

### From Judge Margaret Lee, LAW COMMISSIONER



THE EXPERTS SAY a good wine improves with age. This, of course, is opinion evidence. But then experts are allowed to give that sort of evidence, aren't they? Even if it is a matter of common knowledge? Or on an ultimate issue? Provided this evidence will substantially help the court to determine an issue in a proceeding? Such as whether the bottle of old plonk Joe Blogs bought at the bottle store was worth \$81.95?

How did I know it was plonk? Because Joe's dad, who's just back from his fifth holiday in Provence, told me so. Oh, all right, so I'm just repeating what he said. No he can't come and say it himself because he's too crook.

But it's obvious, isn't it, that nobody should be charged \$81.95 for plonk? I mean, that's so obvious no one will question it, surely . . .

How do I know Joe paid \$81.95? Because here's the invoice, produced by the bottle store's cash register which, like all cash registers, always prints whatever figure you ring up on it. Unless it's broken of course. But no one has said it was.

And how do I know Joe's dad *really* thought it was plonk? Because he's never been known to tell a lie, that's how. Pillar of society, and all that. Ask anyone.

So you're calling him an old soak, are you? Drunk before lunch, you say? How can you tell when you're sodden yourself by 10 o'clock every morning?

If you are sued by the bottle store owner for implying he's a cheat, and incidentally for calling his Ausone St-Emilion 1985 "plonk", will you be able to say all this under the Commission's proposed evidence code? You will soon find out, because the code is just about ready. Yes, it's been a while coming, but as the experts say, a good wine improves. . . . But we won't go into that again, will we?

Anyway, *revenons*, as they say in Provence, *à nos moutons* (which roughly translates as let's stick to the point). The evidence team has begun the final stages of drawing together the strands of the evidence codification to which so many people have made significant contributions, notably our patient and eminent guru-with-words Garth Thornton QC. So far, we have kept to the timetable we set ourselves 18 months ago of completing a draft code towards the end of February 1998, even though the Court of Appeal's decision in *R v Hines* has meant a rearrangement of our priorities. (Susan Potter writes about this on page 2.)

Before we finalise the project, we will be taking the completed draft code to the five main centres in the first half of March with an invitation to members of the legal profession to help us test the code in action. The tour will be funded by the New Zealand Law Foundation and administered by the NZLS. Richard Mahoney, Associate Professor at University of Otago, has been our academic adviser over the years. Our association with him has been fruitful and enjoyable. So it is perfectly fitting that he should be a member of the tripartite panel (the others being Elisabeth McDonald and me) touring the code.

Watch this space . . .

### INTERPRETATION BILL INTRODUCED

LEGISLATION TO REPLACE THE ACTS INTERPRETATION ACT 1924 was introduced in Parliament on 25 November, more than a decade after the Law Commission began work on the topic and 7 years after its report *A New Interpretation Act: To Avoid 'Prolixity and Tautology'* (NZLC R17 1990). The Interpretation Bill follows the draft prepared by the Commission, but with some changes and additions which were suggested by the Parliamentary Counsel Office in the course of a further review of the issues this year.

Two significant points of policy should be noted. First, while confirming the purposive approach to the interpretation of legislation (as seen in s 5(j) of the 1924 Act), the Bill omits the requirement to consider "the context" of legislation which the draft proposed. Secondly, clause 10 of the draft (which would have reversed the presumption that the Crown is not bound by statutes), with its implications for Crown criminal liability, has also been omitted. We are considering that separately.

We welcome the introduction of the Bill, which furthers our statutory function of making the law as understandable and accessible as practicable.

### TREATY MAKING REPORT AVAILABLE

OUR REPORT on the treaty making process and the role of Parliament, which we featured in the September issue of *Te Aka Korero*, has just been released: *The Treaty Making Process: Reform and the Role of Parliament* (NZLC R45, \$24.95).

It is especially timely given the report of the Foreign Affairs, Defence and Trade Select Committee, tabled on

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18 November, which recommended that a number of new procedures for considering treaties be introduced for a 12-month trial period.

Our report makes recommendations similar to those of the select committee. Given the increase in treaty making, it confirms the value of notification and consultation with Parliament and interested or affected groups at the negotiation stage of the treaty making process. It also recommends formalising

and developing such practices. Other recommendations concern the timely tabling of treaties in Parliament, the establishment of a Treaty Committee of Parliament, the preparation of treaty impact statements, and preferred methods of implementing treaty obligations in domestic legislation.

The report has further value as a resource, as it not only considers current treaty making practice, the issues involved, and the forces of globalisation, but also includes material on overseas treaty making practice,

relevant internet websites, and an extensive bibliography. Contact **Diana Pickard**, Researcher, [DPickard@lawcom.govt.nz](mailto:DPickard@lawcom.govt.nz).

## 1997 ANNUAL REPORT

OUR REPORT FOR THE YEAR ENDED 30 JUNE 1997, which surveys an important year in the life of the Law Commission, was tabled in Parliament on 13 November (NZLC R43, \$9.95). Contact **Colleen Gurney**, Assistant Publications Officer, [CGurney@lawcom.govt.nz](mailto:CGurney@lawcom.govt.nz), for a copy.

## NEW ANONYMOUS WITNESSES LAW

THE LAW COMMISSION PLAYED A MAJOR ROLE in the formulation of anonymous witnesses legislation last month.

*Evidence Law: Witness Anonymity* (NZLC PP29, \$19.95), which responded to the Court of Appeal decision of *R v Hines* (unreported, 15 August 1997, CA 465/96) outlawing the use of anonymous witnesses, attracted 27 submissions. Most supported our proposal that anonymity orders should be permitted, but only in the most exceptional cases and subject to a number of procedural safeguards to protect the interests and rights of defendants.

Knowing that the government planned to fast-track legislation, we published a final report *Evidence Law: Witness Anonymity* (NZLC R42, \$19.95) in October. Our recommendations were substantially the same as those proposed in the discussion paper.

The report was well received, and last month members of the Commission's evidence team were invited to make an oral submission to the Justice and Law Reform Select Committee considering

the Evidence (Witness Anonymity) Amendment Bill. Two points are of note:

- In its report the committee accepted, by a majority, our recommendation that the appointment of independent counsel to investigate the witness's background should be mandatory (NZLC R42, paras 42–46). However, the Minister of Justice subsequently tabled a Supplementary Order Paper (SOP) moving that the Bill be amended to make appointment discretionary.
- As introduced, the Bill applied to charges laid but not determined before the date the Act came into force, and to charges re-laid on or after that date: the Commission recommended that the legislation should not apply retrospectively to the *R v Hines* retrial (NZLC R42, chapter 3). No change was made to this provision, the select committee leaving it to the courts to interpret the legislation and whether it applies to *Hines* at his re-trial.

Neither the Bill nor SOP had been debated at the time we went to press. Enquiries to **Susan Potter**, Senior Researcher, [SPotter@lawcom.govt.nz](mailto:SPotter@lawcom.govt.nz).

## A NEW PROCEDURE FOR HABEAS CORPUS

IN A REPORT TABLED IN PARLIAMENT LAST MONTH, the Commission recommended a Habeas Corpus Act to safeguard freedom from arbitrary arrest or detention: *Habeas Corpus: Procedure* (NZLC R44, \$19.95).

The Act would provide a procedure that is plain, more contemporary, and appropriate to New Zealand conditions. Existing New Zealand law requires the use of "English practice, pleading, and procedure". Differences between the

New Zealand and English high courts make adapting English procedures confusing, cumbersome, and inefficient.

It is important that the protections enshrined in the Imperial Acts for which our forebears fought so vigorously should not be lost. The Commission is confident that its reforms would better secure New Zealanders' traditional freedom from arbitrary arrest or detention. Contact **Commissioner Dugdale**.

## COMMISSION TO CONSIDER COMPENSATION ISSUES

THE MINISTER OF JUSTICE has asked the Commission to review the law on compensation for persons wrongly convicted of criminal offences. The issue is of urgent importance in light of two recent cases (including that of David Dougherty) where compensation was refused.

We addressed the matter briefly in our report *Crown Liability: A Response to Baigent's Case and Harvey v Derrick* (NZLC R37, 1997) earlier this year. We are now addressing the issues in more detail and will report to the Minister in the new year.

## REPEAL THE CONTRACTS ENFORCEMENT ACT?

A DISCUSSION PAPER released this month, *Repeal of the Contracts Enforcement Act 1956* (NZLC PP30, \$19.95), seeks comment on whether or not the Contracts Enforcement Act should be repealed. The Act requires that, to be enforceable, land contracts and guarantees (or a note or memorandum of these contracts) must be in writing signed by the party against whom they are sought to be enforced. The paper states the Commission's tentative view that consistency and fairness require repeal. But it also sets out the main arguments against that view, including that the Act is a useful protection for consumers from hasty and ill-considered conduct. Contact **Nick Russell**, Researcher, [NRussell@lawcom.govt.nz](mailto:NRussell@lawcom.govt.nz). The Commission would like to receive submissions by

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# COMMERCE AT THE MILLENIUM

NEW ZEALAND'S BASIC COMMERCIAL LAW is designed to facilitate paper-based transactions, as it derives from the law of 19th-century England when the only means of electronic communication were the telegraph and the telephone. While it has served this purpose well, on the eve of the 21st century the question is whether it will also meet the demands of trade using electronic means.

The Law Commission is looking at electronic commerce as the first stage of a review of international trade laws. The second stage will focus on various reports and model laws issued by organs of the United Nations, in particular the UNCITRAL Model Law dealing with international insolvency.

With electronic commerce, our objective is to recommend a legal framework which will keep pace with technology rather than react to it. We



*It's some kind of virus. Every time we settle a transaction it downloads a virtual tax inspector!*

propose four principles to guide whether, and if so how, change is made to the law to facilitate electronic commerce:

- people should be able to choose whether to do business through paper documentation or by electronic means; the use of electronic means

should not give rise to uncertainty (beyond that which is unavoidable in any medium);

- fundamental principles underlying the law of contract and tort should be adapted only to the extent required to meet the needs of electronic commerce;
- any changes to the law should be expressed in a technologically neutral manner so that they can apply equally to future developments in technology; and
- principles of domestic and private international law as applied in New Zealand must be compatible with those applied by our major trading partners.

We invite expressions of interest in the project generally. A full discussion paper will be available for submissions in mid-1998. Contact Nick Russell, Researcher, [NRussell@lawcom.govt.nz](mailto:NRussell@lawcom.govt.nz).

## PROJECT NEWS - COMMISSION UPDATE

### Women's Access to Justice

THE COMMISSION HAS RECEIVED a number of very helpful submissions on the sixth consultation paper in the Women's Access to Justice project, *The Education and Training of Law Students and Lawyers* (NZLC MP11, \$6.95).

As part of the consultation process, Law Commissioners met recently with 14 academic staff from the five university law schools, the Director of the Institute of Professional Legal Studies and the NZLS Director. The meeting provided the first opportunity for legal educators to compare ideas on whether and how gender, Treaty of Waitangi, and Māori cultural issues are or may be incorporated into law students' and lawyers' training. The project team is now working to develop processes by which the discussion can continue.

### Māori women's access to justice

THE INFORMATION COLLECTED in the 48 hui held with Māori women reveals many concerns, not only about access to legal services but also about access to justice in a wider sense. Many of the concerns are directed at the policies and activities of government

agencies, particularly those in the justice sector including the Courts, Police, Corrections, and Social Welfare. Māori women expressed strongly the view that the Treaty provides a measure against which the justice of the outcomes of these agencies' activities should be assessed. The project team is collecting information from government agencies about their Treaty policies and practices. We plan to publish a paper on Māori Women's Access to Justice in the new year.

### Opening the Jury Room

OUR DISCUSSION PAPER ON THE JURY SYSTEM, *Juries in Criminal Trials*, will be published soon after Christmas. The paper has been updated to include material about a number of issues of current concern including:

- the disclosure of jury lists to accused persons – an issue which arose after a recent trial in New Plymouth; and
- jury attrition during long trials – in respect of which we advised on legislation (fast-tacked by Parliament in November) allowing a jury of 10 members to continue with a case.

To receive a copy of the paper when it

is published contact Susan Potter, Senior Researcher, [SPotter@lawcom.govt.nz](mailto:SPotter@lawcom.govt.nz).

Meanwhile, an empirical research project on the jury system is set to proceed in the new year and will be completed by September. The study is being undertaken at the request of the Law Commission, with the full support of the Courts Consultative Committee and with funding from the Ministry of Justice, the Department for Courts, the Law Foundation and the Legal Services Board. For the first time in New Zealand it will allow researchers to observe jury deliberations first hand, using questionnaires and interviews conducted with jurors as soon as possible after the completion of a trial. Presiding judges will also be asked for their views. The results should give a firm basis for reforms to jury decision making, with particular emphasis on ways of assisting jurors and avoiding prolonged deliberation. The study will also examine the effect of publicity before and during a trial.

The research will be done by a team from Victoria University, led by Pro-

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## COSTS IN CRIMINAL CASES UNDER REVIEW

THE COMMISSION IS REVIEWING the Costs in Criminal Cases Act 1967. In recent years the Act has come under increasing criticism by judges, the legal profession, and commentators.

We recently published a short issues paper (*Costs in Criminal Cases*, NZLC MP12, \$6.95) which considers the circumstances in which costs should be awarded, to whom they should be awarded, what awards should cover, how they should be assessed, and who

should pay them.

We want to hear from those who have practical experience working with the Act about:

- whether it is currently being used by practitioners and if not, why not;
- how it is working in practice; and
- how it might be improved.

Contact **Brigit Laidler**, Researcher, [BLaidler@lawcom.govt.nz](mailto:BLaidler@lawcom.govt.nz). The Commission would like to receive comments on the paper by 27 February 1998.

## SUBSCRIPTIONS FOR 1998

1998 subscriptions are now available:

- New Zealand: \$140 (incl. GST & postage)
- Australia and Pacific: \$175 (incl. postage)
- Elsewhere: \$225 (incl. postage)

Subscribers receive all Reports and Preliminary Papers, Miscellaneous Papers upon request, and the quarterly newsletter, *Te Aka Kōrero*. Contact **Colleen Gurney**, Assistant Publications Officer, [CGurney@lawcom.govt.nz](mailto:CGurney@lawcom.govt.nz).

### Project News – continued from page 3

Professor Young. 50 trials will be examined, at both High Court and District Court level throughout the country.

### Insurance law

THE COMMERCIAL LAW TEAM is considering the reform of four aspects of the law of insurance:

- charges on insurance money payable as indemnity for liability to pay compensation or damages (Law Reform Act 1936, s 9);
- time limits on claims under contracts of insurance and “claims-made” policies (Insurance Law Reform Act 1977, s 9);
- non-causative exemptions (Insurance Law Reform Act 1977, s 11); and
- a would-be insured’s general law duty to disclose his or her circumstances to a would-be insurer, and the consequences of breaching this duty.

A report is due in the new year, following consultation with interested parties. Contact **Nick Russell**, Researcher, [NRussell@lawcom.govt.nz](mailto:NRussell@lawcom.govt.nz).

### Prosecutions Project

OUR FINAL REPORT and recommendations on the prosecution system, following the *Criminal Prosecution* discussion paper (NZLC PP28) issued this year, is scheduled for completion in February. Particular attention is being paid to the question of private prosecutions by commercial entities.

### Preliminary hearings

ANOTHER ASPECT of the prosecution system is the question of pre-trial disclosure, which in turn raises questions about the role of preliminary hearings. The Ministry of Justice and the Department for Courts have distributed a consultation paper on these

topics. This follows a draft paper circulated by the Department for Courts last year which raised options for reform of preliminary hearings (including the option of abolishing them).

The paper draws heavily on two earlier reviews: that of the 1986 Criminal Law Reform Committee, and the 1990 Law Commission report *Criminal Procedure: Part One: Disclosure and Committal* (NZLC R14).

The preferred option, which the Law Commission broadly supports, is consistent with the type of reform advanced in 1990, namely:

- a limitation in the availability of cross-examination at preliminary hearings to certain specified grounds (including a general “exceptional circumstances” ground), *combined with*
- a tailor-made regime for disclosure in criminal cases.

## STAFF NEWS

**Les Atkins QC**, who served as a part-time Law Commissioner from 1992 to 1997, has been appointed to the District Court bench and will sit in Palmerston North. He is the fourth serving or former member of the Commission in as many years to accept judicial office.

**Sharon Opai** has joined the Commission as a Senior Researcher with particular responsibilities concerning the Māori dimension of our work. Admitted in 1984, Sharon has extensive experience as a prosecutor and criminal defence lawyer. For the last 3 years she practised in Taupo as a barrister sole. She is also a part time member of the Casino Control Authority. Sharon will work in the area of criminal procedure and on a number

of other projects.

**Barbara McPhee** started work at the Commission in mid-November as assistant librarian. Previously in Palmerston North, Barbara has extensive law firm library experience which will be a valuable asset to us.

Three members of the research staff will be leaving the Commission in the coming weeks. Senior Researcher **David Calder** has been the project planning manager for the Evidence project since 1995, and has played a major role in the development of our project management and quality assurance systems. He has also been a member of the commercial law team. David returns home to Scotland next year. **Ross Carter**, in almost 4 years as

a Researcher, has worked on succession law and also on public and commercial law topics. Last year his paper on parliamentary privilege was published by the Commission; it has proved a valuable reference tool. Ross has been appointed an Assistant Parliamentary Counsel and joins the Parliamentary Counsel Office in the new year. Senior Researcher **Loretta Desourdy**, who first joined our staff in 1991 and is our longest serving staff member, is leaving at the end of January to join the Banking Systems Department of the Reserve Bank as a Legal Adviser. Loretta has worked on many law reform projects and, most recently, was the project manager for the succession project.

We wish them all well.