that have been heavily amended or were written in what is now outdated language. The Law Commission's President is one of four certifiers for revision Bills under the Legislation Act 2019.[41] A revision Bill will be written in modern language but (with some exceptions) revision is not intended to change the effect of the original Act. The certifiers work together as a panel to examine and certify each Bill to ensure the revision powers have been applied properly. Once certified, the Bill is presented to Parliament through streamlined procedures (on the basis they do not make substantive changes to the law). For example, there is no amendment or debate on the Bill's first reading, and following the second reading the Bill ordinarily proceeds directly to the third and there is no amendment or debate at the third reading either.[42]

This revision process stems from a 2008 report produced by the Law Commission in conjunction with Parliamentary Counsel Office. The report explains:[43]

> We think it is high time that there was a programme of systematic revision of the Acts in our statute book to get them into a more coherent state. This was last done in 1908, exactly 100 years ago. At that time a small commission assisted by the Law Draftsman went systematically through all our statutes, over 800 of them, and reduced them to an orderly 208. All of the new Acts were enacted together in 1908 and replaced what had gone before.
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> Today we have more statutes. There are over 1,100 of them, and they are in a more disorderly state than they were in 1908. But if the work could be done 100 years ago without the aid of computers, or indeed any modern technology, it can be done now. If it is not, the present state of our statute book will get progressively worse.

The Law Commission anticipated the revision process would result in several revised Acts being passed each year but by my count, only two Acts have been

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41 Legislation Act 2019, s 98(1). The other certifiers are a retired High Court judge nominated by the Attorney-General, the Solicitor-General, and the Chief Parliamentary Counsel.

42 Standing Orders of the House of Representatives 2017, SO 271.

43 Te Aka Matua o te Ture | Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, October 2008) at [13]–[14]. The revision process was initially enacted in the Legislation Act 2012, which was replaced by the 2019 legislation.

passed to date, modernising and consolidating 13 old.[44] Six Acts have been included in the revision programme for the current Parliamentary term.[45] In a 2021 report, the Chief Parliamentary Counsel identified possible reasons for the current low level of use of the revision process. These included resourcing constraints (PCO does not receive an additional appropriation for this work), other government legislative priorities, and limitations of the revision process itself — in particular, the inability to include even uncontroversial minor amendments in a revision Bill[46] (this problem has been partially remedied by a change to standing orders, allowing amendment via Amendment Papers (formerly Supplementary Order Papers)).[47]

Law Reform and Development

The Law Commission's second statutory function is to make recommendations for the reform and development of the law. Most of the Commission's work falls under this head.

As an independent Crown entity, the Commission stands apart from the complex of executive power that is the Parliamentary precinct, both institutionally and physically (we occupy a single floor of an unassuming office building 10-minutes-walk away). Yet, our work has an outsized impact on Aotearoa New Zealand's legal landscape.

It is in the context of the characteristics espoused by Sir Geoffrey — time, resources, autonomy, and standing — that the Commission executes its mandate to reform and develop the law, by completing comprehensive multi-year reviews of some of the most complex and challenging legal issues of the day. These are informed by consultation with parties ranging across members of the public to the profession, other agencies and the judiciary.

Most of the Law Commission's work involves making recommendations for statutory reform, although it is also common for the Commission to make subsidiary recommendations on operational measures (such as legal or judicial education) or rules or guidelines (such as changes to professional regulation).

According to the LDAC guidelines, high quality legislation should be (i) fit for purpose, (ii) constitutionally sound, and (iii) accessible. Under the "fit for purpose" umbrella we find the principle that legislation should only be used

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44 Te Tari Tohutohu Pāremata | Parliamentary Counsel Office *Report of the Chief Parliamentary Counsel on the Review of Subpart 3 of Part 2 of the Legislation Act 2012* (March 2021) at 3; and Te Tari Tohutohu Pāremata | Parliamentary Counsel Office "Revision programme" (11 September 2024) <www.pco.govt.nz>.

45 Te Tari Tohutohu Pāremata | Parliamentary Counsel Office "Revision Bill programme 2024 to 2026" (11 September 2024) <www.pco.govt.nz>.

46 Te Tari Tohutohu Pāremata | Parliamentary Counsel Office *Report of the Chief Parliamentary Counsel on the Review of Subpart 3 of Part 2 of the Legislation Act 2012*, above n 44, at 7–11.

47 Standing Orders of the House of Representatives 2017, SO 271(5).

when necessary. The guidelines therefore sound a strong warning to would-be lawmakers: don't legislate lightly. But the necessary corollary of this warning is that, in some cases, issues *will* need to be addressed by way of legislation. And the Committee impresses upon us the importance of such legislation being effective. One of the tasks for the Commission is therefore to identify where, and the reasons why, legislation might be necessary in the context of a given review.

This role is a critical one in the wider scheme of law reform, and it is a role shared by law commissions globally. But before examining what that role looks like, I want to pause and explain that I use the words "law reform" to mean something more than merely passing a statute. As the Commonwealth Association of Law Reform Agencies says, "law reform" means improving the substance of the law in significant ways.[48] Despite at times being socially controversial, law reform is fundamentally not political — it is not driven by the views of one political party over another.[49] While our work programme is inevitably influenced by the priorities of government, once this programme has been set, s 5 of the Law Commission Act requires us to act independently. Our raison d'être is to look at, and improve, *the law*.

Now, to explain, there are three main ways the Commission might go about recommending reform:

- First, *changing the law* by amendment to existing legislation. For example, the Commission has recently started investigating whether new offences should be added to existing criminal statutes in order to address the problem of hate-motivated offending.

- Second, passing *entirely new legislation*, either to replace old legislation or to deal with a new matter. In 2013 the Law Commission, adopting this approach, recommended that a fresh Trusts Act be passed into law. This recommendation was made after three years of detailed research and consultation. Because of this work by the Commission, the Trusts Act 2019 was enacted, repealing and replacing the outdated and unclear 1956 Trustee Act. In 2022 the Commission published its report on surrogacy law reform, proposing a new Act to create a path to legal parenthood for intended parents in a surrogacy arrangement.

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48 Commonwealth Secretariat *Changing the Law: A Practical Guide to Law Reform* (London, 2017) at 11.

49 At 14–15.

- And third, *codification*, where legal principles which already exist but can only be found by pouring through a disjointed body of common law are brought together in a single statute. This introduces coherency to the law, increases accessibility, and the process ultimately allows these principles to be refined and made appropriate for a modern world. As discussed already, the Evidence Act 2006 exemplifies this approach: the Commission identified a suite of pre-existing legal rules in various judgments and statutes and recommended a single new all-encompassing Act.

Finally on this statutory function, the Commission's more general work to develop the law, through publication of "study papers", should not go overlooked. Most recently, the Commission published *He Poutama*, a study paper which reviews the legal position of tikanga in Aotearoa New Zealand and gives guidance about the ongoing interaction between tikanga and state law, including guidance specifically for policy makers.[50] While not "law reform" per se, the paper has already been cited by the Supreme Court, is being used as a teaching resource in law schools, and, we are told, is being read widely within government agencies.

Advice on Reform Work by Other Government Agencies

The Law Commission's third statutory function is to provide advice to any government agency on the review of "any aspect of the law of New Zealand" that the agency may be undertaking, and "on proposals made as a result of the review".[51] The function is cast in wide terms and could potentially have very wide application. Previously, for example, the Commission has provided specialist advice covering constitutional law issues, as well as more technical advice on the formulation of legislative proposals. In 2008 it was estimated that around 20 per cent of the Commission's time was taken up on advisory work of this nature.

Once again though I am referring to this work in the past tense. For some years the Law Commission has done very little of this work, and none recently. I can think of two explanations for this change. The first, simply put, is that the Commission has not been asked. About once or twice a year, the Commission is invited to provide a submission or advice on a proposal or Bill, but in circumstances where the Commission is one of several agencies invited to comment or submit. There has not been a deliberate decision by the government to make specific use of our advisory function, and we do not have the resources to expend on advice that is not specifically requested. The

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50 Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, September 2023).

51 Law Commission Act, s 5(1)(c).

second is that most other government agencies now have experienced policy teams of their own and may not consider there is a need for further input.

Improving the Understandability and Accessibility of the Law

The Commission's fourth and final statutory function is to advise on how the law can be made as understandable and accessible as is practicable. In large part, this function is achieved through the work I have already described. Indeed, when making recommendations, the Commission — according to s 5(2)(b) of our Act — is *required* to have regard to the desirability of simplifying the expression and content of the law. So, this function is at the heart of every recommendation, study paper, consultation, revision Bill certification — it's at the heart of everything we do.

But, one particularly apt example is the Commission's work on legislation and its interpretation. In 1990, we published *A New Interpretation Act: To Avoid "Prolixity and Tautology"* which proposed a single interpretation statute.[52] Subsequently, the Interpretation Act 1999 — Tāne Mahuta of the legislative world — was passed into law. The Commission was similarly responsible for the Legislation Act 2012, and the Legislation Act 2019.[53]

IV Conclusions

So, is the Law Commission achieving its statutory functions? I will let you be the judge of that. But two things are immediately obvious to me from this review. First, what we are especially good at has changed over time. And second, a large driver of this change has been resourcing. It is undeniably true that the Commission's volume of work is small, and implementation is slow; a difficult fact to pit against our responsibility for systematically reviewing the whole law of New Zealand. Yet nonetheless, the Commission continues to have a large and irreplaceable impact on the country's statute book.

Fighting for both dollars and Parliamentary time is not something unique to New Zealand, so the experiences of law commissions globally may provide some inspiration. For example, in the United Kingdom, "non-controversial" Bills proposed by the law commissions of England and Wales and Scotland undergo a streamlined parliamentary process (wherein the second reading debate

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52 Te Aka Matua o te Ture | Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990).

53 In 2008, the Law Commission report *Presentation of New Zealand Statute Law*, above n 43, made a variety of recommendations, most of which were implemented in the Legislation Act 2012. However, the Commission's recommendation that the Interpretation Act 1999 be subsumed by the Legislation Act 2012 did not happen. This recommendation was later given effect to by the Legislation Act 2019: Te Tari Tohutohu Pāremata | Parliamentary Counsel Office *Interpretation Act 1999: A discussion paper* (17 April 2013).

occurs in a committee, and it is understood that formal stages of the process "need be allocated only limited Parliamentary time").[54]

Now, as promised, I want to return to our Emperor — our poor, limping, bloated Emperor. As a profession, we lawyers often debate the role of the courts, but we spend much less time discussing the capacity and constitutional role of Parliament to keep the statute book in good order. With that in mind, I am going to round out this lecture by charting a two-step course for revival.

First, there must be greater impetus to deal with non-controversial but critical day-to-day legislative issues. Every law reform project that has been undertaken in my four-plus years at the Law Commission has recommended either repealing and replacing legislation or making substantial amendments to it. This includes decades-old legislation covering ordinary, everyday things like divorce and claims against estates. As already alluded to, the Testamentary Promises Act exemplifies my point. Its enactment was a legislative feat more than half a century ago. The problem now is that the Act, despite being outdated, is still in force. In a 2021 report, the Law Commission recommended its repeal and replacement with modern legislation.[55] That report has not yet been scheduled for implementation.

The problem Fuller identified — that statutes can be ill suited to deal with novel situations arising after enactment — is exacerbated by age, because not even the best drafters can see multiple decades into the future. Currently, for example, intended parents in a surrogacy arrangement must adopt their biological child under the Adoption Act 1955. The Law Commission's report on surrogacy is being considered by the Health Committee, with a view to retrofitting our recommendations for new pathways to parenthood into a Member's Bill. The report's recommendations are in this sense being worked through for implementation, but only because a Member's Bill was drawn at random from the biscuit tin.

My second step relates to the political commitment needed to progress recommendations of post-legislative scrutiny. Take the Law Commission's work, for example: whether an area of law needs to be reviewed by the Commission is normally a decision for the Minister to take when setting the annual work programme, as described earlier. In the case of the third Evidence Act review, the current government did not ask for it, an earlier Parliament did. In the case of the second Evidence Act review, the previous government specifically requested the Commission to include in the review issues relating to the giving of evidence in cases involving sexual violence. The Commission's

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54 Commonwealth Secretariat, above n 48, at 177.

55 Te Aka Matua o te Ture | Law Commission *Review of succession law: rights to a person's property on death | He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* (NZLC R145, November 2021) at [R1].

recommendations on that subject were implemented by that government, but the balance of the report addressing more general reforms to the Evidence Act has not been prioritised for implementation.

Judge-made common law has the advantage of being able to be developed quickly, with gaps filled and new issues responded to as and when they came before the courts. By contrast, despite its enormous merit, the trouble with legislation is that progress and renewal of statutes depend on the existence of political will and the factors that shape it.

The Law Commission began operations in 1986 — nearly four decades ago. Since then, society has become even more diverse, the size of the New Zealand statute book has more than doubled and consideration of international law obligations has become routine in law reform. And increasingly, the influence and role of tikanga in the law presents both unique challenges and exciting law reform opportunities.

Clearly, good and effective law reform — and, by extension, the Law Commission — is vitally important in 21st century Aotearoa New Zealand. I have sometimes thought (sometimes aloud) that the Law Commission should be conferred law making powers. Can you imagine how beautiful and well-dressed the statute Emperor would be? For obvious reasons, that will not happen, and so the message I wish to leave with you all this evening is that while the Emperor is all powerful, it also needs some care.