Te Aka Kōrero

QUARTERLY NEWSLETTER

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From Les Atkins, LAW COMMISSIONER

WHEN I CAME TO THE COMMISSION in October 1992 there was, for a criminal lawyer, a sense of arriving in a battle-zone. The *Police Questioning* discussion paper (NZLC PP21) published shortly before had drawn heavy criticism from the defence bar. Some of the critics were colleagues, who, in the circumstances, expressed reservations about my decision to join the Commission.

It was with some relief, but no surprise, that I discovered what should have been readily apparent on any considered view. The Commission's examination of the issues had been both principled and careful, a great deal more careful than the reactions of some of the critics. What proved to be the case with *Police Questioning* proved to be the case more generally: consideration of its work suggested that from its foundation the Commission had sought to be consistently principled and careful. What makes the attainment of these goals possible is the quality and fresh approach of the researchers who work for the Commission and the competence of all of the support staff.

Care and principle may not, however, be enough. In terms of political reality law reform begins, rather than ends, with final reports. That is particularly true of criminal law reform, as the issues with which it deals often touch matters of deep public concern. Attempts at reform of the criminal law have, in recent years, produced a considerable body of work, yet not a great deal in terms of legislation. The extensive work done by the former Justice Department and the Crimes Consultative Committee on the 1989 Crimes Bill has produced no legislative outcome. While no doubt true with respect to all law reform it may be that, with respect to criminal law reform, proposals directed at matters of immediate public concern will be more productive of legislation than more broadly-based attempts at reform.

The jury system is of both immediate and more fundamental concern. The Commission's discussion paper on juries, nearing completion, examines a number of topics: the availability of jury trials; the jury selection process; the discharge of jurors; jury secrecy; the media and its influence; means of assisting jury deliberation; jury disagreement; and majority verdicts. Because of what has been a steadily rising rate of hung juries in the last 4 years the discussion of the introduction of majority verdicts is the primary matter of immediate public concern. It would, however, be unfortunate if this issue were to dominate discussion to the extent that it clouds consideration of the other issues dealt with in the paper. They are all, on any view, of considerable importance.

Jury secrecy has long frustrated empirical research with respect to juries, and reform has been required to proceed almost entirely from a policy perspective. The Commission has been attempting to facilitate empirical research and it has now been confirmed that funding is available to enable Professor Warren Young of Victoria University to undertake such research with respect to New Zealand juries. If empirical research proceeds – as now seems likely – the Commission's final report will be formulated with a great deal more assurance.

BREWER REPLACES ATKINS

AT THE END OF AUGUST, after a term of 5 years, **Les Atkins QC** left the Law Commission to return full-time to his Palmerston North practice.

Les oversaw four major publications (the *Police Questioning* report, and papers on privilege against self-incrimination, and the prosecutions and jury systems), and contributed to many others, including some of the evidence papers. The work on the jury system has been of special interest to him. We regret his departure, but he has agreed to continue to advise us on policy in criminal law.

Tim Brewer has been appointed part-time Commissioner, an appointment which will ensure the continuation of a sound intellectual and practical focus in our criminal procedure work. Tim continues his civil and criminal litigation partnership at Brewer Mazengarb in New Plymouth, where he is also Crown Solicitor. He holds a first class honours from degree Victoria University, and has directed the NZLS Litigation Skills Programme. He is a member of the NZLS Criminal Law Committee and the Ministry of Justice Criminal Justice Policy Focus Group, and has been a consultant to our criminal procedure team. Tim is also a full Colonel in the Army serving as Assistant Chief of General Staff (Territorial Forces).

ANONYMOUS WITNESSES

Should they be allowed?

A DECISION of the Court of Appeal in August raised a matter of crucial importance to our system of justice: whether the courts should be able to let intimidated witnesses give their evidence under a total blanket of anonymity, with their identity withheld

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Witness Anonymity

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even from the defence. This topic has been under review by the Law Commission, and in response to the Court of Appeal decision we brought forward the release of our reform proposals, publishing *Evidence Law: Witness Anonymity* (NZLC PP29).

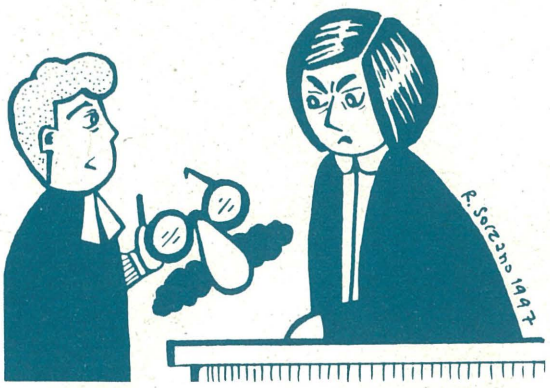
Witness intimidation is a growing problem. In an extreme case last year, a prospective witness was killed. The courts have been expanding the range of protection available to witnesses as they give their evidence, and pressure has also grown for anonymity orders to be made in some cases. Such orders have on occasion been granted, but the decision of the Court of Appeal (*R v Hines*, CA 465/96, applying *R v Hughes* [1986] 2 NZLR 129) is that they contravene the common law.

The matter is for Parliament, and is of constitutional importance. We must be slow to interfere with the centuries old right of accused persons to know of and confront their accusers. Yet to allow guilty people to escape conviction by intimidating witnesses is unacceptable.

The Law Commission's role in such circumstances is to consider the issues and prepare draft legislation for consideration by politicians and the public.

We propose that anonymity orders be permitted, but only in rare cases and with a number of procedural safeguards. Our view is not fixed, particularly on whether the need for change is overwhelming, and we would like a wide range of views – from both inside and outside the legal profession.

Because the issue is to be the subject of early legislation, submissions close on **30 September 1997**. Copies of the paper are available from the Law Commission. Contact **Susan Potter**, Senior Researcher, **SPotter@lawcom.govt.nz**.



"The defendant has the blanket and the witnesses are using all the paper bags, so I'm afraid that only leaves you the false nose and glasses, Your Honour."

PROPOSING AND DISPOSING

When creation of the Law Commission was under consideration, it was pointed out that one reason for the success rate (measured by the number of proposals enacted) of the part-time law reform committees that the Commission would replace was that committee officials had a dedicated interest in their products and pushed for their inclusion in the legislative programme. The foreboding was that with projects of their own to push, Ministers and officials would have no particular incentive to ensure that room was found in the legislative programme for the Commission's proposals. As Professor Gordon Orr observed in 1981:

> . . . the secret of the relative success of the Standing Committees in seeing their reports implemented has been the close and harmonious relationship between the Minister, his department and the law reform agencies. Any attempt to circumvent this is likely to be counter-productive. ((1981) 1 Canta LR 291)

Time has demonstrated the accuracy of these predictions. Although the Commission came into the world more than a decade ago, no system has yet been put in place for translating its proposals into legislative action. So we have seen the Commission's company law proposals enacted only in mangled form, its Arbitration Act enacted only by the odd device of using a slot allotted for a private member's bill, its Limitation Act proposals rendered out of date by subsequent developments and such a superb piece of work as its proposed new Property Law Act lying unconsidered and neglected.

Blanchard J in a recent Court of Appeal judgment ruefully observed:

> The record of the Executive in failing promptly to put draft legislation recommended by the Law Commission before Parliament for its consideration is one of sad and puzzling neglect. It is unfortunate that Governments have not regarded themselves as duty bound to do so. That is not to say that Parliament will (or should) necessarily adopt the views of the Law Commission; but it should be given the opportunity of considering whether to do so. The value to the community of a Law Commission is depreciated if its carefully researched views, formed after a lengthy consultative process, are to be ignored until and unless officials see fit to progress the matter reported on. And it is desirable that space should regularly be made available in the legislative programme. (*R v Hines*, CA 465/96, 15 August 1997, 3)

But the Commission has its part to play. It must ensure that the problems it deals with are topical and important. The spending of public money must be confined to questions whose solution will materially benefit the public. It is important that the Commission retain its independence, but there is a clear need for consultation in the choice of topics for consideration with the public and private sector. The questions that need to be asked are:

- Which are the shoes that are pinching? and
- Is what we are proposing to fix really broken?

There is no point in the Commission creating a product that nobody wants or needs.

There has been another barrier in the way of accepting its proposals for which the Commission has only itself to blame. There have been differences between Commission and Parliamentary Counsel's Office as to drafting style. The Commission has dug in its toes and produced reports with draft statutes in Commission-speak, with the consequence that the drafts need allocation of Parliamentary Counsel's time (an extraordinarily scarce commodity) before they can be introduced. It is an entirely happy development that a concordat between the Commission and the PCO, with the PCO accepting the Commission's stand on some points and the Commission agreeing to abandon others, has removed this impasse.

This innovation and other proposals still under discussion will it is hoped result in more of the Commission's work seeing its way onto the statute book.

Dugdale

Succession project rolls to a conclusion

SINCE THE LAST ISSUE of *Te Aka Kōrero*, we have published two reports on aspects of the law of succession. A third is now imminent.

Succession Law: Homicidal Heirs (NZLC R38) was published in July and proposed a statute setting out what should happen when a person who commits homicide stands to gain from the victim's estate.

Following last year's preliminary paper, a major report on the adjustment of estates after death was published last month: *Succession Law: A Succession (Adjustment) Act* (NZLC R39). It addresses two difficult issues, each of which has been debated since the report was published. We have recommended:

- The law should apply to all relationships in the nature of marriage, including de facto and same-sex relationships. This would allow surviving partners to apply for a property order, or a financial support award, irrespective of whether they had been legally married to the deceased person.
- The provision for surviving adult children to claim a share of a parent's estate, irrespective of their need, should be abolished.

The first proposal provides an alternative approach to stated government policy on property division during partner's lifetimes. The report will enable the property and support entitlements of de facto and same-sex couples to be debated fully and properly when legislation is introduced. The paper is available at **www.govt.nz/lawcom**.

Our third report on succession law is due for release next month. It proposes a statute in contemporary language to replace the Wills Act (UK), parts of which date from 1837. Contact **Ross Carter**, Researcher, **RCarter@lawcom.govt.nz**.

Official Information Act: report pending

OUR REVIEW of the Official Information Act 1982 has been completed. The report, *Review of the Official Information Act* (NZLC R40) will be published and tabled in Parliament shortly. The report finds that the Act works relatively well, and is an accepted part of our system of government, but that it needs fine tuning. The main problems concern

- the burden on some agencies caused by large and broadly defined requests,
- delay in answering requests,
- attitudes to compliance with the Act outside the core state sector, and
- the need for better co-ordination of training and education about the Act.

Changes to the Act which should be made immediately include

- strengthening the duty on agencies to assist people making requests,
- encouraging dialogue between parties,
- helping agencies to identify information and resolve the request with a minimum of cost and delay.

We have recommended that the time limit of 20 working days for responding to requests be reviewed in 3 years, and that a reduction to 15 days be considered in view of advances in information technology.

The report contains extensive commentary about the Act, its changing context (including the MMP environment), and its practical operation. It will be a useful resource for agencies which receive requests under the Act and also for users. Contact **Padraig McNamara**, Senior Researcher, **PMcnamara@lawcom.govt.nz**.

The treaty-making process

IN 1990 GOVERNMENT ACCEPTANCE of an international convention obliged New Zealand to abolish and never reinstate the death penalty. There was little public knowledge, let alone debate, of that event. But its ramifications for public policy were (and remain) considerable.

Like any other government, New Zealand becomes a party to treaties all the time. Major ones, such as GATT, can require extensive public consultation. Others are of less importance. But under existing and well-established doctrine, the making of international treaties is an executive government function. There is no accepted procedure for public notification or consultation, nor does Parliament have any role except when legislation is required to implement treaty obligations in domestic law.

There have been increasing calls for greater involvement by the legislature and greater consultation with the public. Several commentators, including the Clerk of the House, David McGee, have spoken publicly on the matter. The Law Commission prepared a draft report on this topic 2 years ago and will shortly publish a final report. The draft report recommended:

- practices of notification and consultation with interested or affected groups at the stage of treaty negotiation;
- timely tabling of treaties subject to ratification, accession or acceptance, so that members and committees of the House of Representatives can determine whether they wish to consider the government's proposed action; and
- that where possible, legislation implementing treaties or other international instruments use the original wording of the treaties.

Contact **Diana Pickard**, Researcher, **DPickard@lawcom.govt.nz**.

WHATEVER HAPPENED TO . . . PPSA?

THE MINISTRY OF COMMERCE hopes within a matter of weeks to obtain Cabinet approval for its proposals for a new Personal Property Securities Act, based largely on the Commission's 1989 report, *A Personal Property Securities Act for New Zealand* (NZLC R8). The Commission, through Commissioner Dugdale and Senior Researcher Loretta Desourdy, is actively assisting the process.

Women's Access to Justice

THE SIXTH CONSULTATION PAPER in the Women's Access to Justice project has just been released: *The Education and Training of Law Students and Lawyers*. Many of the women who spoke or wrote to the Commission described barriers to their access to justice in terms of the quality of the service they received from their lawyers.

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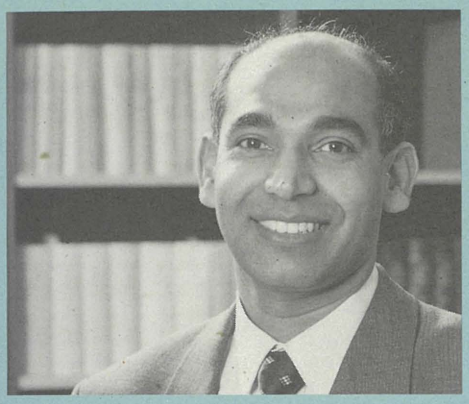
STAFF NEWS

AS PART OF MOVES TO STRENGTHEN its capacity to deal with commercial law issues, the Commission has appointed **Paul Heath** as a part-time consultant. Admitted in 1978, Paul was Office Solicitor to the Commercial Affairs Division in Auckland until 1981. He then moved to Hamilton to join Stace Hammond Grace & Partners where he was a partner from 1983–1995. Now working as a consultant, Paul is a highly respected specialist in commercial litigation, particularly insolvency-related matters. He is currently convenor of the NZLS Commercial and Business Law Committee and has a particular interest in cross-border insolvency.



***Bala Benjamin** (above) took up his position as Finance and Administration Manager in June.*

Two staff members have left the Commission recently, and will be greatly missed. **Mākere Papuni**, a researcher in the women's access to justice project, left the Commission in July. Makere was involved in the consultation with Māori women last year, and worked closely with the Commission's Māori Committee. Our Library Manager, **Katrina Young-Drew**, left at the end of September after 9 years' service, to join her husband in their technology business. Well known to many people who have dealt with our library, Katrina (right) played a leading role last year in the development of the new computer system, and oversaw the integration of library and information tools within the system. **Judith Porter**, our reference librarian since 1996, is the new manager.

Nick Russell, a researcher in the evidence and commercial law areas, was recently admitted as a barrister and solicitor. We have engaged **Melanie Smith**, a Wellington law student, as a part-time research assistant to help with the analysis of submissions on Women's Access to Justice consultation papers.

Project News

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It was repeatedly suggested that the education and training of law students and lawyers could better prepare members of our legal profession to assist their diverse clientele.

The paper focuses on the academic and professional training of lawyers. It places the issues raised in a context which will promote debate by legal practitioners, academics and others concerned with the aims, content and effectiveness of lawyers' training. Contact **Michelle Vaughan**, Senior Researcher, **MVaughan@lawcom.govt.nz**. Submissions are due by **Friday 17 October 1997**.

A new law of habeas corpus

HABEAS CORPUS AD SUBJICIENDUM is a law used to obtain the remedy of a person's release from unlawful detention. When any person is arrested or detained, habeas corpus is used to test the validity of that detention. It helps to secure everyone's right not to be arbitrarily – including unlawfully – detained (see the New Zealand Bill of Rights Act 1990 ss 22 and 23(1)(c)).

Habeas corpus is at present obtainable only through English procedures: these procedures are adapted, sometimes only with difficulty, to apply in New Zealand. As well as not reflecting the constitutional importance of habeas corpus, the current arrangements fail to provide a procedure that is modern, clear, well-integrated with related procedures, and locally appropriate.

In July the Law Commission distributed a draft paper on a new statutory procedure. We are now considering the comments made in response and revising the paper. Contact **Ross Carter**, Researcher, **RCarter@lawcom.govt.nz**.

Māori custom law

GOOD PROGRESS is now being made in the Māori Custom Law project, which aims to produce an outline of custom law principles for use by judges and others. Assisted by written material provided by consultants, the outline is now being discussed with our Māori Committee and we hope to be able to publish it this year.

Legal professional privilege

IN ITS PRELIMINARY PAPER, *Evidence Law: Privilege* (NZLC PP23) the Commission proposed replacing the present absolute privilege for communications between lawyers and their clients with a qualified privilege. This privilege would extend beyond lawyers to persons performing lawyer-like functions (such as lay advocates in the Employment Court) and could be overruled by the court in appropriate cases. Further consideration suggests that such a rule may be insufficiently hard-edged to be workable in practice.

If the existing law is to remain, which communications, with which lawyers, should attract absolute privilege? Should the privilege attach only to communications by and to lawyers in partnership or sole practice? What about lawyers in the corporate and public sectors?

The President and Commissioner Dugdale are holding a series of meetings with interested parties. Contact **Karen Belt**, Researcher, **KBelt@lawcom.govt.nz**.

*Law Commission publications**

Evidence Law: Witness Anonymity (NZLC PP29) $19.95

Succession Law: Homicidal Heirs (NZLC R38) $19.95

Succession Law: A Succession (Adjustment) Act (NZLC R39) $24.95

Women's Access to Justice: The Education and Training of Law Students and Lawyers (NZLC MP11) $6.95

* supply subject to availability