

**LAW COMMISSION OF NEW ZEALAND**

**TWENTIETH ANNIVERSARY CONFERENCE**

**WHAT IS DISTINCTIVE ABOUT NEW ZEALAND LAW AND THE NEW  
ZEALAND WAY OF DOING LAW?**

**WELLINGTON, NEW ZEALAND, FRIDAY 25 AUGUST 2006**

**LAW REFORM AND THE TRANS TASMAN LOG JAM**

**The Hon Justice Michael Kirby AC CMG<sup>\*</sup>**

**AN ENORMOUS PRESUMPTION**

Law is full of presumptions. Some of them are innocent enough, although often they involve quite fantastic notions to which judges and lawyers solemnly give effect.

One such presumption paid us a visit in the High Court of Australia recently. It happened in *Neilson v Overseas Projects Corporation of Victoria Ltd*<sup>1</sup>. The case involved a person from Western Australia, married to an employee of a corporation formed in Victoria, injured in a university facility in China. We all solemnly sat there

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<sup>\*</sup> Justice of the High Court of Australia (1996-) and one-time Chairman of the Australian Law Reform Commission (1975-84).

<sup>1</sup> (2005) 223 CLR 331.

struggling with the suggestion that inherited English law required us to *presume* that the applicable law of China was the same as the applicable law of Australia - whatever that might be. Justice McHugh and I dissented, not being willing to presume so much<sup>2</sup>. However, the majority were untroubled. They found no offence to reason in the notion that the good people of Wuhan (although undoubtedly oblivious to the fact) were living under the blessings of the same law as Australia, indeed of a particular Australian State, yet to be ascertained.

I do not much like presumptions. It is a distaste that I have inherited from Justice Lionel Murphy<sup>3</sup>. In the end, the law (a practical business) must not lose its link with actuality and realism - and that means with the sources of its power.

Yet here I am, once again, as an Australian judge, given the privilege of speaking to a conference in New Zealand, with a star-studded cast, assembled to ask questions about New Zealand law and New Zealand institutions. What a big presumption. There may be some present who will suggest that I am not practising what I judicially preach.

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<sup>2</sup> *Neilson* (2005) 223 CLR 331 at 348-349 [36]-[37] per McHugh J; 396-397 [203]-[204]. See also at 343 [16] per Gleeson CJ.

<sup>3</sup> *Calverly v Green* (1984) 155 CLR 242 at 264. cf M D Kirby, "The Power of Lionel Murphy's Ideas" in *Through the World's Eye* (2000), 127 at 140-141 citing *Stivactas v Michaletos (No 2)* [1993] NSW Conv R ¶55-683; *Brown v Brown* (1993) 31 NSWLR 582 at 595.

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So I start by paying my respects to the people of New Zealand, Maori and Pakeha. Out of deference to my new-found commitment to anti-presumptionism, I shall not even mention my erstwhile suggestion that New Zealand should cast aside its foolish hesitations and throw in its lot with the Australian Commonwealth<sup>4</sup>. I will not again mention the open invitation expressed in the federal Constitution of Australia<sup>5</sup>. I will not even breathe a whisper of my unilateral offer of a two-State participation for New Zealand which inflamed Sir Robert Muldoon, as Prime Minister, to question my presumption, if not my sanity. The advent of the Closer Economic Relations Treaty between New Zealand and Australia, and developments in the worlds of politics and economic reality, may have rendered these constitutional dreams not only presumptuous but, worse still, unnecessary.

Instead, as a guest who has been coming to this country in various offices since 1976, I will begin by saying how glad I am to be at this conference to witness the new Governor-General of New Zealand, His Excellency Anand Satyanand, open our dialogue as one of the first official acts in his high office. Our friendship dates (if I may be allowed to presume) to the conference of the Law Society of New Zealand in

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<sup>4</sup> M D Kirby and P A Joseph, "Trans-Tasman Relations - Towards 2000 and Beyond" in P A Joseph (ed), *Essays on the Constitution* (1995). See also M D Kirby, "CER, Trans-Tasman Courts and Australasia" [1983] NZLJ 304.

<sup>5</sup> *Commonwealth of Australia Constitution Act* 1900 (UK), Preamble and cl 3 as originally enacted.

#### 4.

1976 - a gathering that marked the beginning of life-long friendships with many of those also participating in this meeting. The symbolism and actuality of this appointment, as the representative in New Zealand of Her Majesty the Queen of New Zealand, is powerful and uplifting. His Excellency's commitment to justice and human rights and his life-long dedication to the service of all of the people of this nation provide a marvellous encouragement to us for fresh insights and brave thoughts. This should be our objective. To think boldly and to try (difficult though it is for judges and lawyers) to escape the shackles and presumptions of the past.

Sir Owen Woodhouse I count as one of my mentors. I met him in my first days as Chairman of the Australian Law Reform Commission (ALRC) in 1975. He was then in Australia in the ultimately fruitless endeavour to assist us to move to the eminently sensible New Zealand system of universal accident compensation<sup>6</sup>. In the end, that bold legal reform was defeated not because it required a leap of the legal imagination too large for our federal capacities. Instead, it was one of the legislative measures that fell victim to the dismissal of the Whitlam government on Remembrance Day 1975. Nearly thirty years later, Australia once again looked to a judge who derived from another land (Justice David Ipp originally from South Africa) to lead it to a new

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<sup>6</sup> Australia, National Committee on Compensation and Rehabilitation in Australia (Woodhouse Report), 1974, AGPS, Canberra.

approach to tort law reform<sup>7</sup>. This time it was to be an approach that lacked the conceptual unity of the Woodhouse report. The resulting piecemeal legislation has attracted much criticism and controversy. The final chapter of this saga of law reform is yet to be written<sup>8</sup>.

A young lawyer working with Sir Owen Woodhouse thirty years ago was Mr Geoffrey Palmer. Our first encounter was on the very day that I first went to Canberra in my new capacity as inaugural Chairman of the Australian Law Reform Commission (ALRC). I was instantly impressed by his intellect and energy. So much so that I sought to steal him from New Zealand and secure his appointment as one of the foundation full-time members of the ALRC. As I dangled this bauble before him in the Administrative Building in Canberra, I saw his eyes momentarily gleam. But he refused the temptation and went on to serve as Minister and Prime Minister of New Zealand. Happily, his longstanding commitment to law reform has not been dimmed by the intervening years. It has now resulted in his appointment as President of the New Zealand Law Commission that he helped to establish<sup>9</sup>. This

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<sup>7</sup> Australia, *Review of the Law of Negligence*, Final Report, 2002.

<sup>8</sup> E W Wright, *National Trends in Personal Injury Litigation: Before and After "Ipp"*, noted (2006) 80 ALJ 490.

<sup>9</sup> G Palmer, "Law Reform and the Law Commission After Eight Years - We Need to Try a Little Harder", unpublished address to the New Zealand Centre for Public Law, Victoria University of Wellington, 30 March 2006 (hereafter Palmer, "Law Reform"); G Palmer, "Systematic Development of the Law: The Function of the Law Commission" [1986] NZLJ 104.

conference is his idea. We must make it succeed for otherwise he will castigate us roundly.

Sir Kenneth Keith was there at the 1976 conference, as were the Chief Justice, Dame Sian Elias, Justice David Baragwanath and Justice Bruce Robertson. It has been said that the story of law reform in New Zealand is the story of outstanding individuals. Wild, Woodhouse and McCarthy were named in an earlier list<sup>10</sup>. Elias, Keith, Baragwanath, Robertson and Palmer must now be added to that list of honour. And there are many others whom we should acknowledge in this reflection on the twentieth anniversary of the Law Commission, established by the Act of 1985<sup>11</sup>.

A Commission, created to serve the Parliament and people of New Zealand, is much more than its President. It involves many people: commissioners, staff, consultants, departmental supporters and the public who help to make it operate. I pay my respects to all who have participated in the first twenty years. But we are not here for hagiography. Nor is this an occasion for mere nostalgia. Twenty years is not long enough for that. In any case, there are problems and deficiencies that need to be solved.

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<sup>10</sup> B J Cameron, "Legal Change Over Fifty Years" (1987) 3 *Canterbury Law Review* 198 at 202.

<sup>11</sup> *Law Commission Act 1985* (NZ) s 4.

Presumptuous though it may be, therefore, in fulfilling this invitation, I must offer some thoughts for consideration. I do so as someone with a great love and respect for New Zealand and its people. And with a belief that New Zealanders and Australians together can chart the future by discussing the issues of institutional law reform together. We may be separated by twelve hundred miles, by ethnic distinctions, by sporting rivalries and by constitutional differences. But our shared history, similar institutions of government and common problems make this encounter timely and useful.

#### A THRESHOLD PROBLEM

If we start at the beginning, both New Zealand and Australia have, at the source of their legal systems (down there with what Kelsen called his *Grundnorm*) a paradoxical feature that made law reform essential, although for one hundred and fifty years or more we each failed to see this, or denied it when confronted with its actuality.

I refer to the mighty presumption that we could pick up a body of law that had developed over nearly a millennium (sometimes in a somewhat haphazard way) and transport it, at first in little wooden ships, as far away as one could go from the islands of its origin to other, quite different islands, at the furthest extremity of the world.

Only an Empire at the height of its political, military and economic power, as the British Empire was, could have had such a presumption

as to assume that the law of the home country would be generally (almost totally) suitable for packaging and immediate transplantation into the rustic, awkward and sometimes violent societies far away, including indigenous peoples whose cultures, languages, values and attitudes to life and society were so utterly different from those shared by the human passengers on those small wooden boats.

In fairness, the mother country had learned some lessons as a consequence of the loss of the wealthy American settlements in the unexpected Revolution of 1776. Britain moderated the heavy-handed rule that it had tried to impose on the American settlers. It adopted a more benign attitude to governance so as to avoid the irksome necessity of fighting repeated insurrections even further from home than Philadelphia had been. As the High Court of Australia was to discover in the early native title cases<sup>12</sup>, the colonial administrators in London were actually much more defensive of the rights and dignity of the indigenous peoples than the settlers in Australasia would often be. The settlers were pushing forward their hegemony and thus, as they saw it, the boundaries of British power and law<sup>13</sup>.

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<sup>12</sup> See eg *Wik Peoples v Queensland* (1996) 187 CLR 1 at 227 quoting from the communications by Earl Gray, Secretary of State for the Colonies, to the Governor of New South Wales, Sir Charles FitzRoy.

<sup>13</sup> *Yougarla v Western Australia* (2001) 207 CLR 344 at 381-383 [105]-[109].

This notwithstanding, as Jim Cameron explained in one of his insightful essays on law reform in New Zealand, written over more than twenty years<sup>14</sup>, the transplanted colonists did not, for the most part, require gunboats and rifles to enforce the common and statute law of England on themselves. On the contrary, they embraced English law with imperial enthusiasm as a birthright, a precious heritage. Only rarely did they stop to question whether English law was truly suitable for the new multi-racial, rural, frontier colonies so far from Whitehall.

In a 1956 article, Mr Cameron described the power in New Zealand of English precedent and the virtually unquestioned force that it had right up to comparatively recent times. The same was true of Australia. He says<sup>15</sup>:

"A hurdle which any would-be reformer in New Zealand must face is the pointed query: 'Has this been done in England?'. The prevailing approach is well illustrated by a remark of Dr Grace during the Second Reading debate on the Infants, Guardianship and Contracts Bill 1887: 'It should always be our aim so far as possible to assimilate the laws of New Zealand those of England'. This statement could find an echo in many sessions of Parliament before and since, and would probably meet with the assent of a good many lawyers even today".

In a recent case in which the High Court of Australia was examining the limitations law of the State of Victoria, Dr Grace's remarks

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<sup>14</sup> B J Cameron, "Allies of a Kind: The Politics of Law Reform" [1988] NZLR 18 at 19, 20.

<sup>15</sup> B J Cameron, "Law Reform in New Zealand" (1956) 32 *New Zealand Law Journal* 72.

were replicated, virtually word for word, almost a century later, in the Parliament of that Australian State<sup>16</sup>. Only now, in the past decade or so, has this subservient, obsequious, dependent attitude begun to fade.

In part, unquestioning borrowing of English law came about originally because of the immediate need for law of some kind and the ready source that English law provided. We should not sniff at this. When I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, one of the constant complaints of the judges in the post-Khmer Rouge nation, was that all laws of the earlier era had been burned and destroyed. There was no written law. The Cambodian judges' solution was to telephone the Ministry of Justice for guidance on what the law should be. The solution of the Australian settlers, surely preferable, was to borrow from the statute and common law of England.

In part, this happened because of imperial confidence and self-assurance that "British justice" was the best in the world; that it expressed universal values suitable everywhere in the world as a gift of the Empire; and that the sooner the map of the whole world was painted British pink, basically, the better.

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<sup>16</sup> *Stingel v Clarke* (2006) 80 ALJR 1339 at 1360-1361 [106]-[109].

Only now do we see how these approaches sometimes led to unthinking attitudes towards law; to complacency about the way imported law sometimes fell unjustly on local people; and how we ignored for so long the denial of basic respect for what the *Law Commission Act 1985* (NZ) describes (in translation) as the "dimension" in New Zealand's law of the position of the indigenous people of the land<sup>17</sup>.

In Australia, it took our law even longer to give proper consideration to this "dimension". When it came in the *Mabo Case*<sup>18</sup> and the *Wik Case*<sup>19</sup>, it was extremely controversial. It was sharply contested<sup>20</sup>. I sometimes wonder whether, without the stimulus of those decisions, the democratically elected legislatures of Australia would, in my lifetime, have faced up to the need for a new legal beginning in the relationship between the ethnic majority of settlers and their descendants and the indigenous peoples of Australia. Sometimes, the judicial branch has an important role to speak for minorities, to uphold their basic rights and dignity, and to re-express the law for those purposes. We saw this earlier in Australia in the *Communist Party*

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<sup>17</sup> See *Law Commission Act 1985* (NZ), s 5(2)(a).

<sup>18</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

<sup>19</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>20</sup> J D Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 110; cf M D Kirby, *Judicial Activism* (Hamlyn Lectures, 2003), 2004, 50, 79.

Case<sup>21</sup>. We have seen it since in refugee law<sup>22</sup>. Democracy involves a curious and sometimes messy interaction of majoritarian rule that still ensures respect for minorities. All of the branches of government have their different roles to play.

Although English law would not be treated as applicable in Australasia if it were unsuitable to the conditions of the colonies, all too often moral blindness, imperial infatuation, self-satisfaction and conservatism in the legal profession prevented adjustment where it was necessary. A vivid instance of this in Australia was the belated invocation, in *Dugan v Mirror Newspapers Ltd*<sup>23</sup>, of the English law doctrine of "corruption of the blood" and the "civil death" of convicted felons. It was held there that Darcy Dugan, once sentenced to death, could not sue for damages for defamation because, in the eye of the law, he was already dead. He was a non-person. He had no access to the courts. His property was forfeited to the Crown. As late as 1978, a majority of the High Court of Australia found that the old English law in this respect, so offensive to fundamental notions of individual human rights, was entirely suitable to be treated as part of the law of modern

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<sup>21</sup> *Australian Communist Party v The Commonwealth* (1954) 83 CLR 1.

<sup>22</sup> *Minister for Immigration and Multicultural Affairs v Kahwar* (2002) 210 CLR 1; *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

<sup>23</sup> (1978) 142 CLR 583.

Australia. Justice Murphy was alone (as was often the case) in dissent. Ironically, now, after having abolished such common law doctrines by statute, later lawmakers in Australia are enacting new deprivations of civil rights respecting prisoners<sup>24</sup>.

The abject respect paid to English statute law shown by legislatures in Australasia until quite lately was exceeded, if anything, by the conservatism of the courts. Mr Cameron instances the "slavish"<sup>25</sup> copying of English decisions by New Zealand courts well into the second half of the twentieth century. This was so despite the existence of multiple and well-reasoned local decisions supporting different outcomes<sup>26</sup>.

Such was the mind lock upon those who made our laws. It was a kind of blindness to the unsuitability of unquestioningly copying conclusions reached far away, and often long ago. Little wonder that Lionel Murphy regarded the inflexible obedience to English precedents as an attitude of mind suitable for nations, such as ours, where the

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<sup>24</sup> See eg *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575. Federal legislation was enacted in 2006 to deprive prisoners of the right to vote in federal elections. See *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), s 2(1), Sch 1, para 4, 15, 109. The constitutionality of this provision has been challenged.

<sup>25</sup> Quoting P B Carter, 1954 *Annual Law Review of Western Australia*, 68.

<sup>26</sup> See in *In re Rayner* [1948] NZLR 455 at 506.

majority of living creatures were sheep<sup>27</sup>. Yet this was the approach that was strongly defended at the time when I was first appointed to a law reform agency. At that time, the Chief Justice of Victoria, Sir John Young, declared that there were great dangers in appointing people who were *paid* to work on law reform. According to this view, the wisest and most experienced lawyers knew that, generally, it was better to leave the law well alone<sup>28</sup>. There are still lawyers of this persuasion, although fortunately their sun has now probably set.

Such, then, were the features of the legal system when I came to that legal conference in Auckland in 1976. They reflected an attitude of mind that was partly prideful, partly complacent, partly arrogant and overwhelmingly conservative. But at that very time, two different stimuli of great power intruded into our legal backwater. Like so many other things in those days, they came already packaged for us in the Antipodes, a gift from lawyers in the United Kingdom. Specifically, they were highly influenced by the thinking of two great judges who dominated the English bench at that time and competed for the intellectual supremacy of their notions. I refer to Lords Tom Denning and Leslie Scarman.

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<sup>27</sup> L K Murphy, "The Responsibility of Judges", Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed) *Law, Politics and the Labor Movement* (LSB, 1980).

<sup>28</sup> J Mcl Young, "The Influence of the Minority" (1978) 52 *Law Institute Journal* 500. See M D Kirby, "Are We There Yet?" in B Opeskin and D Weisbrot, *The Promise of Law Reform* (Sydney, 2005), 433 at 434.

Denning advanced the bold idea that the judges should be more active in the cause of justice, more sensitive to instances of irrationality, unfairness and outmoded principles. For him, the judiciary was divided between "bold spirits" and "timorous souls"<sup>29</sup>. Basically, he urged the judges to be more active in fixing the law up, as their great predecessors in the common law had done. He had no time for subservience to precedent in an age of such radical social, economic and technological change. His powerful writing, his central judicial position in England, his captivating personality, his visits to our part of the world and his optimism undoubtedly had an impact on the judiciary and other lawyers in Australia in the last four decades of the twentieth century. It was an impact favourable to judicial law reform. It can be seen in many of the wise and creative decisions of Sir Owen Woodhouse, Sir Robin Cooke and others in the New Zealand Court of Appeal of that era. It can also be seen in the creative phase which the High Court of Australia entered when its majority included Chief Justice Mason and Justices Brennan, Deane, Toohey and Gaudron.

For Leslie Scarman, there were institutional problems with this judicial approach. It depended entirely upon the chance factors of litigants, judicial personality, ability and inclination as well as cases,

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<sup>29</sup> *Chandler v Crane Christmas & Co* [1951] 2 KB 164 at 178; see also M D Kirby, "Lord Denning: an Antipodean Appreciation" [1986] *Denning Law Journal* 103 at 108.

appeals and bench composition. Moreover, it seemed to Scarman to be out of harmony with the obligation to uphold the central role of Parliament in the reform of the law. For this purpose, Scarman embraced the idea of institutional law reform. Subsequently, he endorsed the idea of human rights legislation - basically as a stimulus in each case to the often lethargic parliamentary process<sup>30</sup>.

Generations of lawyers, in New Zealand and Australia, have now grown up with leading lawyers who acknowledged the faults and injustices of the old attitudes and the institutions as they formerly operated. Despite the efforts of the conservatives in the law, who demand a restoration of the "former state of things"<sup>31</sup> and media ideologues who want to turn back the clock, I do not believe that in Australasia we will go down that path. We have come too far. Too many wrongs, inefficiencies and injustices have been identified. The continuance of institutional law reform, at least, seems assured. However, the refinement of the mechanisms of law reform is a challenge that is still before us.

Of Scarman's second essential stimulus - a legal statement of fundamental human rights - much could be said. In most jurisdictions it

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<sup>30</sup> M D Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 ALJ 299 at 311-315 (hereafter "Scarman Lecture").

<sup>31</sup> cf M D Kirby, *Judicial Activism* above n 20, 91.

rides in tandem with the role of institutional law reform<sup>32</sup>. Canada, New Zealand, South Africa and the United Kingdom have, in their differing ways, embarked upon the human rights enterprise<sup>33</sup>. Even in Australia, we have now begun this journey<sup>34</sup>. For Australians, the journey remains far from complete. But, although clearly relevant to our institutional malaise in law reform, this is subject for another day. Despite the critics who rail against the embrace of human rights laws<sup>35</sup>, New Zealand judges and lawyers have much to teach Australia in respect of this legal development. Nevertheless, it will be enough for me to concentrate on institutional law reform. To consider where we have come from; where we are; and where we might be going.

#### THE LAW REFORM JOURNEY

*Where we have come from:* Anyone in doubt concerning the common resistance to law reform in the judiciary and legal profession

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<sup>32</sup> M D Kirby, Scarman Lecture (2006) 80 ALJ 299 at 310.

<sup>33</sup> *Canadian Charter of Rights and Freedoms*; New Zealand *Bill of Rights Act 1990* (NZ); South African *Constitution 1996*, Ch 2; *Human Rights Act 1998* (UK). See I Richardson, "Rights Jurisprudence - Justice for all?" in P A Joseph (ed) *Essays on the Constitution* (1995), 61 at 69ff; G Palmer and M Palmer, *Bridled Power* (1997), 264ff.

<sup>34</sup> *Human Rights Act 2005* (ACT); *Human Rights and Responsibilities Act 2006* (Vic).

<sup>35</sup> J Allan and G Huscroft, "Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts" (2006) 43 *San Diego Law Review* 1 at 22.

before quite recent times needs a refresher course in the manner in which inadequacies, inappropriateness, injustice, confusion and outmoded provisions in the law were dealt with (or more often not dealt with) in earlier generations. They can read all about it in Jim Cameron's descriptions of lawmaking in nineteenth century New Zealand<sup>36</sup>. The story is also told by those in the know of more recent events, including Sir Owen Woodhouse himself<sup>37</sup> and Sir Kenneth Keith<sup>38</sup>.

The creation of the first law reform bodies in New Zealand, under the *aegis* of the Law Reform Committee of 1937 is described by Sir Geoffrey Palmer<sup>39</sup>. The fact that it took fifty years before the present Act was adopted by the New Zealand Parliament, demonstrates, as vividly as anything could, the unhurried attitude to institutional law reform that existed in those days.

The Law Reform Committees that preceded the Act undoubtedly performed very useful work. They helped cure many injustices brought to their notice. But Jim Cameron's assessment was that this was a

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<sup>36</sup> B J Cameron, "Law Reform in New Zealand" (1956) 32 NZLJ 72.

<sup>37</sup> Sir Owen Woodhouse, "The New Law Commission" [1986] NZLJ 107 at 108.

<sup>38</sup> Sir Kenneth Keith, "Law Reform" in Sir Ian Barker and Graeme Wear (eds), *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (Wellington, 2003), 353 at 357.

<sup>39</sup> G Palmer, "Law Reform" above n 9, para [8].

"Clayton's law reform committee"<sup>40</sup>. The composition, mode of operation, resources and subject matters undertaken limited what could be achieved. Officials, fearful of the intrusion of competing sources of influence on Parliament and the Minister in the matter of lawmaking, had no real reason to want things radically changed<sup>41</sup>.

Typically enough, it was probably the move of Lord Chancellor Gardiner to establish the English and Scottish Law Commissions in 1965 that provoked the proposals by the Hon J R Hanan in June 1965<sup>42</sup> for a stronger institutional system of law reform in New Zealand. In February 1966 the Law Revision Commission was created<sup>43</sup>. It was replaced by a Law Reform Council in 1975. Yet according to Jim Cameron, it served only to stifle the need for a more profound reform arrangement<sup>44</sup>. This system of part-time law reform bodies existed when I came to New Zealand in 1976. Wonderful people participated in the committees - lawyers of great ability. But the institutions were not well serviced. They

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<sup>40</sup> B J Cameron, "Legal Change Over Fifty Years" (1987) 3 *Canterbury L Rev* 198 at 200.

<sup>41</sup> J L Robson (ed), *New Zealand: The Development of Its Laws and Constitution* (2nd ed, Stevens, London, 1967), 496.

<sup>42</sup> *Ibid*, 499.

<sup>43</sup> Sir Kenneth Keith, above n 38, 318; B J Cameron, "Legal Change Over Fifty Years" (1987) 3 *Canterbury L Rev* 198 at 201-202.

<sup>44</sup> *Ibid*, 363.

deserved the criticism that they were "ramshackle, unsystematic, part-time and unsatisfactory"<sup>45</sup>.

*Where we are:* The ensuing years, and the examples of Australian, British and other law reform agencies, virtually ensured the creation of a permanent, better-resourced, national law reform body when the moment seemed right. There was a growing appreciation, in the New Zealand literature, that the major defect of the part-time committees was not so much what they did but what they could not do; or do thoroughly and with proper speed<sup>46</sup>. When, therefore, in 1984, the New Zealand Labour Party election policy included the creation of a permanent national commission<sup>47</sup>, it came as no surprise.

Upon the election of the fourth Labour Government, the Bill was introduced in July 1985. The *Law Commission Act 1985* (NZ) followed. The mandate given to the Commission was visionary and ambitious<sup>48</sup>. What marked the new Commission out from virtually every other law

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<sup>45</sup> G Hammond, "Part-time Law Reform Committees: An Overview" (1988) 13 *New Zealand Universities Law Review* 135.

<sup>46</sup> G Palmer [1986] NZLJ 104 at 105.

<sup>47</sup> G Palmer, "Law Reform Enterprise in New Zealand", Address to the Board of New Zealand Law Society, 17 February 2006, unpublished, 105.

<sup>48</sup> G Palmer, *ibid* 8; cf G Palmer [1986] NZLJ 104. G Baragwanath, "The Role of the New Zealand Law Commission", New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper No 2, March 2001, 1.

reform agency, was the wide mandate given to it, in performing its tasks, to recognise and reflect the Maori dimension in proposals of law reform. This was an added component of principle designed to free the commissioners from the tyranny of wholly majoritarian thinking<sup>49</sup>. By coming late to the creation of a national law reform body, New Zealand had the chance to learn from the errors of others<sup>50</sup>. The participation of Jim Cameron, former Deputy Secretary of Justice, brought to the Commission's table someone who for decades had been puzzling, writing and planning for a successful institution that could master the elusive techniques of working in appropriate liaison with the key officials and creating an effective relationship with Parliament that would always have the last word<sup>51</sup>. If the Commission were to fail, it would not be because of the intelligence and experience of the personnel; the novelty and challenge of its statutory mandate; the goodwill of its creators; and the recognition of all concerned that institutional problems in lawmaking required a fresh institutional start.

Yet by 2000, a certain malaise had appeared. Fewer than 50% of the Commission's proposals had been implemented<sup>52</sup>. Some proposals,

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<sup>49</sup> G Palmer [1986] NZLJ 104 at 107.

<sup>50</sup> G Palmer, Address to Law Society, above n 47, para [7].

<sup>51</sup> Sir Owen Woodhouse [1986] NZLJ 107.

<sup>52</sup> G Palmer, Address to Law Society, p 2. See also J B Robertson, "Tradition and Innovation in a Law Reform Agency", NZ Centre for Public Law, Victoria University of Wellington, Occasional Paper No 11, July 2002, 2 where the author states that the implementation is "not a brilliant hit record".

apparently too large and complex for easy parliamentary absorption, seemed trapped in the legislative doldrums. A thorough review of institutional law reform, conducted by Sir Geoffrey Palmer in 2000, identified the need for a new climate of opinion concerning the priorities of law reform recommendations and changes to the attitudes proper to their consideration<sup>53</sup>. Without a change of attitude, he warned, the work of the Commission would suffer<sup>54</sup>. The government took heed. It announced that it adopted the Palmer report. It undertook to respond to law reform proposals within six months of their publication; to appoint a Minister with separate responsibilities for law reform; and to improve the parliamentary committee system so as to ensure an orderly consideration of the Commission's recommendations<sup>55</sup>. In March 2005, the Minister appointed to the new responsibilities (the Hon Marian Hobbs) acknowledged the concerns of the Commission about the implementation process; stressed the desire of the government to improve the procedures of consideration; acknowledged the practical difficulty of the limited time available in Parliament for consideration of law reform; and called for closer working relations between the Commission, the government and government agencies "in the interests of quality and understanding"<sup>56</sup>.

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<sup>53</sup> "Change needed in attitude to law reform" (2000) 541 *Law Talk* 12.

<sup>54</sup> G Palmer, Law Society Address, above n 47, 17.

<sup>55</sup> Hon Marian Hobbs, "The Law Commission: Development of the 2005-2006 Work Programme", Address to the 7th Annual Public Law Forum, Wellington.

<sup>56</sup> *Ibid.*

So what can be done about the apparent log-jam that remains as much an impediment to law reform action today as it was in earlier times? What can be done to address this systemic obstacle to institutional effectiveness, that is as real in Britain and Australia as it is in New Zealand? Consistently with our notions of a democratic and responsible parliament, it is impossible to alter the means by which law reform reports secure their appropriate share of parliamentary time? This is the central issue that requires, and deserves, our attention. Beside it, all other institutional problems seem readily capable of solution.

#### THE WAY AHEAD

*Market response and law reform:* Before offering some thoughts on the way ahead, it is necessary to dig a little deeper so as to understand more clearly the essential nature of the problem. It is certainly not one confined to New Zealand. It is found in virtually every nation. Democracies, indeed, probably do better in responding to the needs of law reform than autocracies and old-fashioned dictatorships.

When I studied economics, forty years ago, a lecturer shocked our class by expressing an opinion of a kind that would now be commonplace in the mouth of Judge Richard Posner. He suggested that, in the then undeveloped democracy of Indonesia, where the law was often out of date, difficult to find and unsuitable when discovered,

corruption of officials actually played a useful economic role in helping the economy to operate efficiently. If the legislature could not update the law, so as to keep it in harmony with society's needs and current attitudes, a little bit of corruption was a thoroughly good thing. At least it was so, looked at from a short-term economic point of view.

This was a shocking proposition to me at the time. Yet had I been mature enough, and knowledgeable enough, I might not have been so affronted. In Sydney, just down the road from the University where I received this lecture, prostitution, gay venues, sly grog shops, off-course gambling and obscene magazines were readily available although certainly in breach then of some law or other. In the 1960s, one did not have to go to Indonesia to find illustrations of the consequences of the breakdown of the parliamentary law-making process. It was happening right under our nose. Of course, the insidious affect of corruption cannot be evaluated solely by reference to the provision of relatively harmless goods and services prohibited by laws out of tune with market requirements. The long-term effect of corruption on society is much more serious. In fact, it should stimulate reasonably prompt attention to law reform so as to defend the law enforcement machinery of the State and the very integrity of government within it. Now, many of the laws that encouraged such corrupt practices in the 1960s have been changed; but not all. Failures of law reform have an undoubted economic, personal and political price-tag.

*Inexplicable inaction:* Yet failures there are and sometimes they seem completely inexplicable and indefensible.

In *Coventry v Charter Pacific Corporation Ltd*<sup>57</sup>, the High Court of Australia, in 2005, was called upon to give meaning to the provisions of the *Bankruptcy Act 1966* (Cth), s 82(2), which provided that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy". The Court was asked to decide whether a party's entitlement to unliquidated damages for the contravention of a statutory provision, namely s 995(2) of the *Corporations Law* (Qld) which prohibited misleading and deceptive conduct in relation to dealings with securities, was a debt provable in bankruptcy. It was unclear whether a claim for damages arising under statute fell within the exception in s 82(2) of the *Bankruptcy Act 1966* (Cth), given that such a claim did not strictly arise under a "contract, promise or breach of trust".

A majority of the Court<sup>58</sup> resolved the ambiguity by a close scrutiny of the 1869 English Act from which the Australian statutory provision was ultimately derived and, as well, 19th century English case law. I found that an unsatisfying approach to the meaning of an important provision of contemporary Australian federal legislation,

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<sup>57</sup> (2005) 80 ALJR 132; 222 ALR 202 ("*Coventry*").

<sup>58</sup> Gleeson CJ, Gummow, Hayne and Callinan JJ.

enacted in 1966, designed to operate in the present world of Australian economic relationships. Canadian and New Zealand statute law on the subject had been reformed respectively in 1949<sup>59</sup> and 1967<sup>60</sup>, each in similar terms. By the reformed laws, all demands in the nature of unliquidated damages were provable debts and thus included in the bankrupt's estate. In 1988, the Australian Law Reform Commission in the report in its *General Insolvency Inquiry*<sup>61</sup> noted the ambiguity in the Australian statute and urged passage of legislation along the same lines as had since been adopted in Canada, New Zealand and the United Kingdom. In respect of corporate insolvency, Australian legislation had fixed the problem<sup>62</sup>; but remarkably, not in the case of individual bankruptcies.

In the end, I came to the same conclusion as the other members of the Court, although taking a differing route through the maze of statute and judge-made law. But what a shocking waste of court time and what inefficient lawyering was involved. Why had nearly twenty years passed without action since the ALRC reform proposal? Why especially, given that a like reform was meanwhile enacted in the corporations field? Why such shocking neglect and apparent

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<sup>59</sup> By the *Bankruptcy and Insolvency Act* 1949 (Canada), s 121. See *Coventry* (2005) 80 ALJR 132 at 157 [137]; 222 ALR 202 at 233.

<sup>60</sup> *Insolvency Act* 1967 (NZ) s 87(1).

<sup>61</sup> ALRC 45 (1988), Vol 1, pp 316-319.

<sup>62</sup> *Corporations Act* 2001 (Cth) s 553(1).

indifference? Why, especially, in a matter that must arise dozens of times in any given year, add to costs and uncertainty for bankrupts, creditors, credit agencies and citizens and produce outcomes reliant on judicial reasoning from nineteenth century case law on statutes overtaken virtually everywhere else?

As judges and lawyers, we all know of many such cases. There is just no acceptable explanation for the inattention and inactivity of the lawmakers. The only true explanation is the breakdown and failure of a nation's lawmaking machinery in a highly practical, technical and (one would think) uncontroversial area of the law. Fortunately, lay clients and litigants very rarely know of such defects. If they did, they would rise in anger against the law and those who make and administer it, even more than they already do. Perhaps they would lay the blame where it properly belongs - with the officials who fail with due speed to advise governments and with ministers and members of parliament who fail to pay heed to well-reasoned law reform reports.

One can understand divisions of opinion in government and parliament, over controversial contemporary issues of potential legal reform. Such issues exist and sometimes they require a due interval of gestation before action emerges. We have recently witnessed an instance of this kind in Australia in the current political and public controversies over the legally permissible use of embryonic stem cells

for therapeutic cloning for human beings<sup>63</sup>. But where there is no action, and no explanation, in an apparently innocuous area of technical law, the failure of our institutions (and of the law reform process) is maddening. In *Coventry*<sup>64</sup>, I ended my reasons with these words:

"The chief point in the appeal is the need for urgent legislative action. The reforms enacted long ago in Canada and New Zealand show what can be done".

I have no confidence that these words will have any more effect than the report of the ALRC twenty years ago. The fact is that alterations to the *Bankruptcy Act* are not interesting enough. People with the relevant power just do not appear to care enough. The subjects are not political. They will win no votes. They are not part of a government's election-winning agenda. The Opposition is indifferent. The officials are not pressing for change. Nothing is done. The institutions of lawmaking are not grinding slow. In this respect, they appear not to be grinding at all.

When I hear political leaders, media pundits and even some law professors who should know better denouncing Bills of Rights and so-called "judicial activism" in the name of an infantile faith in the

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<sup>63</sup> Following the Australian Government, *Legislation Review: Prohibition of Human Cloning Act 2002 and the Research Involving Human Embryos Act 2002*, Report, Canberra, December 2005 ("Lockhart Report").

<sup>64</sup> (2005) 80 ALJR 132 at 159 [145].

"sovereignty" and "supremacy" of Parliament, I sometimes wonder if they are living on the same planet<sup>65</sup>. Clearly, they are not being faced, as the courts commonly are, with the unattended imperfections and unjust defects of the law, including in cases where law reform bodies have recommended perfectly reasonable, well-argued, well-tried and seemingly uncontroversial reforms to the law.

### A NEW ACTION PLAN

*What can be done?:* There are various initiatives that might be taken by a body such as the New Zealand Law Commission, to avoid the doldrums in which reports get lost, overlooked, forgotten, neglected or unaccountably ignored. Some of them are more attractive than others:

- (1) *Getting closer to government:* The Minister has suggested getting closer to government and departmental officials<sup>66</sup>. In fairness, she emphasised that this would have to be done in ways consistently with the independence of the Commission and its role as a body established by Parliament.

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<sup>65</sup> Scarman Lecture (2006) 80 ALJ 299 at 311-315.

<sup>66</sup> Hon Marian Hobbs, above n 55, 2. See also "Law Reform Must be Collaborative" (2006) 662 *Law Talk* 1.

This suggestion is a tricky one. True, appropriate liaison with ministers, their personal staff and departmental advisers, is a process that all institutional law reformers observe. Sadly, they are often reduced (in my memory) to snatched encounters in which hoped for suggestions are planted in the recipients' ears, for the most part passing through the intervening space into forgetfulness. It is not quite the encounter on the White House lawn on the way to the helicopter; but it is often not all that different.

There is no offence to independence in seizing the moment to attempt to lobby ministers and their officers to remember the claims on their attention, and parliamentary time, of law reform reports. Conferences and official dinners, book launches and even funerals, have been known to be pressed into this worthy service. But the process is delicate because no official (and certainly no judge) will want to overstep the line that marks off the space known affectionately in Australia as the "bear pit" or in New Zealand as the "beehive". Bears and bees doubtless have their own seductive attractions. But they can get nasty when angry or distracted. It is best for independent advisers to keep a certain distance and at all times to take precautionary measures.

This point was made to me, early in the life of the ALRC. I was desperately keen to demonstrate that the Commission was a body both practical and useful to government. For this purpose I explored ways by which we could get very close to the

departmental officials who seemed to hold the key to rapid implementation of our proposals. A very wise federal public servant, Sir Clarrie Harders, Secretary of the Attorney-General's Department, gave me the contrary advice. He pointed out that proximity to political power had a tendency to be contaminating. He explained why it was the very independence of the Commission that gave it a distinct voice and a viewpoint valuable because it was different and could tap new blood. With reference to the then recent and unexpected change of government in Australia in November 1975, he indicated that the Commission must speak with a longer term of reference in view. In any case, what was acceptable, even desirable, to politicians and officials at one time might, under a different government, be quite unpalatable; and vice-versa.

This was wise counsel. The ALRC has adhered to it. If it sometimes means that the Commission does not get the inside running that departmental officials can secure in ministerial attention and slots in the legislative programme, it does assure a longer term perspective. A particularly fruitful period, we found in the ALRC, was when a new government came to office. Before their own programme was ready for implementation, Bills prepared in the ALRC could be considered, adopted and found a place in the parliamentary agenda. It was in this way that the

ALRC reports on *Insurance Contracts*<sup>67</sup> and *Privacy*<sup>68</sup> were accepted by the new Hawke government in 1983 and began their passage into federal legislation. This was so, although each was a major feat of legislation, a significant alteration of the preceding law and attended by various antagonistic lobbies and opposition.

- (2) *Governmental initiation*: One possible, suggested means of ensuring the relevance of law reform activity is to confine the tasks of an agency to references provided by the law minister of the day. Such is the provision under the ALRC statute; but it is not the exclusive way in which projects may be initiated in New Zealand. Might there be a danger in the initiation of inquiries by lawyers who can become out of touch with government interests and priorities<sup>69</sup>? Are there criteria that should be observed in initiating a project of law reform that does not originate in the government of the day<sup>70</sup>?

In practical terms this issue may not be very significant. Most law reform bodies have an official working relationship with the minister and the civil servants that assures an interchange on the

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<sup>67</sup> *Insurance Contracts* (ALRC 20, 1982); cf *Insurance Contracts Act* 1984 (Cth).

<sup>68</sup> *Privacy* (ALRC 22, 1983). See *Privacy Act* 1988 (Cth).

<sup>69</sup> J B Robertson, "Initiation and Selection of Projects" in Opeskin and Weisbrot, *The Promise of Law Reform*, above n 28, 102 at 113.

<sup>70</sup> D Baragwanath, above n 48, 4.

subjects suitable for attention in the law reform programme. Some Ministers are bristling with proposals. Others have few ideas of their own and always rely on the commissioners for suggestions. Ministers of the latter school tend to be lethargic and apathetic (even sometimes antagonistic) about law reform reports when they come. Such Ministers can be a menace, whatever was the origin of the law reform inquiry.

Once again, there is merit in the present New Zealand arrangement for self-starting. It allows the Commission to look into the future and to suggest programmes that are objectively important for the long-term health of the law. If those projects do not immediately appeal to the present government, they may appeal to their successors. Second guessing politicians is always fraught with danger. Naturally, law reform bodies will tend to respond most energetically to tasks assigned by the government of the day and especially where they necessitate a sensitive or urgent inquiry, such as the recent ALRC and proposed New Zealand inquiries into sedition laws<sup>71</sup>. The prompt delivery of reports on such topics may fit comfortably into the priority of the government that assigned them. The prospect of enactments based on such reports are thus enlarged. The challenge for the Commission in such matters is to retain distance and objectivity.

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<sup>71</sup> Australian Law Reform Commission, *Sedition* (2006) (forthcoming).

If a quick and limited political job is needed, it is generally better that it be performed within the permanent government bureaucracy. Law reform agencies usually march to a different drum.

- (3) *Cost implications:* One possible impediment to the implementation of reform proposals is the cost that would be involved in carrying them into practice. It would be a naïve law reform agency that did not now assess the costs, financial and otherwise, of implementing its proposals for this will be the first question that potential opponents in politics and the bureaucracy will raise. In the past, the costs of the implementation of reforms have often been unspecified. In these more frugal times, with pressures for out-sourcing of formerly public activities to the private sector<sup>72</sup>, law reformers must be more transparent and candid in their consideration of the cost implications. A failure to be so may result in their proposals being consigned forever to the back-burner.

On the other hand, costs include opportunity costs. Whilst the New Zealand accident compensation scheme might seem to someone from a different country an expensive innovation, the net savings in litigation costs and in the administration of claims

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<sup>72</sup> cf *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277; *Griffith University v Tang* (2005) 221 CLR 99.

disputed on common law grounds must be offset against the costs of the reform. Sir Kenneth Keith has pointed out that the New Zealand scheme costs citizens about \$1 per day<sup>73</sup>. The most recent "reform" of Australia's accident compensation laws has been achieved much later by a hotch-potch of pragmatic statutory provisions, reversing many principled decisions of the courts, in a way designed to afford large protections to insurers and to reduce the politically sensitive costs of compulsory motor vehicle and employer insurance premiums. The result has been a controversial package that lacks universality and "reforms" that often fall heavily on vulnerable victims of accidents and injuries<sup>74</sup>. Costs must be included in law reform proposals. But let them be real costs.

- (4) *Lawyers' law*: Should law reform be confined to so-called lawyers' law? Or should it include big projects, controversial inquiries, social investigations and politically sensitive tasks? Sir Geoffrey Palmer favours a place for the "larger more profound" tasks<sup>75</sup>. There is no doubt that these carry risks. Governments today are often averse to risks. The closer they get to elections, the more it is so. Yet, as I have shown, even the purest lawyers' law can

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<sup>73</sup> Sir Kenneth Keith, "Philosophies of Law Reform" (1991) 7 *Otago Law Review* 363 at 368.

<sup>74</sup> See E W Wright, above n 8.

<sup>75</sup> G Palmer, Law Society Address, above n 47.

sometimes prove too hard for action. A modest reform of the Australian *Bankruptcy Act* seemingly proved too difficult to digest. Like so many others, this problem presents a tricky issue. If the subject is too technical, it may be boring. If it is too controversial, it may be unacceptably sensitive. All of this suggests the need for a better, institutional procedure for consideration of reports so that they are not dependent on so many chance factors and *ad hoc* initiatives for successful follow-up.

- (5) *Draft Bills*: In the early days of the ALRC, we followed the tradition of the English Law Commission and annexed draft Bills to our reports. Certainly, that facilitated ease of implementation (with or without amendment) if the governmental will was there. The assistance of recently retired first parliamentary counsel in our work helped us in this endeavour. As well, the presence of draft legislation was an assurance that the law reformers had focussed on the practical questions and the details - and not been content with comfortable esoteric conclusions typically written in the passive voice. Resources for the hard discipline of drafting legislation are difficult to come by. But if this is to be part of the work of law reform, those resources must be made available to the Commission<sup>76</sup>. As everyone recognises now, there will be

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<sup>76</sup> G Palmer, "Evaluation of the Law Commission: Report for the Associate Minister of Justice and Attorney-General, Hon Margaret Wilson" (Wellington, 28 April 2000), 356.

instances where proposals for law reform can be implemented without the need for legislation at all<sup>77</sup>. There is enough cluttering up of the statute book without adding needlessly to its pages. Sometimes the final conclusion of the Commission, on a hotly debated topic, may be that no change at all is justified. This was a conclusion reached by the ALRC in its major review of the adversary trial system as it operates in federal courts in Australia<sup>78</sup>. The much debated question of whether (if that be constitutionally possible) a more inquisitorial procedure could be substitute for the adversarial and accusatorial process traditional in our courts, was answered in the negative. Law reform bodies today are much more willing to conclude, without embarrassment, that the law is sometimes best left alone. Occasionally, the solutions worked out by courts and legislatures in the past constitute the least worst way for the law to tackle a given problem. Law reform bodies should no longer feel an obligation to deliver legislative solutions and draft statutes in all of their enquiries. An important strategy for avoiding the log-jam of legislative implementation is sometimes to examine the possibility of shifting some, at least, of the suggested changes into subordinate lawmaking designed by the Executive Government.

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<sup>77</sup> M D Kirby, "Are We There Yet?" in Opeskin and Weisbrot, above n 28.

<sup>78</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000). See M D Kirby in Opeskin and Weisbrot, above n 28, 438.

Naturally, this has risks and dangers as New Zealanders well know<sup>79</sup>. In response to suggested procedures for the amendment of statutes by orders in council and regulations, the New Zealand Government in 2004 expressed its disinclination "to see the proliferation of the affirmative resolution procedure". However, the government acknowledged "at the same time ... [that] there are some limited and exceptional circumstances where the affirmative resolution procedure is justifiable"<sup>80</sup>.

- (6) *Catching the wave*: An important consideration for the timely implementation of law reform reports is the need for law reform agencies to catch the wave of current governmental and parliamentary concerns. These may include the growing moves towards globalisation of trade with consequences for law<sup>81</sup>; the response to the dangers and perceived dangers of terrorism; and the need to implement the international principles of human rights and other treaty law<sup>82</sup>.

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<sup>79</sup> G Palmer, "Law Reform", 22-25 [65]-[81].

<sup>80</sup> New Zealand Government, House of Representatives, Interim Report on the Inquiry Into Affirmative Resolution Procedure, tabled in accordance with Standing Order 251A(2) (24 September 2004).

<sup>81</sup> D Baragwanath, above n 48, 18.

<sup>82</sup> cf *Al-Kateb v Godwin* (2004) 219 CLR 562.

- (7) *Use by courts:* Sometimes, even if governments and parliaments neglect law reform reports, it is possible for judges, in discharging their limited creative functions, to develop common law principles in harmony with the reasoned approach of law reform bodies. Recent investigations have shown the growing inclination of courts, particularly in Australia, to have regard to law reform reports in this way. I frequently do so myself. Often law reform reports give the best and most accurate and detailed picture imaginable of the state of the law at the time of the report. The recommendations for change can sometimes, but not always, be reflected in judicial accretions where Parliament's log-jam has proved impenetrable<sup>83</sup>.

*A delegated legislative procedure:* The foregoing is all very well. But it does not attack the *basic* obstacle. Neither law reformers nor judges can ultimately do so. Only legislators can achieve the change that is necessary to make the formal enactment of statutes, where that is deemed necessary, more responsive to the needs of reform in the current age.

In Britain, with the support of the Law Commission, the Legislative and Regulatory Reform Bill was introduced into Parliament in 2006. It was designed to introduce a procedure of delegated legislation in a

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<sup>83</sup> See eg *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49 at 89 [104].

speedier and more streamlined way, apt to institutional law reform. Clause 3 of the Bill concerns a suggested procedure that would permit Law Commission proposals, as approved by the government, to proceed, with such amendments as the government introduces, but without substantive parliamentary debate. Under the procedure, Members of Parliament would not have been able to propose amendments.

Remarkably perhaps, this clause survived the passage of the Bill through the House of Commons. However, it then came under heavy fire in the House of Lords. The Delegated Powers Committee (chaired by Lord Dahrendorf) and the Constitution Committee (chaired by Lord Home) both condemned it. In the Lords, it was attacked by one Peer after another on the Second Reading. The general consensus was that something needed to be done to cure the problem at which the clause was targeted. But that clause 3 was not acceptable and shifted too much power from Parliament to the Executive Government in selecting reports and proposals for the limited, fast-track, legislative procedure.

In consequence of the debate the Minister (Baroness Ashton) announced that clause 3 was being withdrawn. However, she has remained in discussion with Opposition parties, cross-benchers and the Law Commission itself to try to find an alternative procedure upon which everyone can agree. It is expected that the Bill will go back to the Committee after the British summer recess, either in September or October 2006. We who, from the other side of the world, observe these

processes of the Mother of Parliaments must therefore continue to watch this space.

Obviously, the requirement is for a mechanism that will be applicable to appropriate, ie non-politically controversial, law reform Bills. Plainly, any such fast-track procedure would not be apt for a report on a major project (such as the entire reform of insurance contracts law); a sensitive project (such as a report on privacy law); or a politically controversial one (such as sedition law). But one would imagine that modest reforms of bankruptcy law adopted in many other jurisdictions and consistent with an analogous reform in corporations law might be suitable for such treatment.

It may be that one single parliamentary procedure for all of these issues would not be sensible or achievable. A Parliamentary Committee, or Joint Committee, in which the law reform agency could play a larger, invited, role might be one way forward. This could help the development of an effective working relationship between the chairperson of the Parliamentary Committee and the head of the law reform agency. Once established, such a Parliamentary Committee might have the potential to grow as a champion of orderly reform within Parliament. Now, there is no such reliable champion.

The forces of politics, elections, media and lay interest need to be mobilised in a way better than occurs at present. Anyone in doubt about the need should reflect carefully on the institutional weaknesses that

have developed in how countries such as New Zealand, Australia and Britain are governed<sup>84</sup>. Parliament, as a vital, central and ancient institution, must find within itself the means to repair the institutional defects in law reform implementation. They are endemic. They are serious. They have been called to attention for at least fifty years. It is not too much for citizens to expect that Parliament and Executive Government, will look at themselves and offer real, workable solutions. It is noble for parliamentarians to defend their institution from encroachments and to insist on scrutiny of every clause of all proposals without exception. But it is not unreasonable for law reform agencies to point to the failings in attention, time and action and to say, in effect: Parliament, heal thyself.

If it does not, judges will sometimes try to provide changes where that is lawful, just and proper. Officials will sometimes be tempted to turn a blind eye to outmoded laws. Individuals will sometimes try to find their ways around the law. The economics of the market will try to discover ways to circumvent the problem. Improvement of the machinery of governance is a preferable, and now an urgent, option. Yet nowhere has it been tackled successfully. It is a major institutional

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<sup>84</sup> A F Mason, "Democracy and the Law: The State of the Australian Political System" (November 2005) *Law Society Journal* (NSW) 68 at 69; J Laws, "Law and Democracy" (1995) *Public Law* 72 at 81; S Sedley, *Freedom, Law and Justice* (Hamlyn Lectures, 1998) 10; E Thomas, "The Judicial Process" (Cambridge, 2005) 49-52; M D Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30 *Melbourne University Law Review* 1 at 18-19.

defect in the law-making procedures of contemporary democracies. Only governments and parliaments themselves can cure it. But is there the will.

From the judiciary and the law reform agencies of Australia, I bring greetings and congratulations to the Law Commission of New Zealand on its twentieth anniversary.

**LAW COMMISSION OF NEW ZEALAND**

**TWENTIETH ANNIVERSARY CONFERENCE**

**WHAT IS DISTINCTIVE ABOUT NEW ZEALAND LAW AND THE NEW  
ZEALAND WAY OF DOING LAW?**

**WELLINGTON, NEW ZEALAND, FRIDAY 25 AUGUST 2006**

**LAW REFORM AND THE TRANS TASMAN LOG JAM**

**The Hon Justice Michael Kirby AC CMG**