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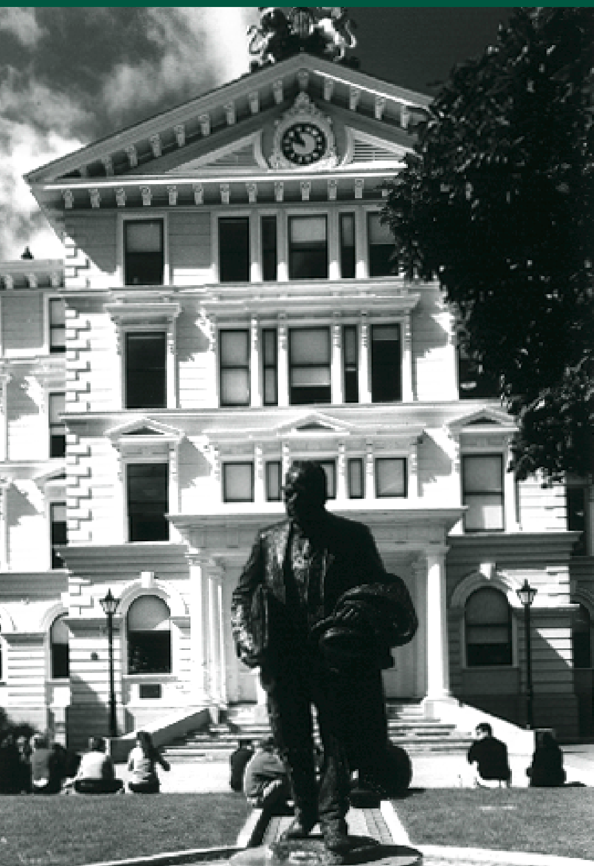

Tradition and Innovation in a Law Reform Agency

by Hon J Bruce Robertson

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TRADITION AND INNOVATION IN A LAW REFORM AGENCY

Hon J Bruce Robertson*

* President, NZ Law Commission. This paper was an address given to the NZ Centre for Public Law, Victoria University, Wellington, 23 July 2002.

Tradition and Innovation in a Law Reform Agency

HON J BRUCE ROBERTSON*

I am pleased to have the opportunity to talk about the New Zealand Law Commission and our operation. Because it is a relatively short time since my predecessor spoke about the statutory framework and history of this public office, I will not cover those areas. Rather I want to concentrate on whether there is something about law reform agencies which make them unique and justify the not inconsiderable expense which is involved, and how that reality informs what we are currently doing.

My views are necessarily tentative having been in the President's Chair for only 15 months, but they are influenced to some extent by recent international experience.

In the middle of June, at the invitation of the Canadian Ministry of Justice, I participated, along with the President of the Canadian Law Commission, the President of the Law Commission of Bangladesh and the secretaries of the Law Commissions of India and Pakistan, at a workshop in Dhaka in Bangladesh on Law Reform Agencies in the 21st Century.

The following week I was at the Biennial Conference of the Australasian Law Reform Agencies in Darwin and since have visited bodies in Belfast, Dublin, Edinburgh and London comparable to ours.

There are major similarities, but also differences, which reflect individual emphasis and cultural and governmental priority.

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The statutory independence enjoyed by the New Zealand Commission is not universal. In my judgment it is essential. If we do not have the ability to operate independently, then the opportunities to be fully effective and to add value are severely diminished. That does not mean to say that we should not engage with, or be sensitive to, the requirements of politicians, bureaucrats or other sectors but, in the final analysis, we must be able to take independent action. The interrelationship will not always be easy and can create tension. Where there is goodwill, professionalism and integrity on all sides, it can work.

The Law Commission undertakes the normal run of activities of law reform agencies. We get references from Government and we can self refer. We have recently made recommendations with regard to arbitration and the law of trusts. We are currently reviewing statutory powers of search and seizure and evaluating status hearings. Our history of involvement in projects, like that of many similar bodies in law reform, has been more reactive than proactive. If we are to survive and justify our existence I believe we must do more.

Our Commission has not had a brilliant hit record in getting actual change implemented. There are some who think that is because of failures in the establishment because “the movers and shakers” are not interested in mundane, non-headline-catching reforms. I think that is a bit of a cop-out. I believe that, whatever the system, if a Commission is creating a product which is really good, politicians will pick up reports and run with them even if they concern the most mundane and non-sexy areas of the law.

Time may be a harsh critic of my stewardship in light of this attitude but I am persuaded that, whether or not we get a good level of implementation, lies largely in the hands of the law reformer – we have to come up with products which are needed and which the law makers are helped to recognise as beneficial. If we cannot add difference, if we cannot do something more than be a de facto academic research body or the clone of law advisers in government departments, then our existence is not justified and nor is the tax money spent on us. Any law reform agency worth its salt must add value and fill gaps which will otherwise go unattended. To be true to itself, it must ensure that it does not pretend to do things which are beyond its skill, experience or ability to deliver. With that pragmatic reservation, a Commission must be fearless.

This aspect of our mission warrants careful treatment of its own and we do not have time for that now, but let me offer you just a few thoughts. My starting point is the question: 'What is it that makes a Law Commission different from any other organisation?' We have to be able to answer that question satisfactorily if we are to claim justification for the public money that is voted to us.

My answer is not that we have legal expertise (for although we do, that's also available elsewhere), nor that we can advise governments about the law (we can, but lots of government departments do that too). Both of those things are important, but they are not enough.

What really sets us apart as a public legal reform agency is that we have a unique combination of public money (and thus no requirement to have the commercial market-place approve of our work) plus distance from the day-to-day pressures of our elected masters. A government department will necessarily be responsive to the imperatives of their political chief and a private firm has to make money to survive. While we must never be irrelevant to the commercial or political market place, a Law Commission is established to have distance from those pressures. As a result, we can be both bolder and more reflective.

This distance from political and commercial life opens up several possibilities. As we are a public agency, I focus on the unique place we occupy in the public sphere.

First, we can take on projects which are deep or broad and thus will take longer than most government departments can look at, because of the electoral cycle and budget pressures. We can ask more, and more difficult, questions.

The current court project is an example. No government department would have the luxury of over two years to look at the court system, yet I would argue that our constitutional health requires a mechanism for precisely such investigations. Major projects like this one also set a number of specific challenges, not least of which is that they may run across electoral cycles – we have to produce work which is compelling enough, and/or has broad enough public support, to stand independently of any particular political party's policy.

Secondly, we can engage the public without an eye on anyone's ballot box. Our independence properly gives the public different expectations when they engage with or hear from us.

Our independent position gives the public a different perception, perhaps a less cynical one, and this can be very useful in engendering public confidence in difficult debates.

The court review is a case study in the importance of political independence, as well as responding to its challenges.

There is an important general point here which is worth underlining. The health of our constitutional democracy relies in part in ensuring public engagement on core constitutional issues. They are complex, they are difficult, but we leave them to the "experts" or "insiders" alone at our peril. One of the less obvious roles of a Law Commission can be to engage the broader citizenry in these core legal and constitutional questions, to provide the information that enables understanding which is subtle and complex, that enables participation which can weigh up and consider rather than simply take positions. It is insufficient if lawyers and the judiciary merely talk to one another, and that is finally self-defeating. A Law Commission can encourage and enable public participation in critical public issues which surround such high-flown and ultimately transcendent terms like the rule of law and judicial independence.

Thirdly, we can look at some of the classic law reform issues which are too mundane or un-exciting to ever catch the eye of a Minister who has to be re-elected, and thus the subject never makes it onto departmental agendas. This is a valid and important task. Like many Commissions around the world, we have not had great success rates at getting our reports implemented. Perhaps this is an area where we have gone too far from our elected representatives – they do, after all, have to be convinced that what we produce is finally useful. My suspicion is that we have in the past too often presented our case in thick and technical language, which may impress our peers but does nothing for the public or politicians. It is not "stooping low" to speak in ways which communicate beyond those with a law degree.
When I was invited to become President of New Zealand's Law Commission, a substantial part of the attraction was an opportunity to be involved in a comprehensive reconsideration of the Court structure. Last year the Attorney-General set up a working party of 15 of what were informally and irreverently called "the good and the great" to advise on an alternative final court of appeal, if the right of appeal to the Privy Council was

discontinued. The working group was not asked to comment on the merits or demerits of making that move, but merely to provide a substitute judicial framework.

Despite the diversity within the group, it came up with a virtually unanimous report recommending a stand-alone Court of five permanent members presided over by the Chief Justice of New Zealand. There had been suggestions that there should be foreign Judges sitting on that new final appeal Court but the group advised against this. Like most final courts, leave will be required for it to hear an appeal. Its members will not sit elsewhere within the judicial framework.

The Government indicated a general acceptance of the group's proposals and work is underway preparing for the necessary legislative measures to be introduced into Parliament, although there may still be additional perspectives to be brought to bear on the subject.

The Law Commission's specific task is to review everything that exists below the final court, including both Courts and tribunals. I suggest it is what happens below that final court that matters most. Getting things right the first time is at least as important as a sophisticated or comprehensive array of review and appeal thereafter.

We have determined to undertake this task in a way which is different from previous Law Commission projects, or even previous New Zealand reviews of the courts. It is also different from what has been adopted in other parts of the world although I was fascinated to see the interactive approach adopted in Western Australia in a similar undertaking. It is our approach to the task I want to dwell upon today.

We began our exercise by asking the question: why do we have a court system?

This first question was chosen carefully as the proper starting point for if we are to engage citizens in thinking about our courts we must start from first principles. When we stimulate discussion of more detailed subjects like access or formality or openness, we wanted our readers to engage with those questions from the basis of the important underpinning principles. We want to build support for an excellent court system, as well as soliciting advice about how to get from here to there.

The discussion paper is entitled *Striking the Balance: Your opportunity to have your say on the New Zealand court system*. The title is of profound importance as a constant reminder that there are not absolutes in this complex area, as competing values and principles are accommodated.

Striking the Balance suggests that courts exists because:

- Individuals are not always the fairest judges of their own disputes;
- The strong have a tendency to take advantage of the weak; and
- People may use, or threaten to use, force to get their own way.

Given this, it is both necessary and wise to entrust disputes to an independent third party who can be counted on to be impartial and fair.

Although Courts decide individual disputes, because they are resolved in public and with reasons provided it means they affect the whole of society and not just the particular individuals specifically involved.

The Courts also have a fundamental task to ensure that both the Executive and the Legislature act within the law which means that the Courts are more than merely a publicly funded dispute resolution service. The Courts are an integral part of the constitutional framework of our country but different from the Legislature and the Executive because Courts never self initiate but instead react to issues presented by litigants.

The importance of the rule of law to the continuance of a free and democratic society cannot be overstated, and I hope that our report and the public discussion surrounding it has helped to confirm and consolidate this fundamental foundation. When considering altering the court system we must be careful to ensure that considerations of efficiency and productivity do not erode core values of independence, justice, and equal treatment. But we must also not shy away from examining how far short the present system falls from these ideals as we seek to find better ways of operating.

The central touchstone is the expectations and needs of the community – every citizen and not just some. I am convinced that it is essential to ensure that the review is not captured by the legal profession in general or the Judiciary in particular.

This is a real risk, both because so many Law Commission initiatives have focussed on that audience and because the subject is one so dear to the hearts of lawyers and judges. They have a vital contribution to make to the assessment and review, but theirs are not the only perspectives. The careful, thoughtful and balanced assessments we heard yesterday from representatives of national social welfare agencies and from Pacific Island community leaders in Porirua leaves no doubt as to how the system is viewed by significant parts of the community.

There is considerable truth in the assertion made by the Ministry of Justice to the Beattie Royal Commission on the Structure of the Courts in 1978:[1]

> The constitution of our courts does not and should not change frequently; a regular and accepted court system is an important element in the stability of a rapidly changing and mobile society…

Although this sounds like an argument to leave well alone, the Ministry went on to say:

> This makes it all the more important that the review to be undertaken by this Commission should be thorough and unsparing and should not balk at awkward or fundamental issues.

The Law Commission has adopted this sentiment in *Striking the Balance*. We have been asked to consider and report upon the structure of all state-based adjudicative bodies apart from the ultimate final Court. This is similar to the task of previous reviews. For example, the Beattie Royal Commission on the Structure of the Courts was asked to suggest changes that would:

- Better secure the just, humane, prompt, efficient and economical disposal of civil, criminal and domestic business of the courts; and
- Better ensure the ready access of the people of New Zealand to the courts.

Such aims will require technical solutions. For example, and these are only examples not suggestions:

- more judges may be required with differing degrees of specialisation;

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1 The Hon Mr Justice Beattie *Report of the Royal Commission on Courts* (Wellington, 1978) xviii.

- new jurisdiction rules may be necessary; or
- further case management techniques may be of benefit.

The fact that something exists tends too often to be considered as a justification for its perpetuation without any rigorous critical analysis being undertaken.

Lawyers can assist with working through the best technical solutions. But any change will involve balancing competing aims and considerations which are not driven by that professionalism.

For example, how much money do we want to spend on legal aid to better ensure access to justice? When should the principle of open justice trump privacy interests? The court system is costly. Money that is not spent on the justice system is money that can be spent on health or the military or reducing debt. So although these questions have legal aspects they also involve a much broader balancing of issues and competing aims. They require the involvement of a broader segment of society than just the legal insiders.

Previous reviews of the courts did consult with the public, but in my assessment they were consciously or unconsciously geared towards lawyers and those directly involved with the system - rather than analysing the needs of those who use it. Previous reports have had a tendency to jump from basic aims, such as better access to justice, to technical solutions. Although these technical solutions are necessary they miss an important middle step.

Striking the Balance attempts to take that “in-between” step and in so doing to honour the commitment to involve the public in reviewing and improving the court system that is meant to serve them. The paper had two broad aims:

First, to try to assist people to engage usefully in the debate by informing them of the issues involved. People need to be aware that, like most things, the court system is a series of compromises not absolutes. Concepts such as justice, accessibility, equality and efficiency sound simple, but always involve grey areas and compromises. As this paper says, “The delivery of justice is rarely simple or straightforward. It involves prioritising, compromising, and balancing important, sometimes conflicting, principles”. This is the main theme of the paper – hence the title *Striking the Balance*. The area is complex but, given sufficient information, I am convinced that many people will be able to contribute

meaningfully to the discussion. Although our analysis of submissions is at an early stage, there is heartening evidence that this confidence is not misplaced.

The second purpose of the review is to ensure that, "in light of those difficult decisions, the courts best reflect society's values and preferences". To achieve this aim we need to encourage people to use their knowledge and experiences of the court system to identify problems and discuss specific possibilities for change. We need to know not just how the system looks from the bench and the bar, but from the witness and the jury box, from the dock, and from the public gallery where family and friends watch and wait. This range of perspectives will inform the options that will be suggested in the Law Commission's second paper. Again, the submissions are not a litany of complaints but many make constructive suggestions for improvement.

Receiving such submissions has another important function. It involves people in the process of making decisions about a vital part of our democracy – the justice system. It is this aspect that is summed up in the subtitle of the report, *Your opportunity to have your say on the New Zealand court system*. It is necessary in a democracy for people to have confidence in the judiciary and the justice system. Such confidence can be very fragile. There are a number of criticisms of the court system that are voiced – it is too slow, it is confusing and mysterious, it is exhausting, it is too expensive. These perceptions have to be considered or confidence in the courts will be damaged, and if that occurs our democratic society will be damaged with it. The Commission believes that "by openly discussing these issues and being willing to challenge the status quo, we will help retain public confidence in the system".

The paper consciously attempts to engage with the wider public and to encourage them to respond. It is also aimed at the legal establishment and needs its important contribution. In trying to target a number of audiences we have had to chart a difficult course, and this has led to a different approach in *Striking the Balance.*

First, the paper is designed to be easy to read and understand, whilst avoiding being patronising to its audience. The language is clear and non-technical and the level of detail is kept to a minimum. The questions asked throughout the report have the full range of our intended audiences in mind. As such, they often elicit personal responses rather than technical solutions.

Common recognisable examples are used to help explain and illustrate the concepts discussed.

The price we are paying for that approach is its dismissal by some traditional insiders as “Enid Blyton” or “useful for explaining what I do to my granddaughter”. We can live with those predictable responses, although it is worth reflecting on the assumptions which underpin them. I think they are worrying. Perhaps they say more about the legal establishment and how we see ourselves in the community than they do about the Law Commission and what it is trying to do.

Secondly, the paper aims to adopt an honest approach where some of the problems of the current system are discussed openly in a straightforward fashion. The paper seeks to give a balanced view of the arguments on each issue.

Thirdly, the paper is designed to be accessible. The format is different from the usual format of Law Commission documents and includes the use of photos, charts and diagrams.

Fourthly, the paper encouraged submissions through including a submissions booklet and addressed envelope.

Finally, the paper was sent out to a wide range of individuals and organisations – not only lawyers and judges but also libraries, Citizen Advice Bureaux, and community organisations especially those representing Maori and Pacific Island groups.

There are, of course, particular challenges in gathering the perspectives and experiences of those who are economically or politically marginal in our society – and yet those very groups are over-represented in the wrong parts of the justice system’s statistics and under-represented in the good ones. We need to listen hard to what they have to say if we are to have any hope of proposing reforms which are relevant to the things which block their experience of justice.

We are, accordingly, putting extra effort into going toward those communities. In addition to expanding our usual mailing list, we are arranging special meetings with the leaders of community groups in the Mäori and Pacific Island communities. Those meetings will be run in physical locations and at times convenient to them, using protocols appropriate to their gatherings rather than those more familiar to a Judge.

We are offering the opportunity for voluntary welfare groups to come and talk with us, rather than having only the written channel open to them.

We have commissioned qualitative research, where the information will be analysed by a socio-economic group; by rural, urban, and provincial; and by gender.

At the end of all this we hope to have a solid understanding of what a great many of the groups in our society believe about our court system. Their views and their aspirations will underpin the remainder of our work.

We are encouraged by the interest so far. The first print run was of 3,000 copies; the usual print run of Law Commission papers is about 700. The initial demand was so great within the first week we needed to have a second print of 1,500 copies. The report is available on our website and to date we have received nearly three times more hits than has occurred with any previous report. It has reminded us of the valuable tool a website can be to allow the public to have inexpensive access to information and thereby to engage in a meaningful way in the process. There are many users of the courts for whom reading and writing in a formal sense are difficult. The fact that from a home computer they can engage, make a contribution and be involved, is a wonderful advantage which we hope to exploit.

We have received close to 300 submissions which is more than double the response to any previous Law Commission report, with the exception of the *Women's Access to Justice* project which addressed some of these same issues. The submissions we are receiving are varied, interesting and useful. Analysis then undoubtedly can pose difficulties. The questions asked in the paper are broad and can prompt lengthy responses. But they are also encouraging, humbling, challenging.

Some of my judicial colleagues assert that all we have done is provide an outlet for the disgruntled and disenchanted. I do not agree, but even if we have, it is no bad thing. Perhaps the time has passed when those of us who have control must do no more than say to such people "This is the system and you jolly well better like it." Could it be that there are flaws and fundamental misfits which could be changed?

I'm persuaded that the interactive approach will ultimately be more rewarding than simply sending out a survey which told us that, for example, 73% of those responding thought cases took too long.

The submissions received are likely to provide valuable anecdotal evidence about instances where people have been dissatisfied with the court system. We are very aware of their limitations. We all have trouble assessing our own situations objectively; it is difficult to separate criticisms of outcome ("I lost my case, and I don't think I should have") with criticisms of process ("Although I lost my case, I feel the hearing could have been improved in the following ways").

An additional problem with anecdotal evidence is that there may be crucial information missing from a story. A case that may take two years to get to a hearing might have been slowed by the complexity of the evidence that had to be gathered, or due to acts or omissions by the person complaining of delay.

Such limitations will be kept in mind as the submissions are assessed, but they do not mean that the process is unnecessary or unproductive. Hearing from those affected by the court system is essential when deciding where changes need to be made, otherwise we will only be aware of those problems that are evident to those working within the system. We expect to find basic areas of unhappiness, areas where research may then yield options for improvement.

I was not surprised, although a little disappointed, by observations such as that by one of our prominent legal commentators[2] that even if we receive 1,000 submissions, this would only represent a 0.0025% rate across the national population. Such criticisms are true of any public submissions process. This aspect is partly alleviated by the fact that many of the submissions we receive will be from groups representative of larger portions of the population.

But, more fundamentally, such criticisms miss the point that a public submissions process is not a national survey. Rather, the aim is to hear from those who have strong views about the current system. Large parts of society may have little involvement with the courts, and as a result have little opinion.

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2 Jack Hodder in *Capital Letter* 14 May 2002, 25 TCL 17.

We want to hear from those who have thought about such issues or have experiences where the courts have succeeded or failed. Although not articulated, the underlying premise of the commentator is that the Commission should listen to and respond to the views of the insiders. It may be that is what too often happened in the past. The danger in doing that has previously been recognised but not necessarily avoided. We are determined to avoid it this time.

There are a number of impressions of the court system which I suspect are widely held – our courts are too costly, it all takes too long, people are intimidated and exhausted by the process. Anecdotal evidence is helpful and will give insights that statistics cannot. However quantitative data and analysis is also required. For example, if delay is a problem we need to know what the delays are, why they occur and what can be done about them.[3] Such quantitative information will not come from the submissions we receive. In some areas very useful research has already been undertaken. For example, Joanne Morris' report on *Women's Access to Legal Services*[4] and the Law Commission's paper *Justice: The Experiences of Maori Women*.[5] More is required.

Courts need to be understood as a system. Changing one area will affect many other areas, sometimes in ways we neither expect or desire. There are trade-offs and balances to be struck, and complex relationships to be understood. For example:

- The principle that everyone should have access to justice does not mean we want everyone to litigate. In fact we might want to actively dissuade people from bringing some disputes to court, offering mediation instead, for example;

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3 See, for example, Don Weatherburn and Joanne Baker "Delays in Trial Case Processing: An empirical analysis of delay in the NSW District Criminal Court" (2000) 10(1) *Journal of Judicial Administration* 5.

4 Joanne Morris *Women's Access to Legal Services* (NZLC SP1, Wellington, 1999).

5 New Zealand Law Commission *Justice: The Experiences of Maori Women* (NZLC R53, Wellington, 1999).

- Lowering the cost of the court process may encourage more litigation and therefore lead to delays and expense in other areas;

- Too much emphasis on efficiency could lead to lessening of other principles such as open justice. Courts could be much quicker at dealing with cases if they could have closed hearings and judges were not required to give reasons.

Striking the Balance is the first report of three. A second paper will set out a spectrum of options for discussion and will of necessity be a slightly more technical document. However the Law Commission was convinced it was a necessary first step to hear from the public as to problems and difficulties with the court process, and even in this options paper we will work hard to use language which is accessible.

Finally, no matter how we sometimes even subconsciously act as Judges and as lawyers, our courts do exist for the total citizenry. Our constitutional health depends on their vitality and broad acceptance. This review is both daunting and exciting.

Will we propose utopia? No. But if we are committed to the concept of participatory democracy with three branches of government, the time is ripe to see if the third branch is operating at optimum level and that assessment can only be validly made if everyone who is affected by its operation have their say.