Te Aka Kōrero

THE LAW COMMISSION QUARTERLY NEWSLETTER

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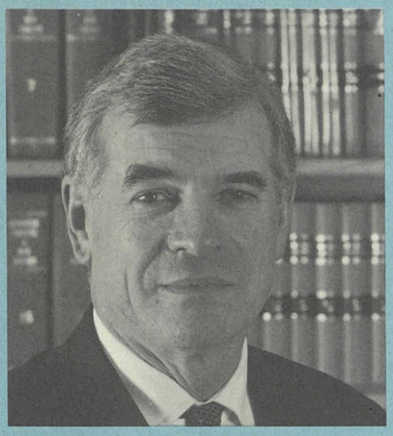
From Justice David Baragwanath, LAW COMMISSION PRESIDENT

A WELCOME TO THE NEW COMMISSIONERS



In a comment on his appointment as Law Commissioner, Donald Dugdale was described as "formidable", and in the Queen's birthday list Denese Henare was honoured with an ONZM.

Commissioner Dugdale is a former President of the Auckland District Law Society and senior partner of Kensington Swan; he is one of New Zealand's foremost commercial lawyers. He has served on the Council of Legal Education and the Council of Law Reporting. He is the author of standard texts on hire purchase and credit contracts and a law reformer of distinction. As a member of the Contracts and Commercial Law Reform Committee he was party to classic contract and insurance law reforms. Since joining the Commission he has undertaken consideration of how commercial law can be made simpler and more efficient. He has produced a draft for an indigenous habeas corpus statute (which we have lacked since 1840), and a bill to deal with the effects of homicide of a testator by a beneficiary.

Commissioner Henare (Ngati Hine, Ngā Puhi) is another experienced commercial lawyer, with a diploma in Air and Space Law from London University. She has had extensive public sector experience as Royal Commissioner in the Contraception, Sterilisation and Abortion enquiry, an Auckland City councillor, a member of the Board of Māori Affairs and the Transitional Health Authority, director of the Northern Regional Health Authority, and in numerous other capacities. She has advised and represented Māori in many major cases, representing Tainui throughout its litigation and trail-blazing settlement with the Crown, and is a leading authority on Treaty jurisprudence. Her appointment greatly enhances the Commission's ability to perform its statutory function to take account of te ao Māori in its work.

Since January, with the assistance of the new Commissioners, we have reviewed our role. We see it as using public resources to improve the lives of New Zealanders by focusing on where the law is unjust, inefficient, or inadequate. We seek the help of others in the community to identify problems and to develop and carry out a new work programme which we are currently formulating.

This newsletter contains essays by both Commissioners on why they have accepted appointment (see pages 2–3). Commissioner Dugdale emphasises the need for relevance in our work; to avoid mending what is not broken and to deal with issues of immediate importance. Commissioner Henare focuses on the Māori dimension. The Treaty affects all New Zealanders and the need for informed discussion of it is urgent. The newsletter contains a discussion of the place of Māori customary law within the wider New Zealand legal system (see page 4).

SUCCESSION ADJUSTMENT

How a deceased person's estate is shared out is determined by the terms of his or her will if one exists or, if not, by certain statutory rules governing the distribution of intestate estates. Under the present law the courts have power in certain situations to adjust such sharing. In our forthcoming report, "A Succession (Adjustment) Act: Modernising the law on entitlement to share in property a person owns on death", the Commission will recommend consolidating these rules under a single statute and modernising them in important respects.

In 1976 the rules governing the division between spouses of matrimonial property were fundamentally rewritten. However, the reform applied only where both spouses were still alive. The need to extend the reform to situations where one or both spouses is dead has long been acknowledged. Part of the logic behind the Commission's proposal is the anomaly of the existence of two different sets of rules; those from 1976 as well as the 1963 rules. However, as the 1976 rules are currently under consideration by the Ministry of Justice (particularly those in relation to de facto spouses), the Commission's proposals will have to march in parallel with, and – if necessary – be adjusted to match the Ministry's proposals.

The Testators' Family Maintenance Act 1900 was a pioneering statute enabling courts to give relief where a deceased person had not provided adequately for the needs of dependants. Its current descendant is the Family Protection Act 1955. Unfortunately, the application of this statute has become skewed in recent years. Our preliminary paper, *Succession Law:*

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NEW ZEALAND LAW COMMISSION • TE AKA MATUA O TE TURE

Level 10 • 89 The Terrace • PO Box 2590 • Wellington • DX: SP23534 • Telephone 0–4–473 3453 • Fax 0–4–471 0959 • e-mail: com@lawcom.govt.nz

BECOMING LAW COMMISSIONERS

Denese Henare and DF Dugdale write on what becoming a Commisioner means to them

From Denese Henare ONZM

Hutia te rito o te harakeke
kei hea te komako e ko?
Rere ki uta
Rere ki tai.
Ki mai koe ki au,
"He aha te mea nui o te Ao?"
Maku e ki, "He tangata, he tangata,
he tangata".

If the centre shoot of the flax bush were plucked,
Where would the Bellbird sing?
You fly inland
You fly to sea.
You ask me,
"What is most important in the world?"
I would say, "'Tis people, 'tis people,
'tis people".

THIS WHAKATAUKI or proverb affirms the values of continuity and growth. It best sums up my reason for accepting a position as a Law Commissioner. Serving people – particularly Māori people – has been the focus of my life and becoming a Commissioner is a natural progression of both my professional career and my service to the public.

The Law Commission's governing statute requires it to "make recommendations for the reform and development of the law of New Zealand". In making those recommendations, the Commission is required to "take into account te ao Māori (the Māori dimension)". In giving effect to te ao Māori, the question is not "is there a Māori aspect to this particular issue", but rather, "what is the Māori aspect?" and, "what are the implications of this issue for Māori?" Given the diverse nature of Māori interests, it is central to the Law Commission's work that it reflect such diversity.

It is an exciting time to be joining the Law Commission. In doing so I am realising the aspirations of my tupuna: to work for the growth and development of a bi-cultural society based on the Treaty of Waitangi – a society where diversity is respected. It is the role of the law, I believe, to fairly reflect the beliefs and values of that society.

The Law Commission's strategic business plan for 1996/1997 states:

> Giving effect to this responsibility [te ao Māori] requires concrete steps to recognise the significance of the Treaty of Waitangi in the Commission's work, and to achieve a bi-cultural approach to the way in which it operates. (8)

The Commission established the Māori Committee in 1993, of which it has been my privilege to be a member for the past year. The committee is currently chaired by Bishop Manuhuia Bennett, and includes Chief Judge ET Durie, Dr Mason Durie, Mrs Whetu Wereta, Judge Michael J Brown, and Mr Archie Taiaroa. It has two major functions: first, to advise the Commission on projects and processes (including consultation), and on operations within the Commission (such as identification of projects and recruitment policy); second, to develop a framework in which the laws of New Zealand reflect the joint heritage of the country.

The received wisdom of past experience is that responsiveness to te ao Māori can best be achieved by Māori. The Māori Committee has always viewed the recruitment of Māori at all levels within the Commission as the best way of enabling the Commission to begin to take account of te ao Māori. I hope my appointment as a Commissioner will encourage other Māori to join the Commission.

I welcome the opportunity to implement the vision of the Māori Committee and look forward to working with all of my colleagues at the Commission. In particular I hope to assist the Commission to better discharge its responsibilities under the Law Commission Act and the Treaty of Waitangi toward Māori, both generally and in relation to specific law reform projects.

From DF Dugdale

EVER SINCE THE ENACTMENT OF the Matrimonial Property Act 1976 it has been generally agreed that there is no logic in property-sharing disputes between living spouses being determined under the new regime imposed by that statute, while if one or both spouses happens to be dead the different rules to be found in the 1963 Act apply. Is it not regrettable that more than 20 years have passed without the necessary change to the law being enacted?

A developed nation needs a system for granting security over personal property that enables lenders reliant on such security to lend, and buyers needing to ensure that they are acquiring unencumbered ownership to buy with confidence. The personal property securities legislation proposed by the Commission in 1989 would have provided that system. There is a cost to the economy in bad law. Is it not unfortunate that that proposal has not resulted in legislation?

Is it not scandalous that, despite the constitutional importance of the writ of habeas corpus, the effect of the Judicature Act 1908 s 54C is that a New

Succession adjustment

Continued from page 1

Testamentary Claims (NZLC PP24, 1996), records among others the argument that the cherished right of New Zealanders to dispose of their estates as they think fit has been tinkered with by the courts not on the grounds of need – the original basis of the legislation – but on the basis of breaches of some undefined moral duty. So for example, the courts have allowed claims by wealthy adult children in no financial need whatsoever, simply on the basis of what seems to the court to be fair. We are currently considering the responses and preparing proposals intended to rationalise the law.

The Commission's proposals will add to the usefulness of the Law Reform (Testamentary Promises) Act 1949. That Act provides a convenient machinery for deciding claims based on contributions to the estate of a deceased person in two cases. The first is where the deceased person promises to reward the contributor. The second case is where it is unjust for the deceased person's estate to retain the benefit provided.

The Commission intends the end result to be a clear code governing succession adjustment, so that claims against deceased estates can be disposed of swiftly and in a principled way.

The report is scheduled for release in July and follows on from the discussion paper *Succession Law: Testamentary Claims* published last year.

NEW ISSUES ARISE IN PROPERTY AND COMMERCIAL LAW REFORM

COMMERCIAL LAW REFORM is once again a priority for the Law Commission.

Since completing its review of the Property Law Act in 1994, the Commission has had only a limited involvement in law reform with a commercial flavour. The new Companies Act 1993 was, of course, largely based on the Commission's work. That reform is now settling down, and since 1995 the main responsibility for commercial law reform has rested with the Ministry of Commerce and, in respect of securities law matters, the Securities Commission.

Our discussions with those and other agencies in recent months have identified law reform needs in the commercial arena, and it is apparent that the Law Commission is well placed to address some of them. They include work in the area of insurance law (eg, the law relating to non-disclosure), the implications of internationalisation (eg, cross-border remedies in insolvency law), and the grey area between securities law and land law, in which issues of enforcement arise concerning schemes such as retirement villages and time-share developments.

The Commission seeks views from the commercial and legal communities in respect of these, and any other, issues.

Another important area of unimplemented reform is the Law Commission's work on personal property securities law (PPSA). The Commission recommended sensible and workable reforms as long ago as 1989. Despite widespread support, those reforms were not included in the company law reform package of the early 1990s, although the package contemplated their introduction at some time before the expiry of the transition period in June 1997. Policy proposals for a PPSA statute are now in preparation by the Ministry of Commerce, and the Law Commission will play a significant advisory role.

Becoming Law Commissioners

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Zealander seeking the issue of such a writ has to resort to English practice, pleading, and procedure, adaptation of which to the New Zealand rules is no easy task (as Justice McGechan's text describes with melancholy lucidity).

I am afflicted by the no doubt naive belief that questions like these matter, that the well-being of our society depends on (among other things) the existence of a just and efficient set of laws. To hold such a belief demands a readiness to identify and criticise acts or omissions that seem harmful to the justice and efficiency of the legal system. It also demands a preparedness to roll up one's sleeves and pitch in if asked to help with the business of law reform. It was in that spirit that I worked hard as a member of the Contracts and Commercial Law Reform Committee during the 21 years of its existence, which was terminated by the peremptory disbandment of all the part-time law reform committees.

It was in the same spirit that, when invited to abandon the comforts of life as senior partner of the firm that had been my professional home since I entered the employment of Kensington Haynes and White some 42 years ago, in favour of life as a Law Commissioner, I accepted without any real hesitation.

It seems to me in my simple way that the responsibility of the Law Commission is to try and change the law for the better. Law reformers propose; parliamentarians dispose. Part of the responsibility of the Commission is to present its proposals in a way that brings home to political decision-makers that such proposals have immediate importance. The Commission's statutory obligation is no doubt to engage in *systematic* law reform, but it does not seem to me that that adjective entitles the Commission to spend public money looking for ways to mend what is not broken. I have no wish to devote the next 5 years to the preparation of impeccably researched reports that are simply left to gather dust.

Meanwhile the questions keep coming. What is to be done about the way the courts have applied the Insurance Law Reform Act 1977 s9 to claims made policies? Should a will be admitted to probate despite bungled compliance with the formalities of execution if the testator's intention is clear? Should New Zealand accede to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters 1965? Should we cut out some dead wood from our contract texts by repealing the Contracts Enforcement Act 1956?

I hope that in the humble role of Law Commissioner I can do the state some service. In any event it is fun to try.

ENGLISH AND TRIBAL LAW: NEW ZEALAND'S DUADIC LEGAL SYSTEM

THE LAW COMMISSION HAS A RESPONSIBILITY to advise and promote improvements to our law in the interests of all New Zealanders. Rules and laws are of the essence of a society; their reform allows for commerce to be made more efficient, better access to justice, and citizens' rights to be protected from infringement. Perhaps the most challenging task of the Commission is to deal fairly and effectively with the place of Māori and their institutions within New Zealand society. These are commonly called Treaty issues, and with some justification, since the Treaty of Waitangi is New Zealand's founding document. It is the justification relied on by the Crown to have received sovereignty from Māori: it gives Parliament the authority to make our statutes, and the judiciary the authority to interpret them and develop the judge-made common law.

In New Zealand the law includes the statutes and judge-made law that are the legacy of British colonial settlement. What is less well known is that there is another source of law altogether. This is the law of indigenous rights which has been recognised by international law since the 16th century, by English colonial law since the 17th century, by the Privy Council in numerous cases (including appeals from New Zealand), and by our own Court of Appeal in recent times. Its principle – in the New Zealand context – is that the rights of individuals or their tribes which were recognised by customary usage before 1840 were not superseded by the colonial law of England that took effect upon the cession of sovereignty. No legislation was needed to give legal effect to this usage; the judge-made common law gave it effect upon the British Crown's assumption of sovereignty. Moreover, the explicit language of the Treaty includes an undertaking to protect those rights.

Recognition of the existence of indigenous rights was either resisted or rejected by colonial governments in New Zealand, Australia, Canada, America, and the French colonies. In New Zealand they were at first recognised; with a growing shortage of land for settlement, the land wars that followed, the fear of the colonists that they would be defeated, and a backlash against Māori by other elements of the colonial society, the judiciary abandoned its original position and refused to recognise indigenous rights. The pattern was similar in other colonial societies. With the passing of time, changes in international opinion, and an increasing maturity, each of these jurisdictions has now recognised that indigenous rights need to be recognised.

Whether there should be change is not the present point; certainly indigenous rights can be, and have been to a large extent, removed by inconsistent legislation. Title to most privately-owned land, for example, is protected by legislation; there is no prospect here of difficulties on the scale of those in Australia, where the *Wik* judgment of the High Court delivered last December may affect as much as 40% of that continent. But in considering future options, New Zealanders should understand that, in the absence of such legislation, Māori indigenous rights remain.

Once that is understood, other New Zealanders may appreciate that the law's "protection of Māori rights" is required by the same legal rules that protect their own. Māori New Zealanders would have every reason to feel aggrieved if their rights were simply ignored. Further, the preamble to the Treaty and article II, which in substance promise to protect Māori values, have not received significant effect in the formulation of our law. That requires attention.

It does not follow that there are or should be two distinct legal systems, each hermetically sealed from the other. If a Māori and non-Māori together commit a serious crime it is impracticable to suggest that they should be arrested by different police officers, and taken to separate watch houses. Nonetheless, at least in some cases, there is much room for imaginative forms of justice, especially a restorative justice that rehabilitates the victim. The Commission's consideration of alternatives to prosecution (see page 5) is taking place within the reality that New Zealanders are of many cultures and of a wide range of opinions. In this, as in our other work, we seek ideas and advice from all sectors so that we can advise Parliament on changes to our law that will improve New Zealanders' lives.

The starting point for reform of the law is the further reality that our single legal system is derived from, and contains elements of, both English and Māori roots, both greatly modified by Parliament and the judiciary over the past 157 years. The term "duadic" expresses that reality: of two bases of a single system. A major task lies ahead: what principles should govern the updating and reform of this total system? Concepts of the protection of Māori and tribal identity are increasingly seen as important by international law. Statute aside, the law guarantees Māori their particular identity. Moving forward requires of all of us goodwill and generosity of spirit, to develop a united single nation proud of, and eager to protect, our differences.

JUSTICE WALLACE IN HONOURS LIST

THE WORK of the Honourable Sir John Wallace QC has been marked by public service as a High Court judge, as a law reformer, and as someone concerned with citizens' rights. Appointed to the Law Commission in 1989, the then Justice Wallace took particular responsibility for the evidence project. From early 1991 to early 1996, he was also deputy president of the Commission.

He was a member of the Contracts and Commercial Law Reform Committee, the Royal Commission on the Courts chaired by Justice Beattie, and has been chairperson of the Equal Opportunities Tribunal, the Human Rights Commission, and the Royal Commission on the Electoral System, and President of the Electoral Commission.

The Law Commission was delighted at his being made a Knight Commander of the Order of New Zealand in the Queen's Birthday honours list.

Progress report – Women's Access to Justice: He Putanga Mō Ngā Wāhine ki te Tika

Continued from page 5

calls for responsiveness to Māori values and needs across a range of state activities.

These four papers, together with the three earlier papers (*Information About Lawyers' Fees* (NZLC MP3), *Women's Access to Legal Information* (NZLC MP4), and *Women's Access to Civil Legal Aid* (NZLC MP8)), will form the basis of the final report, due to be submitted to the Minister of Justice in early 1998. This report will also incorporate responses to the seven consultation papers, and discussions on those responses. We will report to the Minister on the effective delivery of appropriate and affordable legal services to New Zealand women in all their diversity, and on enabling justice sector agencies and the legal profession to respond appropriately to the needs of Māori women.

Our terms of reference require us to report on "principles and processes to be followed by policy makers and lawmakers, specific law reforms, and educational and other strategies". What is needed is an integrated, multi-pronged strategy of policies and actions, of which law reform will be a part. The project will emphasise short-term results but will also address larger and more long-term problems and solutions.

If you would like to make submissions on any of these papers, or receive further information about the project, please contact Michelle Vaughan on freephone 0800 88 3453, email mvaughan@lawcom.govt.nz or write to Freepost 56452, Law Commission, PO Box 2590, Wellington.

STAFF NEWS

THE COMMISSION HAS APPOINTED Tim Brewer, Crown Solicitor, as a consultant to the criminal procedure project team. Tim comes from New Plymouth and is a partner of Brewer Mazengarb. He is a member of the Criminal Law Committee of the New Zealand Law Society. He is taking a particular role in the Commission's work on the prosecution system and alternatives to prosecution (see page 5).

The Commission has also appointed Bala Benjamin as our new Finance and Administration Manager. Bala was previously the Financial Accountant of Hutt City Council, and brings with him a wealth of accounting and management experience.

With Bala's appointment the Commission farewells his predecessor, John Lett, who joined the Commission in 1991. The role of finance and administration manager is critical to the operation and efficiency of any organisation. In his 6 years at the Commission, John completely overhauled our financial systems, managed an effective team of support staff, and, in 1996 took responsibility for the replacement of the computer system. We wish him well in his new position as Finance and Corporate Services Manager with the South Wairarapa District Council.

One of our secretaries, Alison Johnston JP, retired in April after 2 years at the Commission, initially as personal assistant to Sir Kenneth Keith. In her place, Leonie Gwiazdzinski has joined our support staff team, and will work closely with Denese Henare and members of the te ao Māori project. Leonie comes to us from Izard Weston where she worked as a legal secretary and personal assistant.

Elisabeth McDonald, Research and Policy Manager of the evidence project, is travelling to Fiji to assist in the process of criminal evidence reform. Her visit is in response to a request from the Department for Women and Culture, Suva, to help make a submission to the Fijian Law Commission on procedural and substantive issues which, from the department's perspective, require review. Her travel and accommodation expenses are being sponsored by the Pacific Regional Human Rights Education Resource Team, a project seeking to enhance the legal and social status of women in the Pacific.

The Commission is delighted at the compliment to Elisabeth that lies behind the request, and is pleased to be able to support the work of the Fijian Law Commission.

LAW COMMISSION PUBLICATIONS

SINCE THE REDESIGN of the Commission's publications last year, we have produced several reports and preliminary papers (see right), and have recently published our tenth miscellaneous paper. Copies of these publications are still available.

Also available are annual subscriptions for 1997. Subscribers receive copies of *Te Aka Kōrero*, all reports and preliminary papers, and miscellaneous papers upon request. (Anyone taking out a 1997 subscription will receive back copies of publications produced so far this year.)

Please contact Matthew Oliver, Publications Officer: phone 473–3453, or email moliver@lawcom.govt.nz.

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