

**SUBMISSION TO THE AUSTRALIAN SENATE INQUIRY INTO THE
AUSTRALIAN LAW REFORM COMMISSION BY THE LEGAL AND
CONSTITUTIONAL AFFAIRS COMMITTEE**

Introduction

1. I am the current President of the New Zealand Law Commission. I am also a warranted Judge of the Court of Appeal of New Zealand. I was seconded to this Commission, as President, for a period from 1 December 2010 until 14 May 2014 (3½ years). The slightly odd period comes about because of the exigencies of the secondment; the Rt Hon Sir Geoffrey Palmer, who was my predecessor, was seconded as a matter of urgency to a UN Inquiry.
2. I am familiar with the operations of the Commission, having assisted it on various projects on the past; through having appeared before Select Committees of the New Zealand Parliament; because some years ago I was the permanent head of a Canadian law reform agency; and because considerable use is made of Commission reports in our Courts.
3. I became aware of the Senate Inquiry into the ALRC through the usual briefing of Australasian government papers that are received in my Commission library. I indicated to the President of the Australian Commission that I was, of my own motion, prepared to make a short submission if that might prove of any assistance to your inquiry. I have been aware of the work of the Australian Commission over the years. The ALRC did not solicit a submission from me or my Commission. It is in large part my admiration for the work of the ALRC that has prompted me to take this step.

Law Reform Commissions in the British Commonwealth

4. It is a striking feature of the British Commonwealth jurisdictions that almost all have institutional law reform agencies outside Ministries of Justice and Attorney-General's departments. Indeed the institutional law reform movement is a marked feature of Commonwealth jurisprudence. Niall Ferguson, in his recent work

“Empire”, suggests that the rule of law and quality legislation have been the single greatest achievement and legacy of that empire. The empire has been greatly transformed, but this important legacy remains. There are more than 60 institutional law reform agencies in the British Commonwealth and a respectable, and increasing, degree of co-operation between them. Particularly the less developed jurisdictions have looked to what is still sometimes referred to as the “old Dominions” (Canada, Australia and New Zealand) for assistance, and the Pacific Island jurisdictions look for all the assistance they can get in their developing jurisdictions. In that respect Australia and New Zealand play an important part in the Pacific.

The New Zealand Law Commission

5. The New Zealand Law Commission is an independent Crown entity governed by the Law Commission Act 1985 and the Crown Entities Act 2004. Its stated legislative process is to promote the systematic review, reform and development of the law of New Zealand. We have our own Minister of the Crown.
6. The Commission is a law reform agency. In practice its project work programme falls into two categories: those referred by the Government to the Commission under section 7 of the Law Commission Act; and those that, upon its own motion, the Commission decides to embark upon. In recent years we have not carried out any self referred projects, as the weight of government references has been very heavy.
7. In addition to this core work programme, a principal function of the Commission under its Act is to advise the Minister of Justice and the Minister Responsible for the Law Commission on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. The main way in which the Commission undertakes this function is through its servicing of two important executive Parliamentary committees that are aimed at improving the quality of legislation. These are the Legislation Advisory Committee (LAC), which has existed since 1986, and the Legislation Design Committee (LDC) which was created in 2006.

8. The Commission is also called upon by departments and ministers to provide assistance on a wide variety of legislative proposals they have under consideration that involve particularly difficult legal or constitutional issues. The Commission frequently collaborates with departments which are considering policy changes and improving ways to deal with issues. Upon request, the Commission also appears in front of Select Committees of Parliament to provide advice on particular issues of legal concern.
9. Structurally, the Commissioners form a Board for the purposes of the Crown Entities Act. As matters now stand, the Commissioners are myself as President, the Deputy President (Dr Warren Young, who is a former Deputy Secretary of Justice), Emeritus Professor John Burrows QC; Mr George Tanner QC (a former head of the Parliamentary Counsel Office and Compiler of Statutes for New Zealand); and Professor Geoff McLay, on leave from Victoria University.
10. In terms of funding, in the 2010/11 financial year the Commission had a government grant of \$4,723,000, earned interest of \$47,230, and \$15,000 from sale of publications, for a total income of \$4,785,230. That figure is inflated somewhat over previous years because of some extra monies which were made available to the Commission by the administration of the day. The Commission had the principal carriage of a large collaborative governmental programme on alcohol law reform.
11. New Zealand is as subject as any other jurisdiction to the financial constraints governments worldwide are feeling, and negotiations are presently underway for the next budget round. It is highly likely that the base budget for the next three years will be \$3.9m per annum. The overall picture is complicated by the fact that as a warranted Judge my salary and allowances are paid out of a protected Crown account (which has permanent legislative allocation) and some adjustment will (and is being) worked out between the Minister of Justice and the Commission. However things come to rest, I think it a fair appreciation of the New Zealand budgetary situation of the Commission is that the annual government grant will be around \$4m per annum.

12. The output of the Commission is set out in the Annual Report of the Commission. I will not labour the results here. The reports are published in hard copy and online, and will be available to the Inquiry should it wish to review that material.

Processing of New Zealand Commission Reports

13. It is well recognised that there have been generic problems for Law Commissions around the British Commonwealth in securing legislative approval and enactment of their reports. At the time of the 20th anniversary of this Commission it was decided to take matters up with the Executive Government to see if this generic problem could be rectified. It is worth noting that the Hon Mr Justice Kirby of the High Court of Australia (as he then was) visited New Zealand. He spoke at certain meetings and sessions on this problem and was of great assistance.
14. I am pleased to be able to say that the Executive Government responded. There was introduced a streamlining process for handling Law Commission reports. These are set out in a Cabinet Office Circular (CO(07) 4). They are designed to ensure that there are strong linkages between government priorities and the Commission's objectives, both in developing our work programme and in implementing the resulting law reform recommendations.
15. In announcing the changes, the then Prime Minister of New Zealand, The Rt Hon Helen Clark, said:
- “It was clear to me that the way the New Zealand government handled Law Commission reports had to change, as it was a waste of valuable time and resources to go on in the way we had over the last 20 years. I became a champion of change and Cabinet has now agreed to a new system for government references to the Commission, which will ensure Law Commission reports get prompt consideration by ministers.
16. The basic proposition, accepted by Cabinet, is that the administration of the day has undertaken to file a (public) response as to what it is going to do about particular Law Commission reports within a set timeframe.
17. Perhaps the most dramatic recent example – and a burden of some delicacy for my Commission – is the Commission's Civil List Report (NZLC R119). There we recommended that the setting and approval of allowances related to Members

of Parliament be removed from Parliament to an independent tribunal. The report was filed (prior notice is given to the responsible Minister's office) prior to noon on a day in December 2010; the Prime Minister announced publicly that afternoon that all of the recommendations would be accepted, and that the necessary legislation to give effect to them would be enacted by June 2011. That is a rather dramatic example. But getting definitive responses from the administration of the day within six months is a major step forward.

18. Perhaps the other major change of recent years is that the degree of interaction with central government and government agencies has increased dramatically. Twenty years ago the idea of a Law Commission was that it was rather aloof, some might even say "stand-offish". There was a very good reason for this in principle: for the advice to be worthwhile at all, law reform agencies have to offer strictly independent advice. However there has been increasing recognition that a more robust degree of interaction is appropriate, at least in New Zealand. Essentially, what now happens here is that every year we revisit our work programme; through the office of the Minister of Justice any concerns or proposals that any other government department may have are solicited; we then review our work programme (with the Ministry); and what we take on is sought to be prioritised with reference to governmental concerns and against a backdrop of what resources are actually available.
19. In our experience this does not compromise independence. It does lead to some lively debates, but that is as it should be, as to what we take on and how we advance things. There is no evidence that I am aware of, and I would be greatly concerned if there was that the Commission has ever been under any pressure to sustain a particular viewpoint.

Relationship with the ALRC

20. Australia was one of the leaders in the law reform movement in the British Commonwealth. The ALRC is certainly the senior law reform agency in Australia. The work it has produced is of admirable quality. It is routinely looked to by this Commission when it is considering its projects. For instance, the work

the ALRC did in relation to official information, and areas like privacy, have been of the greatest interest here.

21. There has been no formal collaboration between the two Commissions. However for my part, given the increasingly close contacts between Australia and New Zealand, and the requirements (sometimes overlooked) under CER (Closer Economic Relations) for greater conformity between our respective jurisdictions in relation to commercial law, this is a feature that might be expected to grow in future years. This kind of collaboration is also becoming more of a feature of work in the British Commonwealth law reform agencies. As only one instance, at the upcoming Commonwealth Law Conference in Hyderabad (February 2011), one of the items on the agenda is consideration of a proposal to digitise all the various law reform reports and material from around the British Commonwealth so as to make them more readily available, and thereby increase efficiency.
22. For the future, I would expect the Australian contribution to be significant. Because of the federal structure of Australia, the Australian experiences are of interest to jurisdictions with that characteristic. A Federation carries its own kind of complexities and the solutions which are thrashed out often tend to have a useful compromise character to them that is of interest to us all. I would therefore not at all underrate the Australian contribution to problems which are common to many countries, and therefore of some intrinsic importance.

Conclusion

23. Every jurisdiction has the problem of how to modernise and develop its law. The institutional law reform movement has been an important contributor to those concerns since the Second World War, and Australia has made a notable contribution to that movement.
24. Each jurisdiction of course has to settle its own response to this generic problem according to its own felt necessities. But I would think it will be a matter of real disappointment if the Australian contribution cannot be sustained and enlarged.

