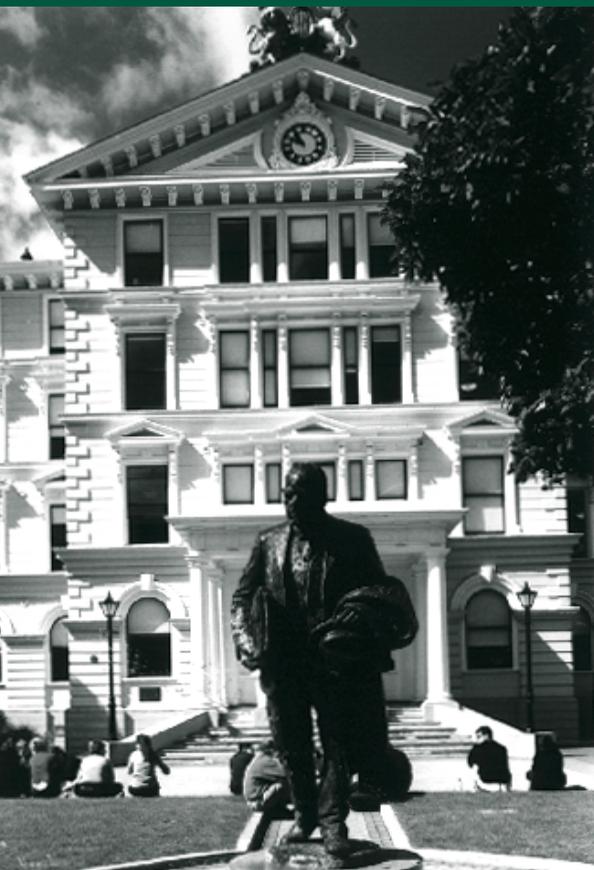


New Zealand Centre for Public Law

Te Wananga o Nga Kaupapa Ture a Iwi o Aotearoa



The Role of the New Zealand Law Commission

by Justice David
Baragwanath

March 2001

Occasional Paper No 2

VICTORIA UNIVERSITY
OF WELLINGTON

*Te Whare Wananga o te Upoko
o te Ika a Māui*



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Funded through the VUW Foundation.



ISBN 0 - 475 - 50063-6

THE ROLE OF THE NEW ZEALAND LAW COMMISSION: NUNC DIMITTIS

*HON JUSTICE BARAGWANATH**

It is a privilege to be invited to speak within this University by the Dean, who as Deputy Secretary for Justice introduced me to the Law Commission. He told me that the two crucial topics were the Treaty and the Constitution. Throughout four years as President I have come increasingly to agree, although in ways that were then beyond the horizon.

I begin with a note of thanks for the valuable contributions that we have received from many of you, across a wide range of topics, throughout my term. While time does not permit me to list what we have attempted, let alone your contributions, they have been particularly evident in my own sphere of public law and with responsibility for the Adoption reference. Both the author of the Law Commission Act,¹ whose Evaluation last year was of such value, and my distinguished immediate predecessor² warrant special acknowledgement as Eminent Victorians for their continuing guidance across a wide area.

It has been my task since October 1996 to give practical effect to the visionary and ambitious statutory expression of the Law Commission's role.³ It was my fortune to be joined by four outstanding Commissioners:

* President of the New Zealand Law Commission October 1996-March 2001 and Judge of the High Court of New Zealand. This address was given to the Faculty of Law and the New Zealand Centre for Public Law, Victoria University of Wellington, 27 March 2001.

1 Rt Hon Sir Geoffrey Palmer.

2 Rt Hon Justice Sir Kenneth Keith.

3 Law Commission Act 1985.

Don Dugdale, Denese Henare, Tim Brewer and Paul Heath QC, while to our great delight the appointment of a continuing Commissioner Judge Margaret Lee was renewed. It was this team which was responsible for most of the decisions to which I will refer. We have tended to begin our vigorous in-house debates from very different starting points.

My own starting point, reflected in *Mandatory Orders Against the Crown and Judicial Review* (NZLC SP10, Wellington, 2001), is influenced by values also considered in important essays received this month, one by Professor Akhil Reed Amar of Yale⁴ and the other by Sir Stephen Sedley.⁵ While the role of government in our community is essential it does not exist for its own purposes. Professor Amar's position⁶ is that ultimately "People are sovereign and governments are not." I would put the point as that the role of government, like that of those of us who are law commissioners and judges, is or should be that of public servant. To achieve it requires authority not possessed by others lacking that responsibility. But such authority is always to be tested by the measure of public benefit - to the individuals and groups of citizens whose taxes pay our salaries. Hence the importance to get right the balance between governmental autonomy, where strong decisive decision-making is required in the wider public interest, and governmental accountability. Judicial review must distinguish between arrogant interference with what others know best and effete failure to prevent infringement of the rule of law. As the citizens' watch-dog the judiciary must identify those who are to be protected or left in peace and those who are to be barked at or bitten. It is difficult to express more precisely how the choice is to be made; it is unsurprising that this is one of the rare cases in which we have not achieved consensus.⁷

4 Akhil Reed Amar "The Supreme Court – Foreword" (2000) 114 Harv LR 26.

5 Sir Stephen Sedley "Settlers v Natives" [2001] *London Review of Books* 24.

6 Professor Akhil Reed Amar, above, 115.

7 The exceptions among New Zealand Law Commission reports are *Succession Law: a Succession (Adjustment) Act* (NZLC R39, Wellington, 1997) and *Tax and Privilege* (NZLC R67, Wellington, 2000). The two cases in which the Commission has published a Study Paper in the name of an individual Commissioner are *Women's Access to Legal Services* (NZLC SP1, Wellington, 1999) and *Mandatory Orders Against the Crown and Judicial Review* (NZLC SP10, Wellington, 2001).

Remarkably, we have managed to do so in the very challenging sphere of the Treaty.⁸ I am more optimistic than Sir Stephen, in his thought provoking essay on that topic,⁹ as to where that debate will take us. My own view, having represented Maori, debated the issues with Maori colleagues and friends, and considered what happens as well as what is said, is that the rhetoric about division is of no more moment than that about suppressing the Treaty. Recognition of the value of the tough and resilient strand of Maori identity and culture within our diverse society is increasing. So too is the appreciation of the Maori qualities of dignity, courage, enterprise, warmth of personality and ability to get on with others, revealed by the historians of our civil and military history. They are precisely what is vital to New Zealand's struggle for a place in the global society – and not least among the nations of the Pacific. While there are inevitable differences over historical grievances, in my view they are manageable so long as those of us in authority are seen to be making a real effort to be fair. But major effort is required to get rid of the conditions that lead to offending and resentment. My experience of young Maori is that their first need is of what many of us have taken for granted - health, education, and the prospect of a future. Given those, the ever-increasing pride in Maori heritage gives real reason for optimism as to all else.

Within the Commission the process of debate has toughened both our reports and our skins. We have come to accept that, while we try to get our Preliminary Papers into reasonable shape before they are released, their whole purpose is to expose our ideas to criticism and improvement to improve life for New Zealanders. The most notable example happened to be one for which I was responsible - *Compensation for Wrongful Conviction or Prosecution* (NZLC PP31, Wellington, 1998); where the Preliminary Paper offered four options for consideration and after public consultation the final report *Compensating the Wrongly Convicted* (NZLC R49, Wellington, 1998) proposed a fifth!

⁸ See *Justice: the Experiences of Maori Women* (NZLC R53, Wellington, 1999); *Coroners* (NZLC R62, Wellington, 2000); *Juries in Criminal Trials* (NZLC R69, Wellington, 2001), and *Maori Customs and Values in New Zealand Law* (NZLC SP9, Wellington, 2001).

⁹ In a review of *Waitangi and Indigenous Rights: Revolution, Law and Litigation* Auckland 23 November 1999 by FM Brookfield, whose views were adopted by the Court of Appeal of Fiji in the recent constitutional case *Prasad v The Republic of Fiji* (15 November 2000) Court of Appeal, Fiji, 26.

There is a considerable literature on law commissions, including well known essays by Sir Geoffrey Palmer and the first President, Sir Owen Woodhouse.¹⁰ But Sir Geoffrey warned me at the outset that a continuing law commission succeeds or fails according to its own performance, whatever mana it may have enjoyed during previous regimes. That was the clear lesson of events in other jurisdictions where law commissions, once successful, had been disestablished. The statutory brief is both inspirational and comprehensive. Yet it is essential to avoid the fate of AA Milne's ship-wrecked sailor, who contemplated everything and achieved nothing.¹¹ Where should we start?

The first task was to define our role. It is in my view, shortly, to identify and tackle items in the "too hard" basket that are of real importance. The statute makes clear that the New Zealand Commission is no mere adjunct to central government. There is a very subtle and indeed complex balance between autonomy and accountability. We could be requested by a Minister to undertake particular projects; yet we have the privilege of self-initiated work. How we went about our task was for us to determine; yet since much of our application of public resources concerned proposals for law reform there was little purpose in engaging in frolics of our own.

We evolved a three-fold test for work we would either propose for Ministerial reference or self-refer:

- (1) Will the work significantly improve New Zealanders' lives? If not, there could be no justification in wasting their resources on it;
- (2) Are we the best people to perform the task (with or without expert assistance)? If not we should leave it to others;
- (3) Is there a real prospect of implementation? If not we would not touch it, unless we considered it to be of such importance as to warrant our embarking on it nevertheless.

¹⁰ Rt Hon Geoffrey Palmer "Systematic Development of the Law: The Function of the Law Commission" [1986] NZLJ 104, and Rt Hon Sir Owen Woodhouse "The New Law Commission" [1986] NZLJ 107.

¹¹ A A Milne "The Old Sailor" in *Now We Are Six*.

We saw our role as to take on anything satisfying these tests, despite occasional feelings of discomfort on issues of demarcation, of which our intervention between the Court of Appeal and Privy Council judgments in *Lange* was perhaps the high water mark.¹² But we had no hesitation over *Recognising Same-Sex Relationships* (NZLC SP4, Wellington, 1999), to prepare for which Commissioner Dugdale attended an important conference in England, and the encounters with the Treaty of Waitangi I have mentioned. Law reformers must be prepared to tackle social realities, rather than duck them. And unless there is a more competent body to take on specialist work the Commission must equip itself to do so, with the help of experts as, for example, in the case of *Retirement Villages* (NZLC R57, Wellington, 1999) and our several reports on electronic commerce.¹³ We have been moved by the willingness of the experts to help us, even during the period when proper processes for implementation seemed far distant.

Lying behind these questions were some constitutional and political realities.

As established, with four very senior legal practitioners and two judges, it was plain that those appointing this Commission had taken seriously the precept that a New Zealand Commission is not a governmental poodle. That is why such people were able and willing to accept appointment and why the Act confers such strong protections for Commissioners in the due exercise of their functions.

But where in the constitutional firmament should it live? My own conclusion was that ours is a satellite role. Too close to the government and we would crash to earth. Too far away and we would drift off into space. Our function was to perform *our* job, equipping ourselves as best we could for the purpose. I made the personal decision that, like the Chairman of the English Commission, I would continue to sit regularly as a judge.¹⁴ That was for several reasons. One is that,

¹² NZLC *Defaming Politicians: A Response to Lange v Atkinson* (NZLC PP 33, Wellington, 1998) which was followed after the second decision of the Court of Appeal by NZLC *Defaming Politicians: A Response to Lange v Atkinson* (NZLC R64, Wellington, 2000).

¹³ *Electronic Commerce: Part One* (NZLC R50, Wellington, 1998); *Electronic Commerce: Part Two* (NZLC R58, Wellington, 1999); *Electronic Commerce: Part Three* (NZLC R68, Wellington, 2000).

¹⁴ A rare point on which I found myself in respectful disagreement with the Evaluation of Sir Geoffrey Palmer.

having received appointment as a judge, one must continue to be a judge, with responsibilities as well as the privileges that office brings. Another is the high value, as I soon learned, of maintaining close contact with the judiciary and the legal profession. Both have traditionally been major contributors to the processes of law reform; the debt owed to them by the Commission is a heavy one. I record that the continued personal support of the judiciary, not limited to my colleagues on the High Court, has been a great strength.

A Law Commission is dependent upon the Minister of Justice for the continued appointment of suitable Commissioners. We have been well served on that score. It is wholly dependent on government funding. We have to date had the funds we needed. Under the current legislation it is equally dependent on a government to introduce its legislative proposals, unless a backbencher happens to succeed in the ballot with one of them (as occurred with the Arbitration Act 1996 and with the pending Habeas Corpus Bill). To be effective it is crucial that the Commission enjoy good relations with Parliamentary Counsel Office, who are responsible for law drafting and who have a great fund of practical legal and constitutional wisdom; with the Ministry of Justice who advise the Ministers of Justice; and with such major Ministries as the Ministry of Economic Development whose work should be complemented by that of the Commission. There are many others of importance, including the Clerk of the House, the Secretary to the Cabinet, the Ombudsmen, the Privacy Commissioner, and on occasion the State Services Commissioner.

While there is great talent and experience within the public sector, it soon became apparent that either the legislation or its administration was gravely deficient. There had been gross failure to consider excellent reports by our predecessors. For example, there had been a first rate report *Contract Statutes Review* (NZLC R25, Wellington, 1993) that proposed the simple application to the Sale of Goods Act 1908 of the principles of the Contractual Remedies Act 1979. The following year there had been published the admirable *A New Property Law Act*, (NZLC R29, Wellington, 1994) which received wide spread support for its proposals to get rid of mediaeval relicts and provide a modern set of property laws. Enquiry revealed that each met a compelling public need; each had received wide support; yet when I arrived at the end of 1996 neither had been implemented. Nor was there any system in place to do anything about them, or indeed any future reports. Why bother to appoint law commissioners and have

them prepare reports if nothing was to happen to them? What on earth had gone wrong?

The answer was startling and troubling in terms of the depth of the problem. It was that while the Westminster system of government operates admirably in relation to the big political issues that win and lose elections, it had never taken on board the rudimentary facts that

- (1) most law is not of that class;
- (2) it is the function of law to cater to the wide variety of needs of the citizens of a rapidly changing world;
- (3) if our law is unjust, inefficient, or simply out of date, our citizens are disadvantaged both comparatively and absolutely;
- (4) therefore there must be effective systems to give effect to (2).

Lord Gardiner LC's invention of the law commission concept was a partial response to these problems - applying public resources to deal with them. But then to a disturbing extent, relieved only by the occasional personal efforts of a reforming minister, the notion ran into the sand.

There has been a grave problem of implementation in every law commission state. We identified the following problems in New Zealand

- lack of access to the expert skills of Parliamentary Counsel Office;
- absence of any system for Executive consideration of Commission reports;
- consequently long delays in securing effective reform.

Gross examples of the last have been mentioned. The pattern of delay may have been due to an assumption that reports must be second-guessed, when, in such areas as DF Dugdale's Sale of Goods/ Contractual Remedies Act work and Justice Blanchard's Property Law, the Law Commission provided New Zealand's top expertise and so there was no-one available to do the second-guessing. During the term of current commissioners the volume of reports issued had until this month very greatly exceeded the progress made in implementing them.

The point was not that Law Commission reports were unsound. If they had been, the remedy was to appoint better Commissioners. It was simply that, in the ordinary struggle for priority of drafting resources and a place in the legislative programme, law reform tended to be left standing behind the door. That, despite Sir Geoffrey's advice to us that Law Commission reports have never taken more than a very brief time in the House and that its time is not the real impediment. (If it were we could resort to the "double chamber" practice adopted in Australia, and copied in Westminster, of having concurrent sessions of the House each with legislative authority. The Legislative Council Chamber would be ideal for the purpose).

We therefore set about to try to effect change. That needed an approach on several fronts.

We had fallen heir to a major existing programme which included Criminal Prosecution and Juries; codification of the law of Evidence; Women's Access to Justice; Succession; Maori custom law and projects in public law. So it was necessary both to plan completion of current work and to consider how the Commission should set about preparing for the future.

Given the difficulties that had been experienced elsewhere, with the abolition of the commission in some jurisdictions and its subordination to politics in others, there was a threshold question whether the concept of an independent Law Commission had run its course. Initial appointments of new Commissioners were delayed while that was considered. The answer was very plainly no: what was needed was not less use of the Law Commission but more.

In any society there is a constant tension between the interests of order and certainty in its law and institutions and those of responding to the rapidly changing values of a dynamic and complex community within an evolving world. Optimum laws can

- identify and articulate significant values;
- protect individuals, disadvantaged groups and minorities by removing or reducing injustice;
- facilitate useful activity;
- reduce costs;

- contribute to a sense of community.

Poor or outmoded laws have the opposite effect.

The dominant role in law reform must be that of the elected representatives who, having the confidence of both the electorate and Parliament, have a democratic mandate to bring about change. But, as is later elaborated, experience of the operation of the three year electoral term and of MMP has been that more is required by way of law reform than a government or parliament can deliver unassisted. The major focus of the elected representatives is naturally and justifiably on the major public issues that win and lose elections. Yet, if they alone receive attention, optimum law is unattainable in wide areas of social activity. An independent law commission can assume responsibility for complementing the work of government and Parliament so as to improve New Zealanders' lives. That was our role. Our three-fold test for projects we would recommend to the Government for reference to the Commission or would self-refer met general support.

Optimum performance of the Commission's functions required:

- Commissioners of high ability with broad and complementary experience who shared a common vision of the Commission's role;
- systems for work selection that would give effect to the three-fold test;
- a balance between what could be performed within New Zealand and what required participation in international initiatives;
- systems for performing projects that would combine efficiency and quality of work within the Commission with contributions from others in New Zealand and beyond;
- systems of implementation that would give effect to the Commission's work. We were fortunate that, following the tradition of powerful appointments to the Commission, appointing Ministers selected as Commissioners:
- a senior practitioner with a life time of experience in law reform, of practice in a major commercial law firm and of service to the legal profession;

- an existing member of the Commission's Maori Committee with wide experience in the public sector as well as in legal practice;
- a Crown Solicitor of high standing with broad experience in other disciplines;
- a Queen's Counsel who is an international figure in commercial law reform.

These were in addition or in succession to the distinguished continuing appointees of whom

- one had led major research into women's access to legal services;¹⁵
- another, a Professor of Law, had led the Succession project and performed considerable research into Maori issues;¹⁶
- another, a Queen's counsel and later a District Court Judge, had led the Prosecutions and Juries projects;¹⁷
- the last, a Judge of the District Court, remains in office until the end of March 2001 having brought to conclusion the massive Evidence reform in addition to other projects.¹⁸

To give effect to the three-fold test there was introduced an annual sequence of the Commission's preparation and submission by 22 December to the Minister and Ministry of Justice of a draft work programme to commence on the following 1 July; a two day Commission retreat in January/February to debate and fine tune proposals with discussion with the Minister and senior officials during the afternoon of Day 2; a Ministerial response by 28 February; and the preparation and execution of a Memorandum of Understanding to take effect from 1 July. In preparing its proposals the Commission sought to monitor developments in New Zealand and overseas so as to adapt the work programme to ensure that appropriate priorities were maintained.

¹⁵ Joanne Morris OBE.

¹⁶ Professor Richard Sutton.

¹⁷ Judge Atkins QC.

¹⁸ Judge Lee.

I have mentioned the very strange, and major, problem that the Law Commission in New Zealand (unlike those in the UK) did not have access to Parliamentary Counsel Office to draft their bills. It is of course intelligible that bills which do not receive government support may not warrant having precious PCO time spent on them. But the same may be said of Law Commission time which is paid for from the same pocket. To require the Law Commission to look elsewhere for bill drafting, or even to have to do its own, is altogether unsatisfactory. Where there is real doubt whether a bill will be adopted as government policy it is usually possible to have the policy decision made in advance of drafting; and where, as with some forms of commercial work, it is simply imperative to accompany a proposal with a bill, that should occur.

There has recently been a welcome double break-through. First, at the end of 2000, Parliamentary Counsel Office received funding on the basis that it will be responsible for drafting Law Commission bills, as occurs in the United Kingdom. That will do away with the inefficiency and waste of the past, when such bills were first drafted outside Parliamentary Counsel Office and then reconsidered before submission to Parliament. Secondly, Hansard recently reported a removal of the log jam of reports dating back to 1990.¹⁹

¹⁹ Hon M Wilson (19 February 2001) NZPD Q Supp 913.

913.

Hon MARGARET WILSON

(Associate Minister of Justice)... The Government intends to make progress in 2001 on the implementation of the following Law Commission reports

NZLC R14 [1990] Criminal Procedure Part One: disclosure and committal

NZLC R25 [1993] Contract Statutes Bill

NZLC R29 [1994] A new Property Law Act

NZLC R30 [1994] Community Safety: Mental health and Criminal Justice issues

NZLC R37 [1997] Crown Liability and judicial immunity

NZLC R40 [1997] Review of the Official Information Act 1982

NZLC R44 [1997] Habeas corpus: procedure

NZLC R51 [1998] Dishonestly procuring valuable benefits

NZLC R54 [1999] Computer misuse

will be a statutory reform, requiring any government to make its policy response to a Law Commission report within 6 months, in the same way that it must reply in timely fashion to the report of a Select Committee.

The new system will have numerous advantages. It will at a stroke do away with the past habit of putting aside Law Commission reports as being of less urgency than measures of greater political significance and the consequence that by the time a report is considered by Parliament the Commissioners responsible for it have long since departed. It will for the first time provide New Zealanders with a vehicle allowing them to advance proposals for reform that, if accepted in the Commission's work programme, will within a reasonable timeframe receive systematic consideration by Government and, if appropriate, Parliament. Already the prompt Parliamentary consideration of issues raised in *Adoption and its Alternatives: a Different Approach and a New Framework* (NZLC R65, Wellington, 2000) has allowed the researcher responsible for its research to advise the Commission to offer submissions to the Select Committee. That is a major advance for which credit is due to all who were responsible for it.

With these systemic problems resolved the Law Commission will, I believe, assume a very important role indeed in our society. The combination of the three year electoral term and the constraints of MMP have been adopted for very good reasons. But their effect is necessarily to give a very short term focus to much of our politically important policy making. There is need, in addition, for the taking of a long term view of what New Zealand's laws should be. In matters outside the political sphere that fall within the Law Commission's sphere of expertise it should regularly be asked to investigate the most difficult questions and come up with practical solutions. That its reports will have to be responded to promptly and result in PCO legislation will provide multiple incentives:

NZLC R55 [1999] Evidence

NZLC R57 [1999] Retirement Villages

NZLC R58 [1999] Electronic Commerce Part Two

NZLC R62 [2000] Coroners

NZLC R65 [2000] Adoption and its Alternatives

NZLC R68 [2000] Electronic Commerce Part Three.

- for governments to use this resource systematically;
- for the community to invite the Commission to seek a government reference or to self refer and to expend the time and trouble needed to respond to draft proposals;
- for potential Commissioners and other staff, especially those who would be concerned at interrupting legal practice, to accept appointment in the knowledge that their work will receive proper attention.

The combined effect will be to increase substantially the contribution that the Law Commission can make to the well-being of our community. All of us should benefit from the improved laws that will result.

The notable privilege of self reference and of running its own work programme necessarily implies that the Commission will do so systematically, as section 5(1)(a) contemplates. That means

- identifying areas where our law is seriously deficient and our citizens are consequently disadvantaged;
- considering what method of law reform might be suitable to respond;
- establishing priorities, taking into account
 - the needs;
 - the potential benefits;
 - the Commission's actual and (with assistance) potential capacity;
 - the desirability of achieving and maintaining balance in its work.

We soon appreciated that the Commission must be a broad church, both to cater for the wide range of issues and because it was impossible to escape the fact that, applying public resources to the community's law, we must communicate closely with other New Zealanders and to expose our work to media and other public scrutiny. By maintaining a broad programme in such conventional areas as public law, commercial law, criminal law we were more readily able to resist unfair criticism when engaging in more controversial topics, such as Treaty work.

Since much of our law originates overseas we considered that the effective way to safeguard New Zealand's interests was to take part in

its creation by maintaining the impetus of our distinguished predecessors in public and private international law issues. It is hoped that Cabinet will decide to accept membership of the Hague Conference, so that the Commission will in future act as New Zealand's public sector clearing house for issues of private international law, complementing that of Ministry of Foreign Affairs and Trade in public international law.

But the major reform effort occurs within New Zealand. To assist the salutary practice of our predecessors of using Preliminary Papers and wide consultation within and without the legal profession we put the Law Commission on line. We seek to

- identify sources of expert advice;
- secure public contribution through the media;

as well as debating each project regularly within the Commission which contains a wide range of perspective and experience.

While law reform was our major task, it was not the whole of it. We are not simply a law reform commission but a law commission. Our concept of that role developed progressively.

The reason for including judicial members and other senior Commissioners and the stringent safeguards of Commissioners against liability was to allow the Commission to perform in the public interest work that might not always be popular. We saw the Commission's responsibility as to uphold the rule of law and both in our reports and, where necessary, elsewhere to express its view on legal issues. In doing so the Commission must balance the high public interest of maintaining confidence in our existing laws and institutions against that of offering another view where we consider the public interest demands. It did so by regularly making submissions to Select Committees on major issues, including the proposals to establish the Community Magistracy and to enact the Home Invasion legislation. In view of the high element of law reform entailed we elected to self refer the important issues raised in judicial decisions in the *Lange* case in *Defaming Politicians: A Response to Lange v Atkinson* (NZLC PP33, Wellington, 1998 and NZLC R64, Wellington, 2000). We took the view that the addition to the triennial accountability of politicians of an increased vulnerability to untrue criticism warranted investigation by the Commission's processes of public consideration.

That decision has been criticised; it is for others to assess it.

The Commission's reports on *Evidence Law: Witness Anonymity* (NZLC R42, Wellington, 1997), *Compensating the Wrongly Convicted* (NZLC R49, Wellington, 1998), *Battered Defendants: Victims of Violence who Offend* (NZLC PP41, Wellington, 2000), and on double-jeopardy (*Moore's case*) in *Acquittal Following Perversion in the Cause of Justice* (NZLC R70, Wellington, 2001) have addressed controversial issues where major public values came into collision. *Juries in Criminal Trials* (NZLC R69, Wellington, 2001) was a root and branch appraisal of the ancient institution of trial by jury unprecedented in other jurisdictions.

We are conscious that we are performing a function for all New Zealanders and seek both to secure their contribution to the Commission's work and account to them for our use of the resources they provide. In doing so we customarily invite the comment and criticism of all identifiable groups insofar as that is practicable. These include the powerful and invaluable Maori Committee established by our predecessors; the judiciary; scholars at our five law schools; the legal profession; many with long experience with the public service; the many other groups, such as the specialists in electronic commerce, into whose sphere of expertise we needed to stray. The media are of great assistance in bringing our work to public attention; while there is a proper tension between the responsible media and the Commission, each sees as important the contribution the other can make to improving our laws. They are an essential means of communication with the public we serve. But like the judiciary and the Law Commission the media must be properly accountable. That fact was acknowledged by the positive response to our *Lange* reports by some of the most senior and respected media figures. That we have been invited to speak informally with editors and senior editorial personnel of our leading newspapers and that the criticism of our work has in general been fair, even where our views did not coincide, has been a feature I have come to respect.

There is a series of interfaces to be managed. One is how the respective law reform functions of the Government and the Commission are to be worked out. The Commission's ability, free of political pressures, to express the independent long term view concerning New Zealand's laws and their reform of carefully selected Commissioners and those whom they consult should complement that of the Government, with its legitimacy as the people's elected representatives

but with the constraints imposed by those often immediate pressures. Lacking as we do the checks of a second house or a written constitution, the role of the Commission is the more vital to the wise, just and balanced judgments required to promote public confidence in the rule of law in New Zealand.

Another interface is between domestic and international law - both public and private. The former is par excellence the responsibility of Ministry of Foreign Affairs and Trade, which fights well above its weight internationally. But in *The Treaty Making Process: Reform and the Role of Parliament* (NZLC R45, Wellington, 1997), commenced by Sir Kenneth Keith and completed by the present Commission, it was sought to draw together the disparate threads of international treaty making, domestic legislative and, to a degree, judicial processes - with the unattractive demarcation dispute in the West Island between the judiciary and the executive as an incentive.²⁰ Looking hard at our systems and those of others, and building on what is best, is a major Commission task.

I have noted that, increasingly, in considering New Zealand's legal requirements it is necessary for us to look overseas. The work of our predecessors in Arbitration²¹ and International Sale of Goods²² has been of great importance. Insolvency, for example, is no respecter of international trade boundaries. We arranged for Commissioner Heath QC, New Zealand's leading authority in insolvency, to go several times to Vienna as Vice Chairman of the Working Group of the UN International Commission on Trade Law to take part in its planning. He is currently there, hand picked as one of three common law representatives to work with three civilians in the Expert Group, engaged in preparation of a legislative guide, to take part in a crucial meeting. He also represented New Zealand and was the representative of all English language states on the Drafting Group set up to refine drafts developed by the Working Group on the electronic signatures work in the vital area of Electronic Commerce.

²⁰ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. See *The Treaty Making Process: Reform and the Role of Parliament* (NZLC R45, Wellington, 1997) paragraphs 39-40, 87-93.

²¹ *Arbitration* (NZLC R20, Wellington, 1991); see Arbitration Act 1996.

²² *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (NZLC R23, Wellington, 1992); see Sale of Goods (International Convention) Act 1994.

The Law Commission took the view that it was essential for this small trading country to lead the world in its preparation for this critical development and so we self-referred what has become a very large process. Latterly we have advised the invaluable work of the Ministry of Economic Development in this sphere. The Electronic Transactions Bill is now before the House. A long term friend of the Commission, now a leading member of the bar,²³ was retained to represent New Zealand in the work of the Hague Convention on Private International Law. While some of my colleagues have tended to regard my enthusiasm for the concept of a future seamless *lex mercatoria* as the excesses of an enthusiastic amateur, having had the privilege of discussing the concept in this University with Professor Fritz Juenger, the Rt Hon Lord Cooke of Thorndon and Sir Kenneth Keith I am unrepentant. The *Pinochet* and International Criminal Court initiatives were unthinkable a decade ago, let alone when I entered another university 42 years ago. The effect of the communications revolution can only accelerate.²⁴

The global village is undergoing urban sprawl: on Monday I will be in Cambodia; shortly after that in Switzerland; then in the UK and later in Bangkok. Only the first of these will be undiluted tourism; in the others there is work to do, for an international judges conference on refugee issues to be held next year in Auckland and Wellington;²⁵ preparation for a conference in Oxford for the establishment there of a chair and an international institute in aviation safety;^{26a}

²³ David Goddard.

²⁴ See, for example, Richard Susskind *Transforming the Law: Essays on Technology, Justice and the Marketplace* (Oxford University Press, Oxford, 2000).

²⁵ For the compelling need to achieve a better international order to deal with this most pressing problem see the UNHCR publication, UNHCR *The State of the World's Refugees 2000* (Oxford, 2000)

²⁶ The Commission is associated with this initiative, described in the *Proposal to Endow the Chair in Aviation Safety* circulated by Professor R Eatock Taylor, Head of the Department of Engineering Science on 1 March 2001. It contains a "call to action. Increasing globalisation and the growing demand for air travel accentuate the problems facing the [aviation] industry - and the world - in relation to:

progressive reduction of barriers to international trade and communication

(such as international trade and cross-border insolvency legislation)

strengthening of world economies and the rise of tourism

judges conference on cross-border insolvency in London; and lecturing about the rule of law at the Asian Institute of Technology, the residual creation of SEATO which led to close New Zealand links with our neighbours in the near north.

A further interface is between the law and non-lawyers. It is increasingly realised that both the law and indeed the state are the property not of the legal profession and the judges, or the politicians, but of every individual citizen. It has been revealing, and not a little humbling, to receive public response to our Preliminary Papers and other publications that shows the deep fund of wisdom and benevolence of the wider community. The Maori community, for example, have been warmly supportive of the Commission's work in relation to Access to Justice, Coroners, Juries and Adoption; no doubt the mana of our Maori Committee²⁷ has been of particular importance in securing their support, as has that of Commissioner Henare. The Committee's work continues to be vital in bringing our small society together, rather than splintering it. Three current or former Commissioners²⁸ are members of the project *Laws and Institutions for Aotearoa/New Zealand* based at the Matahauraki Research Institute at the University of Waikato and directed by Adjunct Professor Judge Michael Brown.

It is unacceptable that most New Zealanders have no ready access even to our statute law, which all of us are presumed to know and understand. The vision of Chief Parliamentary Counsel, in arranging to place all our legislation on the Internet, is very important. But there is need to follow that up and build on the existing limited initiative for teaching civics in our schools. The provision of computer terminals in women's refuges, marae and other publicly accessible places with

increase in the size and numbers of aircraft
physical limitations of airport land and air space
entry of new states, regulators, controllers and operators
continuous development of technology in all aspects of operations
need for increasing technical competence of individual specialisms.

²⁷ The Rt Rev Bishop Bennett ONZ CMG, The Hon Justice Durie, Judge Michael Brown CNZM, Professor Mason Durie CNZM, Whetumarama Wereta and Te Atawhai Tairaoa.

²⁸ Professor Sutton, Denese Henare ONZM and myself.

links to an advice system and also to a “triage” decision maker dealing with urgent problems of family law was recommended in *Justice: the Experiences of Maori Women* (NZLC R53, Wellington 1999) and should be pursued.

Information as to the very role of the state and of the public law that makes it accountable to the citizen, such as Sir Kenneth Keith’s introductory essay to the Cabinet Office Manual²⁹ and the forthcoming revision of the Legislation Advisory Committee Manual, should also be more accessible. The troubling use of retrospective legislation that caused such difficulty to the Court of Appeal in *R v Pora*³⁰ demonstrated the need for better access within our political processes to knowledge of the constitutional basics that have been hammered out over the centuries. Some of these themes are discussed in *To Bind Their Kings in Chains* (NZLC SP6, Wellington, 2000) and in *Mandatory Orders Against the Crown and Judicial Review* (NZLC SP10, Wellington, 2001).

As well as the continuous process of updating our laws there is much to occupy our successors. In a preface to *Women’s Access to Legal Services* (NZLC SP1, Wellington 1999) we urged review of the important work of the Family Court, a proposal vigorously supported by the Principal Family Court Judge and his colleagues. Mention has been made in the area of the Treaty of a series of reports - especially *Justice: the Experiences of Maori Women* (NZLC R53 Wellington, 1999), *Coroners* (NZLC R62, Wellington, 2000); *Juries in Criminal Trials* (NZLC R69, Wellington, 2001) and *Maori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001) – which have sought to advance the process of adapting our laws so as to conform to the essential values of the Maori people as well as of other New Zealanders. But there is a long road ahead.

The lessons of Erebus³¹ and of Lord Phillips’ BSE report last October brought home the fact of grave deficiencies in the systems of government we had taken for granted.

29 Third edition forthcoming.

30 *R v Pora* (20 December 2000) Court of Appeal, Wellington, CA 225/2000.

31 Summed up in an address by the President of the International Civil Aviation Organisation Council, Dr Assid Kotaite, in an address to the Aviation Study Group on 16 February 2001:

One crucial aspect of an organisation’s safety culture is the ability to deal with human error. From an organisational perspective, human error should become a warning flag for regulators and managers, a possible symptom that individual

The former included the role of our aviation safety regulator and later showed, in stark form, how sensitive is the interface between the judiciary and the executive. The latter revealed deep-seated gaps in the Westminster system, extending from the highest political levels to the junior ranks of the executive. Like the universities, in their “critic and conscience” role (the phrase adopted after the Rt Hon Lord Cooke and his colleagues proposed another look at procedures proposed in the later 80’s), the Law Commission must, on behalf of our community, consider how our laws can and should respond to such challenges.³²

Ultimately we are, all of us, given the privilege of academic or Commissioner autonomy as the biblical talents were distributed - not to squirrel away, but to use boldly on behalf of those for whose benefit they are entrusted to us. In doing so we will make mistakes; but others can learn from them.

It has been a privilege to participate in the Commission’s work inside its premises and beyond. I express my deep appreciation to my fellow Commissioners, our researchers, the other staff of the Commission and all those who have given us such support for over 4 years. It is a source of great pleasure that the continuing Commissioners will be able for a time to provide continuity to the incoming team. We are delighted with the quality of the appointments that have just been announced.

workers have been unable to achieve the system goals because of difficult working environments, flaws in policies and procedures, inadequate allocation of resources, or other deficiencies in the architecture of the system. We must face the fact that because of human error, unwanted, un-wilful deviations from the norms will take place. However, deviations in and of themselves are not the problem. The danger lies not in experiencing operational deviations, but rather in not having an adequate process of managing these deviations.

Effective deviation management results from the free exchange of information about operational errors which lead to deviations. We must create, therefore, an operational environment where anyone can feel secure in coming forward and sharing information concerning deviations. In other words, humans must be part of the solution and not part of the problem. This is a non-punitive environment, which nevertheless retains individual and organisational accountability.

³² See, for example, NZLC *To Bind Their Kings In Chains* (NZLC SP6, Wellington, 2000) paragraph 22 and footnote 32.

I conclude by repeating my thanks to those of you who, as senior lawyers and leading academics, have been of such help to us and who see it as your task to instil the precepts of the rule of law into our future intellectual and professional leaders.