LAW REFORM PROCEDURE

SUGGESTED IMPROVEMENTS FROM OVERSEAS EXPERIENCE

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C O N T E N T S.

"Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a state make bad laws, they will suffer from it. Suffering, and nothing else, will implant that sentiment of responsibility which is the first step to reform."

- James Bryce
"The American Commonwealth"
(1888) Vol. 1. p.352

INTRODUCTION.

Few will deny that in a narrow sense we have always had law reform. Since the common law came into being it has been developing and adjusting to new ways of life. Throughout this country's history there have been thousands of statutes that have changed the law. However, when we talk about law reform today we must bear in mind something more than this gradual process of development.

If the law fails to take into account the needs, problems and demands of people it will become increasingly irrelevant and may eventually be flaunted. It was de Tocqueville who pointed out that if we were to judge the Government of France in the period around 1750 by the collection of its laws then we would be woefully misled. He recounts that in 1757 there was a declaration by the King which condemned to death all authors and printers of works contrary to religion or the status quo. The irony of this situation is that it is exactly the period when Voltaire was supreme. What was in fact happening was that the law was irrelevant. It is surely one of the main purposes of law reform procedures to prevent ironies such as these occurring.

However, rather than discuss in detail the desirability of law reform this research paper will concentrate on the procedures through which reform can be achieved.

By studying the methods of law reform adopted in some jurisdictions similar to our own it is hoped that we will be more adequately equipped to constructively review our own law reform procedure and improve it where necessary.

WHY STUDY FOREIGN LAW REFORM PROCEDURES?

Broadening the knowledge of lawyers is an important factor. It has been observed by some commentators[1] that lawyers who study their own law exclusively may become very proficient in the laws of their own country but they may also be inept to guide its development. By studying the law reform process of other legal systems we are building a base from which we can launch a detailed analysis of our own law reform procedure with a view to improving it. A former Attorney-General, the Hon. J.R. Hanan, observed that one reason why law reform in New Zealand has been inadequate is this country's lack of information of the law and practice of other jurisdictions[2]. It is hoped that this research paper will contribute to remedying this defect as far as knowledge of some foreign law reform procedures is concerned. Which countries should form the basis of the study?

An answer to this question should not be arrived at without taking into account the following considerations.

Firstly, if by a study of other systems of law reform we can examine more effectively our own law reform methods then it would be advantageous to study reform procedures in legal systems which resemble our own. The reason for this is that if we wish to adopt some feature of a foreign law reform system for our own then few complications are likely to be caused by the divergencies of the legal systems concerned.

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1. A. David, "Major Legal Systems", p.8 Stevens (1968)
2. J.R. Hanan, "The Law in a Changing Society", p.20, (1965)

The second factor is the availability of research material. Although it would be interesting to study the law reform procedures of some of the relatively obscure legal systems of the world this would be an impracticable ambition if no information was readily available about the reform procedures of those countries.

Accordingly, our discussion of foreign law reform procedures will focus primarily on those systems which can be found in New York State, Canada (Federal), England and Wales, and the State of Victoria.

Chapter 1 THE BASIC AIMS AND FUNCTIONS OF LAW REFORMERS.

> "Law reform is the process of identifying and clarifying standards of performance for the legal order and of finding and implementing ways of optimising achievement of those standards".[3]

The scope of this paper limits the writer from embarking upon a philosophical discussion about the nature and purpose of law reform. Rather, it is intended that by studying the stated aims and functions of law reform organisations in jurisdictions similar to our own, and by taking into account local considerations, it may be possible to ascertain what the functions of law reformers in this country should be. Although this foundation lacks depth it will nevertheless serve as a base upon which the infra-structure of this paper can be developed.

New York Law Revision Commission:

The New York Law Revision Commission (note the use of the word "Revision" rather than "Reform") was created by Chapter 597 of the Laws of New York 1934 and was charged with the following duties:

1. To examine the common law and statutes of the State and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.
2. To receive and consider proposed changes in the law recommended by the American Law Institute, the

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3. J.N. Lyon: "Law Reform needs Reform" (1974) 12 Osgoode Hall Law Journal, 421, pp.425

the Commissioners for the promotion of uniformity of legislation in the United States, any Bar Association, or other learned bodies.

3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of this State, civil and criminal, into harmony with modern conditions.

The Commission on the Administration of Justice (reconstituted by New York Laws 1931, Ch.186) which had the function of investigating and collecting facts relating to the administration of justice in the State, emphasised the importance of the creation of the Law Revision Commission and outlined its general purpose in the following words:

"Assuming that all our present problems are quickly solved, it is certain that new problems will arise from time to time which will be just as pressing as those which now beset us. To the orderly examination of both types, our proposals for a Judicial Council and for a Law Reform Commission are admirably adapted. We recommend these devices to the legislature in the belief that if they are adopted maladjustments in adminstration of justice and in our own system of law generally,

will henceforth be far less likely to reach the critical stage."[4]

The function of the Commission, stated in its simplest form, is that of advisory agency in law reform to present to the Legislature from time to time its considered opinions on various topics, accompanied by proposals for legislation.

Law Reform Commission of Canada:

According to the Law Reform Commission Act 1970 the task of the Canadian law reform body is to undertake a continuing and systematic review of the laws of Canada with a view to their improvement, modernisation and reform. In the words of the Commission itself its job is to "try and ensure that Canada does not have laws that are bad."[5]

The purposes of the Commission include the following:

1. The removal of anachronisms and anomolies in the law.
2. The reflection in and by the law of distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions.
3. The elimination of obsolete law.

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4. 1934 Report Commission on the Administration of Justice (1934 N.Y. Leg. DOC. No.50) pp.51

5. "The Worst Form of Tyranny" Second Annual Report Law Reform Commission of Canada pp.7.

4(b) See also an excerpt from the Report in McDonald, "Legal Research Translated into Legislative Action" (1963) 48 Cornell L.Q. 401, 410

4. The development of new approaches to, and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society, and of individual members of that society."[6]

In practice the Commission's function is one that necessitates an examination of the theory of the law and an examination of the law itself.

Section 11 of the Act includes among the Commission's objectives "the development of new approaches to the law and new concepts of law to respond to the changing needs of modern Canadian Society". According to the Commission's Second Annual Report the values which the Commission seek to carry out this task are those "which in the light of the general views current in Canadian society could best be rationally supported and defended."[7] The Commission apparently aims not just to recommend the values but to support them with argument to show that these are the values most worthy of support.

Law Commission of England and Wales:

Pursuant to S.3 of the Law CommissionAct (U.K.)1965 it is the duty of each of the Commissioners to keep under review all the law with which they are respectively concerned "with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomolies, the repeal of obsolete and

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6. S.11 Chapter 23 Revised Statutes of Canada 1970 1st 50 pp.
7. "The Worst Form of Tyranny" Second Annual Report Law Reform Commission of Canada pp.9

unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.....".

The function of the Commission is to act as an advisory Body. The Commission was established to plan the course of reform and to formulate detailed reform proposals for Parliament. It has been acknowledged by Sir Leslie Scarman[8] that:

> "One of the valuable functions of an institution having initiative in matters of law reform is that it can maintain a continuous watch for defects - a twenty-four-hour state of alert. This balance of programme between major items of reform and minor remedial response is, indeed, essential to a proper understanding of the new pattern of law reform introduced in 1965. The Commission has a continuing responsibility of vigilance, and the duty, as well as the right, to bring isolated or minor defects to immediate notice, with a view to their being cured". [9]

<u>The Victorian Chief Justices Law Reform Committee:</u>

The role envisaged for the Chief Justices Law Reform Committee by its founder was to consider "reforms which required the action of Parliament, but which were not of

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8. First Chairman of the Commission, now Judge of the Court of Appeal.

9. Scarman, "Law Reform - the New Pattern, pp18 (1967)

a contentions nature, and which it could be hoped that Parliament would accept if recommended to it by some qualified non-partisan body."[10]

Herring C.J.[11], classified the reforms in question as:

1. The abolition of obsolete and useless rules, and
2. Amendments to improve existing laws.

It has been said that "the Committee should deal only with significant matters of principle and not with details of drafting[12]". One member of the Committee has said that its function is to consider matters involving "the interpretation or practical administration of the law". Another has said, "Matters of technical law are of the kind that should be referred to the Committee for its advice."[13]

Herring C.J. certainly envisaged that his Committee would prepare draft Bills for presentation to the government as well as consider Bills referred to it by the Attorney-General, and under his Chairmanship most recommendations were in Bill form[14]. In more recent times recommendations to change the law have not been in the form of draft legislation unless the original proposal was a draft enactment.

The variety of views that have been expressed by members of the Committee over the years indicate differing interpretations of the ways open to the Committee for reforming the law. The divergent views perhaps demonstrate the

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10. F.C. O'Brien "The Victorian Chief Justices Law Reform Committee" 8 M.U.L.R.440 pp.442
11. Chief Justice of the State of Victoria, founder of the Committee.
12. Dean J., refer F.C. O'Brien, Id.pp.443
13. Professor Z. Cowen; refer F.C. O'Brien, Id.pp.443
14. O'Brien, Id. pp.444

vagueness which surrounds the definition of the Committee's function.

Common Characteristics:

There are basic similarities between those statutes which create law reform bodies. Professor Lyon[15] in fact bases part of his criticisms of the Canadian Law Reform Commission on the fact that its statute tends "to look like a carbon copy of the English Law Commission's Act". This similarity, as explained by J.W. Moher[16] is perhaps "not just a matter of copying but of a shared historical model - the English Law Reform movements of the nineteenth century".[17]

If this explanation is correct can it really be said that this model is appropriate today? This question will be answered indirectly during the course of this paper.

The common functions of the law reform bodies which form the bases of this study are as follows:

1. Each organisation acts as an advisor to its respective legislature and executive. Each body ardently recognises the principle of legislative supremacy and acknowledges that it can merely act as an agency to recommend changes in the law.
2. Each body tends to have the general functions of:
   (a) recommending to the Legislature amendments to present enactments or proposed enactments;
   (b) initiating additions to the law by recommending to the legislature reforms which the Commission

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15. J.W. Lyon, "Law Reform needs Reform", 1975, 12 Osgoode Hall Law Journal, 421.
16. Commissioner, Law Reform Commissioner of Canada.
17. Moher - "Comment" (1974) 2 Osgoode Hall Law Journal, 436.

deems to be desirable.

3. The law reform bodies also have the function of acting as an agency to which any interested party can refer ideas for changes in the law.

WHAT SHOULD BE THE FUNCTION OF LAW REFORMERS IN NEW ZEALAND?

Like the Victorian Chief Justices Law Reform Committee, the Law Revision Commission of New Zealand does not operate under any statute or other formal document, having been created informally by a Ministerial decision. Mr. Hanan gave the reason for this in "The Law in a Changing Society". The law reform machinery, he said, "....should continue to be as informal and flexible as possible. Any rigid structure would be likely to display disadvantages. In my view it would be a mistake in this country to attempt to fix in statutory form any part of the machinery for law reform. It seems better to be free to modify and alter in the light of experience or as the circumstances at any particular time dictate."[18]
It is not intended to dispute the former Attorney-General's belief that a law reform system should be as flexible and informal as possible. Flexibility is considered to be an extremely desirable attribute for it permits relatively easy modification in the light of changing circumstances. However, flexibility and informality can still be achieved by statutory codifying in general terms the purposes of the law reform body. The wording of the statute can be wide enough to encompass a variety of functions and purposes.

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18. "The Law in a Changing Society", pp.25

If circumstances should necessitate a change in the aims and purposes of the law reform body then it is not an impossible task to amend the relevant statutory provisions.

Why bother to statutorily state the functions of a law reform body? At the present time some lawyers, parliamentarians and a few laymen are aware of the functions of the law reform bodies which exist in this country. Currently any individual, whether he be a lawyer or a layman who has a suggestion for a change in the law usually refers his ideas to his local Member of Parliament and eventually the idea may be heard by the Attorney-General who may decide to recommend the suggestion to the relevant Law Reform Committee. If individuals could direct proposals for change directly to a law reform agency then a great deal of needless procedure would be circumvented. Furthermore, law reformers themselves would be in direct touch with the community in whose interest proposals for reform should be made. One way of bringing a law reform body to the attention of the community is to give the organisation statutory recognition. True, additional steps have to be taken to make the community aware of the organisation, but at least if there is a statute to refer to, more people will be familar with the organisation than if it is simply the product of a Ministerial decision.

Hence, the functions of law reformers in New Zealand should, like those in Canada, England and New York, be statutorily defined.

Following the example of those law reform bodies which have been examined in this chapter a New Zealand law reform agency should act as an advisory body to New Zealand's House of Representatives. The body should also have the general functions of recommending the abolition of obsolete and useless rules; of suggesting improvements to the existing law and of innovating legislative reforms.

A New Zealand law reform body should also have the function of acting as an agency to which any interested party can refer ideas for changes in the law.

WHAT OTHER FUNCTIONS SHOULD LAW REFORMERS IN NEW ZEALAND AND OTHER JURISDICTIONS HAVE?

As Professor Lyon[19] notes, if law reform is to become measurable in terms of actual results and not just in the number of statutory enactments which result from the organisations' activities, then attention must also be focussed on changing the law in accordance with community expectations. If the law cannot represent through practical means what the community wants (because of the impossibility of numerous situations of ascertaining what the community expects from its laws) then an effort must be made to educate the community about the law and especially about changes to the law.

There is nothing impracticable about either of these alternatives. If law reformers are dealing with an area of the law about which many groups and individuals in the community have expressed concern then the law reformers

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19. J.N. Lyon, "Law Reform Needs Reform", 1974, 12 Osgoode Hall Law Journal, 422, pp.422

should receive representations from these people and conduct surveys to determine what the general feeling of the community is. Most of the law reformer's time is taken up with studying the law about which few members of the community have an opinion. If any reform of this type is to be really effective then individuals within the community must be made aware of the reform. The most effective way this can be achieved is by utilizing the mass media (and in particular television).

Hence the fourth express function of law reformers in New Zealand should be to inform members of New Zealand's society of developments and changes which are recommended by the law reform body. This should also be a function of law reformers in other jurisdictions.

Chapter 2, THE BIRTH OF A LAW REFORM BODY:

Whose function is it to lay the egg and whose job is it to ensure that the new creation is hatched? Put less metaphorically, should a law reform body be initiated, developed and controlled by the legislature, or should some other institution such as the judiciary or the Law Society, or a university carry out these roles?
The answer to this question (if there is indeed an answer) cannot be detemined simply by reference to foreign experiences, after all local factors have to be taken into account. However an examination of what has happened in other countries may assist those who care to consider this issue.

The New York Law Revision Commission:

In 1921 Cardozo J., in addressing the Bar Association of New York City, proposed the establishment of an agency - he called it a "Ministry of Justice" - to mediate between the courts and the legislature. Cardozo J. maintained that what he had in mind was a review of the law with the aim of making necessary changes through recommended legislation.

Two years later the Governor of New York State in his annual message to the legislature, recommended the establishment of an honorary commission to review the law of New York. That year the legislature created the "Commission to Investigate Defects in the law and its Administration". It was composed of seventeen members including the Attorney-General.

The 1923 Commission was not reconstituted, but in his 1925 message to the legislature the Governor of New York referred to the Commission's final report and noted that it was evidence of a need for the formation of a permanent agency.

In 1930 the Legislature, upon the recommendation of the then Governor, F.D. Roosevelt, created a temporary legislative Commission on the Administration of Justice in New York State. This body was concerned more with the procedural aspects of court reform than with the substantive. Its 1934 report recommended the creation of a permanent agency, a Law Revision Commission similar to that proposed by Cardozo J. in 1921. This recommendation was adopted by Governor Lehman, successor to Governor Roosevelt.

In 1934, 13 years after Cardozo J's. proposal the Commission was created by the legislature and was charged with certain statutory functions which were discussed in the first chapter.

The Law Commission of England and Wales.

In England, the credit for inspiring the creation of the law reform bodies which that country has benefited from can also be traced to members of the judiciary. More than a hundred years ago Lord Westbury said that the lack of any person or groups concerned with "observing the effects of the law",[20] prevents advances in legal science and he urged that it be the duty of a body of men appointed by a Minister of Justice to examine all law with a view to its improvement. Lord Haldane echoed the sentiments expressed by Lord Westbury in the Report of the Committee on the machinery of Government (1918) of which he was chairman.

A few months before the Law Revision Commission was organised in New York, the Law Revision Committee was established in England, the members being appointed by the Lord High Chancellor. This body made eight interim reports and six statutes were enacted by Parliament. The Committee stopped functioning in 1939. In 1952 it was succeeded by the Law Reform Committee which prepared eleven reports. In 1965 this body was abolished when the Law Commission's Act (U.K.) 1965 set up a body

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20. Nash, "Life of Lord Westbury" pp.191-192 (1888)

of Commissioners known as the Law Commission consisting of a Chairman and four other Commissioners appointed by the Lord Chancellor.

The Victorian Chief Justices Law Reform Committee:

In 1944 Sir Edmund Herring C.J. organised a meeting in the Judges Conference room in the Melbourne Supreme Court "to consider the necessity of forming some permanent body within the legal profession to formulate schemes for reform of the law on non-political lines."[21] The Chief Justice was apparently impressed by the law reform work that had been carried out in England prior to the war and it would seem that his committee was roughly modelled on the Lord Chancellor's Committee established in 1934. The Chief Justices Law Reform Committee is the only major law reform body with official backing in Australia which was not established by Act of Parliament or by executive order.

Law Reform Commission of Canada:

At the annual meeting of the Canadian Bar Association in Vancouver in September 1968 a resolution was passed calling for the establishment of a law reform commission in any jurisdiction where no such organisation existed.
When this resolution was presented to the Minister of Justice of Canada he apparently indicated that he favoured the establishment of a law reform commission under the auspices of the Government of Canada. Following negotiations between the Federal Minister of Justice and the

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21. F.C. O'Brien, "The Victorian Chief Justices Law Reform Committee", 8 M.U.L.R.440

Canadian Bar Association in 1969 the Bar Association resolved that the Government of Canada be requested to establish a "Canadian Law Reform Commission". This resolution was presented to the Minister of Justice.

In February 1970 the Minister of Justice introduced to the Canadian House of Commons a Bill to establish a Commission for the reform of the laws of Canada. This Bill was passed in May 1970 and proclaimed law in June 1970. The Act sets out in substantial detail the membership requirement, organisation, powers and duties of the Law Reform Commission of Canada.

Common Characteristics:

Attention shall now be focussed on determining what factors are common to the creation of these law reform bodies.

The theory which underlies the Law Commission's Act (1965) U.K., and the statutes creating the New York Law Revision Commission and the Law Reform Commission of Canada is that the law reform should be the province of the lesiglature; that the legislature requires specialist advice in the planning and formulation of law reform; and that this advice should be provided by a body independent of the executive and the legislature. Hence, although the initial inspiration may have come from within the profession the legislature has recognised law reform as its responsibility. The legislature has established an advisory legal body, institutional in character, to plan the course of reform.

On a less formal basis the Victorian Chief Justices Law Reform Committee also falls within this category. Although this organisation has not been recognised by formal

legislation it has received the endorsement of the legislature. As will be seen later the Victorian Legislature has acknowledged by practical means that it needs the assistance of an organisation which has been established to propose ways in which the law can be reformed.

Should Law Reform be the function of the Legislature in this Country?

True, other countries whose legal systems resemble our own have concluded that it is the responsibility of the legislature to establish and develop their law reform organisations. But are there factors peculiar to this country which would suggest that this role should be played by another institution?

No law reform organisations in this country could enjoy more independence than the courts have at the moment. There would be no compulsion, other than the force of public opinion, upon the Government to introduce, or even provide Parliamentary time for the proposals of any law reform agent.

The Courts of course continue to develop and modify the law according to the opportunities offered by litigation. However, although the courts have the technical knowledge and even perhaps the social awareness they lack the opportunity and the power to tackle the job of law reform on a scale similar to that enjoyed by law reform bodies.

Lord Devlin recognised the limitations of the Courts when he said:

"I doubt if judges will now of their own motion contribute much more to the development of the law.

> Statute is a more powerful and flexible instrument for the alteration of the law than any judge can wield. Its stretch is unlimited, it can overturn existing law, extend an old principle to any distance or reach out for a new one".[22]

Other institutions such as law faculties within the Universities and the Law Society do not enjoy the independence of the courts though they also probably have the technical expertise and the social awareness. Because of their dependence upon the legislature it is suggested that these institutions can only continue to act in the capacity of influential pressure groups in the process of law reform.

Conclusions:

It does not matter who gets the credit for actually inspiring the creation of a law reform body. Foreign experience indicates that generally the initiative comes from within the legal profession and more often than not from the judiciary.

The important conclusion is that once the egg has been laid it is up to the legislature to hatch it. The creation of a law reform body is ideally the function of the legislature, for, to be even partially effective reform must not cease with the appearance of a published report. The proposals suggested by the organisation must make their way into the statute books.

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22. Lord Devlin, "Samples of Law Making", pp.119 (1962)

It is desirable that the legislature creates the law reform agency because this ensures that the legislature supports and acknowledges the efforts of the law reform agency. If the legislature does not create the organisation then (as shown by the Victorian Chief Justices Law Reform Committee), it becomes necessary for the law reform body to gain the confidence and support of the legislature if its work is going to succeed. This adds to the burdens of the organisation and such a task at its early stages of development may prove to be a stumbling block if the personalities in the legislature and the law reform body are not capable of meeting these initial demands.

Chapter 3.

THE MEMBERS OF A LAW REFORM BODY - COMMISSIONERS AND COMMITTEE MEMBERS.

Thomas Jefferson was motivated to write on one occasion that "If due participation of office is a matter of right, how are vacancies to be obtained? Those by death are few; by resignation none".[23] The immediate response to Jefferson's question is to insist that due participation of office is not a matter of right. But if only a few will ever have the opportunity to hold office the question then becomes, "Who should the few be? This problem is of particular relevance when discussing law reform organisations. What sort of person should serve on such a body? Who should the administrators be? Who should the researchers be? (see Chapter 4). Is there a role for laymen to play? Yet another question is should law reformers be employed on a full-time basis?

One way of approaching these problems is by studying law reform systems in jurisdictions similar to our own. If some common ratio emerges then, by taking into account local characteristics, it may be possible to determine a solution.

The Law Commission of England and Wales:

The Law Commission Act 1965 (U.K.) provides for the appointment of a full-time body of commissioners consisting of a Chairman and four other commissioners appointed by the Lord

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23. Thomas Jefferson, "Letter to Elias Shipman and Merchants of Newhaven", July 12, 1801.

Chancellor. The commissioners are to be "persons appearing to ... be suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or as a teacher of law in a University".[24] A commissioner may be appointed for a term not exceeding five years, although he can be eligible for re-appointment at the end of that period.

The Victorian Chief Justices Law Reform Committee:

The Committee, which consists entirely of part-timers, has always been composed of representatives of the Bench, Bar, Law Institute and the Universities. The balance between these groups has changed over the years and has reflected changes in the organisations represented on the Committee. The membership grew rapidly from eight to twenty in 1951. Thereafter it declined a little and at 1971 stood at nineteen.

The New York Revision Commission:

Section 70 of the Statute which establishes the Commission provides that the Commission is to consist of five salaried members appointed by the Governor, four of whom are to be Attorneys and Counsellors at law, admitted to practice in the laws of New York, and at least two of them are to be members of Law faculties within the State. In addition there are four ex-officio members who are Chairmen of important Committees of the Legislature, (Chairmen of the Judiciary Committees and Codes Committees of both Houses). Although the Commissioners are not full-time it is important to note that they receive an annual salary which is partial

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24. Law Commission's Act (U.K.) 1965. S.3

recognition of the fact that membership on the Commission involves a lot of substantial work.

Law Reform Commission of Canada:

The Law Reform Commission of Canada consists of four full-time members and two part-time members. Each of the full-time members is resident in one of the following regions: the "Atlantic Provinces", Quebec, Ontario and the "Western Provinces". There is the additional requirement that at least one of the full-time members is to have been a lecturer in a recognised Canadian Law School and one commissioner or counsel to the Commission must have practiced at the Bar extensively in the field of Criminal Law.

The two problems which immediately arise when attempting to determine what the membership of the law reform body should be are; whether the appointees should be full-time or part-time; and whether non-lawyers should have a role in the organisation.

Full-time or part-time Members?

The English tradition in these matters - at least as demonstrated by the appointment of the Law Revision Committee in 1952 was to have part-time appointees. It was believed that extensive consultation and systematic review of the law were rendered virtually impossible by the operation of this system. As a consequence the English Law Commission consists of full-time Commissioners. The New York Law Revision Commission and the Victorian Chief

Justices Law Reform Committee are composed of part-timers, while the Canadians have elected to have four full-timers and two part-timers. There is however one distinction between the part-timers in Victoria and their counterparts in New York and Canada. The Victorian Law Reform body has no source of income. It has been, since its inception, an entirely voluntary body with no member receiving any form of income or expenses for his work. The Canadian and New York Commissioners on the other hand are salaried.

The disadvantage of Part-time Appointees:

It would seem to be inevitable that the presence of part-time members limits the number of subjects which the law reform body as a whole can tackle. This is not a criticism of those extremely capable personalities who become part-time members of a law reform organisation. It is simply that the lack of time available to members for law reform work seriously limits the organisations' activities.

The Advantage of Part-time Appointees:

(a) By ensuring that members of the law reform body are not full-time members confined to nothing other than the reform of law it is possible that the best personalities can be appointed to the law reform organisation. By insisting on full-time appointees it is possible that experts from the judiciary, the practicing section of the profession and the teachers of law in universities will be precluded by their other committments from taking part in the activities of a law reform organisation.

(b) Another advantage in appointing part-timers to a law reform body is that they are not so likely to become preoccupied with the activities of proposing changes

to the law to the exclusion of reality. Law reformers must keep in touch with reality and although part-timers are not immune from unrealistic ideas there is less chance of them stepping beyond the bounds of realism if they have to keep one foot in the outside world.

A theoretical solution:

The appointment of full-time members for a short period constitutes a compromise which takes into account all of the factors which have just been discussed. The main disadvantage of members being appointed for too short a period is that they may not be able to complete projects with which they are concerned. Thus, perhaps a period of appointment should be laid down with provision for re-appointment at the end of that period. It is suggested that five years be the period of appointment; the wisdom of this decision shall be discussed later.[25]

Could this theory be given practical effect in New Zealand?

If we are to avoid building a law reform system in the clouds, reference must be constantly made to New Zealand's distinct characteristics. It would be a mistake to examine other law reform systems, analyse them, and extract what are considered to be the most desirable characteristics from which we may be able to build the ideal law reform system. Utopia may be an ideal to aim for but it is essential to keep in touch with reality, and at the same time strive for those changes we

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25. Refer to p.33

consider to be desirable. History records that Sir Thomas More, when he became Lord Chancellor thirteen years after writing "Utopia", forgot so completely the tolerant spirit of his Utopians and proved himself an intolerable prosecutor. Law reformers and those who propose a law reform system must avoid at all costs the two extremes set by Sir Thomas More. Furthermore, when making a comparison with other law reform systems it is wise to bear in mind the comments of the Rt. Hon. Sir Alexander Turner who said:

> "The situation in any given country tends to generate the kind of solution which on the whole fits that solution best."[26]

What then are the characteristics of this country's legal system which should be borne in mind when determining whether it would be practical to have full-time law reformers?

In 1965 The Hon. J.R. Hanan, Minister of Justice, suggested that the reasons why "Law reform in New Zealand has been inadequate.....include the lack of sufficiently highly qualified staff."[27]

A factor which suggests that perhaps this country is not lacking in potential law reform commissioners is the number of individuals currently engaged on a part-time basis in law reform work. At the present time there are forty-one lawyers (mainly practitioners, teachers and Government Department lawyers) serving on the five Law Reform Committees. In addition to this there is the Law

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26. "Changing the Law", 1969 3 N.Z.U.L.R.404, pp.412
27. "Law in a Changing Society", pp.20

Revision Commission itself which, however, cannot be said to be actively engaged in law reform work. If this number of extremely capable individuals is prepared to work on a part-time basis, without remuneration, then can it be authoritatively stated that because New Zealand has comparatively few lawyers there would be insufficient highly qualified staff to act as Commissioners?

Practitioners could not leave their offices without complications arising and many academics would be missed from their Universities. However, these problems are not insurmountable.

The New South Wales Law Reform Commission which serves a jurisdiction a little larger in size than New Zealand has four full-time commissioners who sit under the chairmanship of Mr. Justice Manning. It is believed that salaries comparable with those of Judges are paid to the commissioners. No difficulty was apparently found in persuading a senior barrister and an experienced solicitor to accept appointment to the Commission. The fourth member is a law teacher who acts as a Commissioner while on leave from his University. Professor David Benjafield and Professor William Morrison of Sydney Law School have both served in this capacity.

<u>How many lawyers currently engaged in law reform work on a part-time basis would be prepared to undertake law reform work full-time?</u>

In an attempt to find an answer to this question a questionnaire was sent to those people currently serving on the five part-time law reform committees. All members

of the five law reform committees were contacted (41 in all excluding the secretaries), however, only 28 responded to the survey. The questionnaire described a hypothetical law reform body similar to the type which this research paper concludes as being the most appropriate for New Zealand. Committee members were asked:

"Assuming that -

1. You would be paid a salary equivalent to that of a Supreme Court Judge;
2. You would hold one of the five positions of "Commissioner";
3. You would be assisted by a full-time research staff;
4. That if you are a University Staff member arrangements could be made with your University so that you could return to your position after serving with the "Commission";
5. That the functions of the "Commission" would be:
   (a) To recommend to the Legislature amendments to present enactments or proposed enactments;
   (b) To initiate additions to the law by recommending to the Legislature reforms which the "Commission" considers to be desirable;
   (c) To act as an agency to which any interested parties can refer ideas for changes in the law;
   (d) To inform the community at large by use of the media of any changes in the law which are recommended by the "Commission";

Would you --

1.

(a) Consider serving on such an organisation for;

(b) Probably serve (if invited) with such an organisation for;

(c) Never serve with such an organisation

	Years					
	2	3	4	5	6	6+
(a)						
(b)						
(c)						

2. Are you:

(a) Currently in private practice?

(b) Currently employed by a University:

(c) Currently employed by a Government Department?

(a)	
(b)	
(c)	

The statistical results of the survey were as follows:

1. Lawyers currently in private practice:

(a) Consider serving on such an organisation for

(b) Probably serve (if invited) with such as organisation for

(c) Never serve with such an organisation

	Years					
	2	3	4	5	6	6+
(a)		1		3		
(b)		2		1		
(c)	5					

Total = 12.

In electing to state that they would never serve with such an organisation three practitioners were courteous enough to send very full explanatory letters. Their reasons for not wishing to work on a full-time law reform body were very understandable and were in fact predictable. Their lack of enthusiasm for a full-time career in law reform is due to the fact that they prefer practice, and would not be attracted to the somewhat different life of a full time

"Law Reform Commissioner". Rarely is it practicable to take a period off from practice for an activity of this kind. However, the results of the survey are surprising. The writer expected that probably all practitioners would state that they would never serve on such an organisation. In fact, however, this group turned out to be a minority. Hence it would appear that there is a general willingness amongst some practitioners to participate in law reform work on a full-time basis.

2. Lawyers currently employed by a University:

	Years					
	2	3	4	5	6	6+
(a) Consider serving with such an organisation				2		
(b) Probably serve (if invited) with such an organisation				4		1
(c) Never serve with such an organisation	1					

Total = 8

Only one person currently employed in a University stated that he would never serve on such an organisation. His reason for not wishing to do so was that he retires at the end of this year, hence quite understandably he does not wish to pursue another career.

3. Lawyers currently employed by a Government Department: Five replied from this category. Two of these said that they would never serve on such an organisation (one because he had retired and was only working in the Department on a part-time basis and was soon to retire permanently). Of the others one said he would consider serving on the body for five years; one thought he would consider serving in the

organisation for four years, and the other thought he would consider serving on the organisation for six years.

One person was not employed in any of these categories but said he would consider full-time law reform work for five years. Two others gave reasons why they considered it inappropriate for them to reply to the questionnaire.

If one accepts that those currently engaged in law reform work on a part-time basis have the desirable skills then it is apparent that there is no shortage of highly qualified people prepared to engage in full-time law reform work.

Participants from within the Profession:

A common characteristic of the foreign law reform bodies studied in this paper is that no branch of the profession appears to be reluctant to participate actively in the operation of the law reform agencies.

The English Law Commission for example, consists of the Honourable Mr. Justice Cooke as Chairman and four full-time Commissioners who are from the teaching and practicing branches of the Profession.

The total number of Supreme Court Judges on the Victorian Chief Justices Law Reform Committee has steadily increased over the years from two in 1944 to six in 1971. The Committee has always included members of the Bar. During the period 1945-50 up to six barristers attended annually but since then there have been three attending regularly. Since 1957 three solicitors have attended most meetings but previously the Law Institute was represented only occasionally. The number of academic lawyers on the

Committee has also steadily grown so that the position now is that both Melbourne and Monash Law Faculties have two representatives on the Committee, with one of Melbourne's being the Secretary.

It is a statutory requirement that the New York Law Revision Commission consist of at least two academic lawyers and that two others are to be Attorneys and Counsellors at Law. There appears to have been no difficulty at all in recruiting a high calibre of personality to fulful these posts. The first appointees were the Deans of the Colombia Law School and Cornell Law School (Chairman) and two practicing attorneys. At the present time the law profession is represented on the Commission by a Professor from Cornell Law School (Chairman); the Dean of the Law Faculty at New York State University and two practicing attorneys from New York City.

The Law Reform Commission of Canada is currently chaired by the Honourable Patrick Hartt, Justice of the Supreme Court of Ontatio. The Vice-Chairman is a Justice of the Superior Court of Quebec, while the other two full-time members are a highly qualified practitioner and a Professor at Osgoode Hall Law School who also is a member of the Department of Sociology at York University. The two part-time members are legal practitioners, one from British Columbia, the other from Quebec.

<u>The Judiciary:</u>

Until the advent of properly constituted law reform bodies the law developed and adjusted to new ways of life by the Judicial Common Law process and the legislative enactments. As in the past, the Judiciary of today have a major role to play in the development of the law. They

They constitute an extremely intelligent and capable portion of the profession and their experience and knowledge has proven to be invaluable to the functioning of those law reform bodies which they participate in.

Their reluctance to engage in the work of the Law Reform Committees presently operating in this country is partly due to a feeling that they should not enter the legislative field, even indirectly. However, as noted by the Hon. J.R. Hanan "The participation of judges in the work of law reform is not regarded as objectionable in England or the United States and it should not be in New Zealand today."[28]

Furthermore, at least one member of the New Zealand Judiciary has participated in law reform activities fairly recently. According to Dr. J. Robson[29] the New Zealand Law Revision Commission in 1969 consisted of 17 members one of whom (Turner J.) was a Supreme Court Judge.

Magistrates generally tend to have been over-looked when it comes to selecting appointees to law reform bodies. However, it is suggested that Magistrates also have a great deal to offer. They are by no means unintelligent or incapable of participating fully on a law reform body. In those areas of the law which Magistrates frequently deal with they would probably be able to lend invaluable assistance to a law reform agency.

If a full-time law reform body were to be established in New Zealand then it is suggested that at least one Commissioner should be appointed from the Judiciary.

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28. "Law in a Changing Society" , pp.25
29. "The Machinery of Law Reform in New Zealand", 1969 pp.6.

This would of course involve appointing a temporary judge or Magistrate to relieve the appointee during the period of his service with the Law Reform Agency. A salary equal to that of a Judge would have to be paid to a "Commissioner" appointed from the Judiciary (and every other Commissioner).

Law Practitioners:

A law reform agency which is not partly composed from the practicing branch of the profession could run the risk of occasionally sponsoring proposals which are theoretical rather than practical.

Sir Alexander Turner[30] recognised that practitioners cannot always prove to be effective as watchdogs and for this reason he advocated the retention of the present Law Revision Commission which "permits experienced men of law to express a deliberately balanced final view".

It is suggested that in a law reform body no group from within the profession should be able to dominate. In the process of law reform all branches of the profession have something to offer but no category is more valuable than another. To permit practitioners to dominate would be as equally unfortunate as to permit academics or members of the Judiciary to play a leading role.

If the New Zealand Legislature were to establish a full-time law reform body then it is essential that at least one "Commissioner" should be a legal practitioner. If he were to be paid a salary equivalent to that received by a Supreme Court Judge then it is less likely that well qualified and talented law reformers from within the practicing

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30. "Changing the Law" 1969 3 N.Z.U.L.R. 404, pp.411

part of the profession would be reluctant to participate in law reform work on a full-time basis. The prestige involved and the satisfaction of engaging in law reform work would also act as incentives to a would-be law reform "Commissioner". If rewards such as these were created it is suggested that as the survey shows, there would not be much difficulty in finding a practitioner who would be prepared to accept an appointment as a full-time law reformer.

Law Teachers:

If law teachers participate in law reform work on a part-time basis there is a definite risk that their teaching may suffer because of the demands made on their time and energy. Another possible problem raised due to law teachers engaged in part-time law reform is the question of whether the University forfeits part of its control over its staff. Because of the skills and expertise which law teachers have to offer it would be most unwise not to include them in a law reform agency. It is suggested that the best solution is for the University to give law teachers leave of absence so that they can be engaged by the law reform body on a full-time basis.

By doing this the advantages of a full-time commissioner would be satisfied and although some universities would lose the services of one or two staff members for the period of appointment they would be able to take the appropriate steps to ensure that relieving staff are employed.

The Period of Appointment:

Professor J.McDonald has maintained that "some of the success the New York Law Revision Commission has had with its programme is attributable to the extraordinary continuity

of service of its members."[31]

The terms of the appointed members are five years and are so staggered that one of them expires each year. Thus there have only been 23 members appointed since the Commissions beginning and of these 23, five currently compose the appointed membership.

Each full-time member of the Canadian Law Reform Commission is appointed for a term not exceeding seven years, and each part-time member of the commission is appointed for a term not exceeding three years. Any member of the commission can be re-appointed.

Members of the English Law Commission are appointed for a term not exceeding five years, although each commissioner is eligible for re-appointment at the end of that period.

Each of the law reform agencies established by statute seems to emphasise the need for continuity of service by allowing each member of the body to be re-appointed at the end of his term in office.

Emphasis has been placed throughout this paper on the need for law reformers to be in touch with what the community expects and wants in its laws. It is suggested that if law reformers become involved in the actual process of law reform for too long they run a real risk of losing touch with community expectations. Furthermore, if law reformers are to be imaginative and enthusiastic in their efforts to reform the law it would seem desirable to take steps to prevent them from becoming "jaded". Both of these pit-falls can be avoided to a certain extend by limiting the period

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31. McDonald "Legal Research Translated into Legislative Action" (1963) 48 Cornell L.Q.401, pp.442

for which full-time law reformers remain in office.

At the same time however, it is essential to give law reformers sufficient time to undertake and complete reform in those areas of the law where reform is deemed desirable. This can involve a considerable amount of time in some cases. The New York Law Reform Commission for example, spent three years reviewing the Uniform Commercial Code to the exclusion of all other work (1952-55).

The compromise which is being mooted in this paper is that a five year period of appointment should be laid down with provision for re-appointment at the end of that period.

<u>The Role of Laymen:</u>

In 1933 when Governor Lehman proposed the establishment of the New York Law Revision Commission his suggestions were similar to the plan outlined by Justice Cardozo. However, one major difference between Governor Lehman's proposals and the Ministry of Justice suggested by Cardozo J. was that the Governor thought that at least one member should be a layman. This request was adopted and since its initiation one non-lawyer appointee has been permitted in the New York Law Revision Commission. Appointments to the English Law Commission are limited to well qualified lawyers. A similar requirement exists for appointees to the Victorian Chief Justices Law Reform Committee and the Law Reform Commission of Canada.

<u>The Disadvantages of having a non-lawyer:</u>

1. The day-to-day work of a law reform agency is largely of a research and drafting routine. This basic work sets out what the law is and indicates where there are ambiguities and needs for change. In this routine

sociologists or other laymen would have to play a waiting game.

2. A further problem lies in deciding what sort of non-lawyer should be appointed. There is a risk that an economist, sociologist, philosopher, political scientist or any other expert would be equally confined in his outlook as a lawyer. A sociologist, for example, may be unable to assist a law reform body which is investigating the law concerning the registration of company charges. The same sociologist may however, be invaluable if the law reform body were to investigate the grounds for obtaining a separation.

<u>The advantages of laymen on a Law Reform Body</u>:

It is suggested that the contribution of non-lawyers comes after the stage when initial research has provided a description of the law as it is. At this stage, laymen and members of other disciplines have a vital part of play; they may well see injustices or anomolies not evident to the unaided eye of the lawyer.

Although lawyers are adequately equipped to describe current laws an understanding of a good deal of modern legislation can only be arrived at with knowledge of the social and economic forces which shaped it. Its reform and revision equally depend on such knowledge. This means that law reform bodies must carry their enquiries beyond the law texts and reports. Few lawyers have the ability to be able to carry out the enquiries which should occupy the time of a law reform body without the guidance and assistance of the appropriate experts.

Conclusion:

When one considers the diversity of subjects which a law reform organisation may examine it becomes evident that no single layman would be completely equipped to assist those who are charged with reforming the law.
This problem could be overcome however, if the law reform body could requisition the services of a layman who was expert on the topic which the organisation was studying.
It is suggested accordingly that a law reform body should consist of full-time legal appointees with provision that as many lay persons as the "Commissioners" consider necessary, be appointed to the organisation's research staff.

Membership Numbers:

There appears to be no numerical consistency in the size of law reform bodies which have been selected for examination in this paper. There is also no evident relationship between the number of members in the organisation and the size of the jurisdiction which they serve. The Victorian Chief Justices Law Reform Committee for example, consists of nineteen members at the present time, whereas the English Law Commission which has to serve a far larger jurisdiction, consists of five members. The fact that the English Commissioners are "full-timers" and the Victorian Committee consists of "part-timers" is not of any real relevance if one takes into account the fact that the New York Law Revision Commission consists of nine "part-timers". The Canadian Law Reform Commission consists of four full-time permanent Commissioners and two part-timers.

If a full-time law reform agency is appointed it is essential that it is large enough to include representatives from all branches of the profession.
The Commission must not be so small that it is limited to the administrative function of assigning topics for study to other groups and yet it must also avoid becoming too large so as to be administratively unweildy.

It is suggested that a full-time Law Reform Agency in this country should consist of five persons from within the profession. One member should come from the Judiciary, one from the Universities and at least one should be a practitioner.

Chapter 4.

RESEARCH STAFF AND INTERNAL ORGANISATION.

Research was recognised by the Hon. J.R. Hanan as being the weakest link in the process of law reform in this country.[32] At present research is undertaken by busy members of the profession who are unable to concentrate fully upon research. By examining the provision which is made in some foreign law reform organisations for research staff it may be possible to determine a solution which could be applied, with modification, to the New Zealand situation.

Canadian Law Reform Commission:

In addition to the four full-time Commissioners and two "part-timers" the Canadian Law Reform Commission consists of a full-time secretary, a special assistant and co-ordinator and thirty-one research personnel.

The internal structure of the Commission can be represented diagramatically in the following way:

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32 "The Law in a Changing Society", p.20

4 full-time
2 part-time
Commissioners

1 Secretary

1 Special Co-ordinator

5 Project Directors

26 Research Officers

The number of Research Officers is not predetermined or fixed.

In addition to this staff 79 other personnel were commissioned for specific research projects during the 1973-74 period.

Of the 26 Research Officers employed with the Commission six were legal practitioners and two were formerly very high-ranking police officers. The other 18 research personnel were generally young graduates (nine with Masters Degrees in Law, one with a Ph.D) who appear to be prepared to spend about two years with the Commission before embarking on their careers of practicing or teaching law.

Law Commission of England and Wales:

The English Law Commission, in addition to its five full-time Commissioners, consists of a staff of 48: a permanent secretary, five draftsmen, 20 other lawyers and 22 non-legal staff. In addition there are three lawyers and one member of the non-legal staff employed on a part-time basis.

As well as this staff, 59 other practitioners, judges, teachers of law and civil servants joined advisory bodies to the Commission during the 1973 year.

Apparently there is no shortage of highly qualified applicants who regard their service with the Commission as valuable training for practice or teaching. Preference is given in appointment and salary to those who have had practical experience either in an office or in chambers.

New York Law Revision Commission:

The basic research of the New York Law Revision Commission is carried on by research assistants who are members of its regular staff and by research consultants who are engaged only for a particular topic. The consultants may be law teachers or practitioners working within the State.

Research assistants are employees of the State. They are paid annual salaries on the same basis as other State employees and are a part of the State Civil Service. "For the most part, a typical research assistant is a high-ranking recent law school graduate who takes the job with the idea that it is a temporary step(one year or two) in obtaining experience and prestige."[33]

Victorian Chief Justices Law Reform Committee:

The Victorian Chief Justices Law Reform Committee is organised so that the Committee comes to a decision on the basis of its own resources or by seeking the advice of a sub-committee.

Initially it seems that members of the sub-committee came substantially, if not exclusively, from members of the full committee. This policy was abandoned in the early 1950's and most appointments to sub-committees have since

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33. McDonald "Legal Research Translated into Legislative Action" (1963) 48 Cornell L.Q.401 pp.423

been left in the hands of the organisations which the members represent.

In 1956 at the suggestion of the Dean of the Faculty of Law at Melbourne University the Law School of that University took over the general administration and secretarial work of the Committee. These duties have proved to be a burden to the Melbourne Law School but with assistance of an annual subsidy from the Victoria Law Foundation it appears that Melbourne University is prepared to continue to make available the administrative and research facilities which the Law Faculty possesses.

No researchers are employed directly by the Committee. All of the basic research has to be carried out by the individual members of the Committee or sub-committe, depending on which branch of the organisation is undertaking the reform of the topic.

<u>How should a New Zealand Law Reform Agency be Organised?</u>

It has been said of the Canadian Law Reform Commission that "....one would expect to find, as the fundamental principle of reform, an unstructured network of functional activities built around the best available minds, supported by flexible administrative services manned by result-orientated 'doers' operating free of hierachial principles and bureaucratic restraints. Unfortunately this is not the case." [34]

<u>If</u> we accept the validity of this criticism it may be possible to attribute some of the blame for the failings of the Canadian Commission to its internal organisation. As

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34. J.N. Lyon, "Law Reform Needs Reform", 1974, 12 Osgoode Hall Law Journal, 421, pp.425

As the diagram on p.40 shows there are at least six rungs within the hierachial ladder of the Commission. It is little wonder that the activities of those within the Commission have been described as being that of law reform manufacturers employed to man the assembly line from which innumerable reports emerge.[35]

It is suggested that the desirable attributes of the internal organisation of any law reform body would have to encompass the following:

1. The ability to determine concisely and accurately what the present law is;
2. The ability to decide what the failings of the present law are;
3. It must be able to propose a viable reform through the assistance of all interested parties;
4. It must have the ability to present its proposals in a convincing and logical way to the Legislature and to the community at large.

The internal organisation would, it is suggested, have to be administratively flexible so that it could cope with the great diversity of subjects which it may be called upon to reform. Those who are employed by the law reform body would have to posses extremely able minds in order to cope with the complexity as well as the diversity of subject matter which they may deal with.

The English Law Commission and the Victorian Chief Justices Law Reform Committee have opted for a more streamlined internal structure than the Canadians. The English

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35. J.N. Lyon, Id. pp.426

Commission for example, will assign a member of its staff to one general area of law reform and after including a particular subject in its programme assigns the topic to the relevant group. The staff, working under one or more commissioners, undertakes the task of drafting a working paper which states the present law, the problem, the changes which should be made and assembles the arguments for and against the solution which is recommended. The draft is considered by the Commission and circulated to the interested parties before being prepared in the form of a report which is submitted to the Lord Chancellor together with a draft Bill. The researcher who first became involved with the preparation of the report will be concerned with the passage of the proposed reforms during every stage, including ultimately on some occasions, being present when the Bill is tabled before Parliament.

The English system enables, therefore, able-minded people to work in a fairly stream-lined system so that they can establish what the law is, where it has gone wrong and make suggestions for reform in a convincing manner after having consulted the various interested parties.

It is suggested that the English Law Commission serves to illustrate how a law reform body can best carry out those tasks which it is charged with. There is of course a need to have a pool of skills which the Law Reform Body can rely on.

Administrative Secretary:

The Administrative Secretary plays a significant role in those law reform bodies which have been studied in this paper.

The Secretary of the English Law Commission at the present time is Mr. Cartwright-Sharp who was formerly employed in the Lord Chancellor's office. The Secretary to the Law Reform Commission of Canada is Mr. Jean Côte. It would appear that he receives assistance in his administrative duties from Judge René J.Marin who is designated as the Special Assistant and Co-ordinator, and Colonel H.G.Oliver, formerly a member of the Bar of British Columbia who is director of operations and research personnel. The Secretary of the Victorian Chief Justices Law Reform Committee has always been regarded as a full member of the Committee. The position now is that both Melbourne and Monash Law Faculties have two representatives on the Committee with one of Melbourne's being the Secretary. The New York Law Revision Commission has elected not to create the position of Secretary, rather the director of research is responsible for carrying out the secretarial and administrative requirements of the Commission.

The functions of the Administrative Secretary of a full-time New Zealand law reform body would include, it is suggested, the delegation of research projects to the research officers, ensuring that all interested parties receive copies of project studies so that they can make constructive submissions; the preparation of an annual report on the workings and achievements of the law reform body; publicising to the community the effect of the organisation's work which is enacted.

LAW DRAFTSMEN:

A law reform body, if it is to be effective, must convince the Legislature of the desirability of the proposals contained in its suggestion for reform. It is not mandatory for the Government to introduce any proposed Bill which the law reform body may draft. However, if a Bill is drafted by the law reform agency there are two factors which favour the possibility of the proposals being enacted.

The first is that individual Parliamentarians may avail themselves of the proposed Bill and introduce it as a Private Member's Bill. The Government of the day would, it is suggested, be reluctant to allow this to happen frequently for the following reasons. If a member of the Opposition elects to introduce the Bill this reflects poorly upon the Government. That member of the Opposition will benefit (and so will his Party) from the publicity which invariably surrounds the introduction of a Private Member's Bill. Any publicity given to a member of the Opposition in respect of the introduction of any legislation which concerns an area where the Government should be taking the initiative will reflect adversely upon the Government of the day. If a member of the Government's back-benches introduces a Private Member's Bill on a topic which falls within a specific portfolio, this also reflects poorly on the Government for it indicates that some members of the Government party are dissatisfied with the manner in which a particular portfolio is being administered.

The second reason is that the failure of the Government to introduce a proposed Bill which has already been drafted may receive adverse publicity from the mass media. It is

suggested that the press in particular may not be reluctant to express the view that a Government which fails to introduce Bills which have already been drafted is not particularly progressive. This sort of criticism would of course depend entirely on the character of the proposals concerned. But if a well balanced law reform agency of the type envisaged were to make intelligent proposals then it is highly likely that the press will question the wisdom of a Government which fails to introduce any proposed legislation.

Therefore, if the proposals of the law reform body are accompanied by a draft Bill, the chances of the proposals contained within it being implemented are greatly enhanced. It is interesting to note that in England, by December 1974, of the 64 reports which had been laid before the House of Commons, 47 have been enacted or formed the basis of legislation. A lot of this success, it is suggested, can be attributed to the fact that each report contains a draft Bill.

In order to enhance the likelihood of a New Zealand Law Reform organisation succeeding (as far as statutory results are concerned) it is suggested that the agency should have the services of at least one law draftsman on its staff.

Researchers:

Researchers in those organisations which have been studied appear in general to be young law graduates with impressive academic backgrounds who regard their service with the law reform body as a prelude to their respective careers. Because a full-time law reform body in this country would be a modern creation it would be unlikely to attract the

services of well established practitioners or teachers who would have to give up occupational security and high remuneration in order to work as researchers.

On the basis of foreign experience research officers employed on a full-time basis by a law reform body would tend to be law graduates. The functions which they would be charged with (i.e. determining the law, analysis, its inadequacies, etc.) call for a high degree of legal skill. However there appears to be no reason why law graduates only should be employed as research officers. Graduates from other fields may be apt in determining the inadequacies of the present law and they may be able to suggest viable alternatives. Accordingly they should be encouraged to join the research staff of the law reform body. It is suggested however, that law graduates have a predominant role to play in research activities and so numerically should form the majority in any research staff.

Conclusions:

Mention has already been made of the desirability of having a streamlined internal organisation which ensures maximum efficiency from those employed within the organisation. Those within the organisation must be inspired to work conscientiously towards the goal of reforming the law. It is suggested that law reform researchers would get the greatest amount of satisfaction if, as in the English law system, they could participate at every stage of reform. It is essential to avoid the state of affairs whereby researchers feel that they are simply a part of an assembly line doing one small part in a law reform project before conveying the work to the next person in the line. This situation, although

it may be efficient for mass production, does not necessarily inspire the law reformers themselves to do all within their power to ensure the success of a project.

Accordingly, it is suggested, that a New Zealand Law Reform body should not be too dissimilar from that which is presently operating in England. It is envisaged that a three tier system would ensure maximum efficiency from those working within the system and would ensure that reform projects do not become tied up in the bureaucratic internal machinery of the law reform body.

A project should be assigned to a research officer (or team of research officers - if the need arose) by the administrative secretary. The research officer(s) working under the supervision of a "Commissioner" would then prepare a report outlining the present state of the law; where the failings of the present law exist and a suggestion of what changes should be made. This study would be widely publicised to all interested parties who would be asked to send written submissions to the law reform body. Once all the submissions have been received it is suggested that the research officers concerned and the Commissioners should go into committee to analyse the proposals and submissions. From there it would be the duty of the original researchers to prepare a report on the findings of the committee. This report would have to be endorsed by the committee. The report would then be referred to the law draftsmen employed by the law reform body who would be charged with the task of preparing a draft Bill which encompassed all of the proposals contained in the report. This report, together

with the draft Bill would then have to be tabled before Parliament. Should either the Government or a Member elect to introduce the Bill then one of the original researchers and the supervising "Commissioner" should be available to sit on the floor of the House and act as advisors during the passage of the Bill.

Chapter 5.

EXTERNAL ASSISTANCE.

The views of all interested parties are essential in any systematic reform of the law, for "the law depends on a broad consensus to achieve an effective ordering of social relations in a democratic society."[36] Reforming laws means more than changing them; it also means improving them. Cromwell's Parliament once passed an Act outlawing Christmas - a change true, but was it an improvement. Did the new law reflect a true social need? The problem is of course to determine whether the new laws reflect a need and whether they receive the broad endorsement of interested parties. There must not be alterations for alterations' sake: new laws must truly reflect societies' wants and constitute some genuine progress.

How then do the law reform bodies which, from the basis of this study undertake to ascertain the views of interested parties on a particular topic?

New York Law Revision Commission:

In New York State the Law Revision Commission does not rely to any great extent on submissions from other interested bodies. During the legislative session the Commission distributes multilithed copies of its recommendations to bar associations throughout the State , to official and unofficial agencies concerned with legislation, and to all interested persons who request them. The bulk of submissions

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36 Law Reform Commission of Canada, first report, "Research Program", pp.6

on any proposal drawn up by the Commission come at the legislative stage. To allow time for comment and consideration of criticism, action on the Commission's Bills has customarily been deferred by the Legislature until after a public hearing on the Bills held jointly by the Senate Assembly Committees on the Judiciary and Codes.

Canadian Law Reform Commission:

In Canada as soon as a project has been completed on a given topic, the Commission publishes its findings as a study paper. This paper is distributed for comment to special interested groups and depending on the topic, to private individuals. At the same time the Commission arranges extensive coverage for the paper in the press, television and radio. In the light of its reception and the comments and criticisms received the Commission itself prepares a working paper embodying its own tentative recommendations. This working paper is given similar but wider coverage. Finally, depending on the way this paper is received, the Commission prepares a final report to Parliament, including where necessary, draft legislation. An example of this can be seen in the Commission's work on the law of obscenity. The Criminal Law Division of the Commission produced a study paper to do four things: to raise the issues, to review the empirical findings, to explore the problems from a philosophical standpoint and to set out the project's reasoning and recommendations. These were:

1. That obscenity should by and large be taken out of the criminal law and that it should no longer be an offence to sell or display obscene literature or

representations;

2. That it should remain an offence to exhibit such material in public;

3. That it should remain an offence to sell such material to young persons.

These recommendations, together with the supporting arguments contained in the study paper, were sent out and issued to the press. Members of the project appeared on television and took part in radio programmes to explain and defend the recommendations. Discussions were held with associations and other bodies.

The next step was for the Commission to prepare a working paper on obscenity based to a large extent on the criticisms and comments received. The working paper was given a similar coverage and was generally favourably received by the media.

Apparently, to some extent the responses were disappointing. This was not due to a lack of criticism, indeed a great deal of the criticism was welcomed by the Commission. Rather, disappointment was due to a failure by the Commission to generate as much interest and discussion as it had expected.

Law Commission of England and Wales:

In England, after a draft paper is drawn up by the Commission's staff and studied by the Commission it is made available in Xeroxed form to those who are interested. The circulation list may include as many as 500 addresses depending on the subject-matter of the draft working paper. The Society of Public Teachers of Law, the Bar Council and the Law Society are given sufficient copies for circulation

to their own sub-committees. It is made clear that the draft contains only a proposal on which comments are invited. It is understood that the Commission receives substantial assistance from the law teachers whose specialist sub-committees take great pains to provide detailed comments on each proposal. When the replies are received, a second working paper is sometimes issued and further comments invited. Only when the Commission has secured opinions and considered them is a report prepared for submission to the Lord Chancellor.

It would appear that in some instances the work of the Commission has benefited greatly from the consultation programme which is followed. The Commission's Report on Injuries to unborn children was presented to the Lord Chancellor in June 1974. This report was the product of nearly two years' work. From the Commission's point of view, the report was a striking example of the value of the consultative processes which were followed.[37] The Commission has acknowledged that without the advice and help of the medical profession no report would have been possible. Apart from providing the medical basis of the report, the Commission's consultation led to medical changes in the provisional views which it had formed on matters of policy, such as the mother's liability for her own child and the effect of the mother's contributory negligence on the child's right against others. These changes were reflected in the passage of the Commission's report which departed from the provisional views which had been expressed in the Commission's working paper. In its

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37. Ninth Annual Report of the Law Commission. pp.1

Ninth Annual Report the Commission maintained that they "Welcome the opportunity to change our views when we think they have been shown to be wrong. We have done so on other occasions in the past, and we have no doubt we shall often do so again. We regard this attitude as essential to the proper performance of our functions."[38]

The Victorian Chief Justices Law Reform Committee:

The Victorian Chief Justices Law Reform Committee would appear to have opted for a more narrow approach. This Committee has not to date actively sought the assistance of outside organisations. The reasons for this appear to be two-fold.

Firstly, the Chief Justices Law Reform Committee prepares a lot of its reports as submission to the Statutes Law Revision Committee. Once finalised, a recommendation of the Committee which arose from a request by the Statute Law Revision Committee is forwarded to that Committee together with any sub-committee reports adopted during discussion. In the event of the Chief Justices Committee reaching its decision after the Parliamentary body has finished taking evidence the recommendation is forwarded to the Attorney-General. In all other cases, whether the source of the inquiry be the Government, some organisation such as the Law Institute or a private individual, the Committee's recommendations are forwarded to the Attorney-General. It would seem that the Victorian Chief Justices Law Reform Committee regards itself as one of the many

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38. Ninth Annual Report of the Law Revision Commission, pp.1

bodies and organisations which can make submissions to the Legislature on a particular case. Hence the attitude of the Committee appears to be that it need not act as a recipient of submissions which could be most effectively directed to the appropriate Parliamentary body.

The second reason would appear to be that the Committee itself consists of a large body of personnel representing all branches of the legal profession. Accordingly, any member of the profession who has a particular interest in an area of the law which the Committee is studying can very readily make his own views known by contacting the representative of his branch of the profession who is serving on the Committee. Although this may, in a limited sense, satisfy the requirements of members of the legal profession, it is not a way of allowing other interested parties to express their views.

Conclusions:

If New Zealand law reformers are to be kept in touch with the expectations of all interested parties within the community, then it is essential that provision be made to enable them to receive the ideas and views of those individuals and organisations which are interested. In practice it would appear that the most effective way this can be achieved is by distributing working papers to all interested groups and individuals. Any submissions on the philosophy and substantive content of the working paper should be encouraged, for by this method the law reformers will be kept in touch with what parts of the community expect from the law.

Chapter 6.

THE SOURCE OF INQUIRIES.

A theme which has been emphasised throughout this paper is the need for law reformers to try and ascertain what the community expects from its laws. Perhaps this aim sounds too idealistic. However, by insisting that one of the functions of a full-time law reform body in this country would be to act as an agency to which any interested party can refer ideas for changes in the law, then may be this aim would be partially achieved. Whether such a theory would work in practice is difficult to determine for foreign experience indicates the source of most law reform inquiries comes from within the legal profession.

New York Law Revision Commission:

Studies made by the New York Law Revision Commission are directed to specific problems suggested for study by bar associations and other organisations, public officials, judges, lawyers and laymen, or are selected by its own study of statute and case law.

Suggestions from the Courts:

The Courts may of course, recommend a change by pointing out that any argument for change in a statute should be addressed to the Legislature, rather than to the Court. In People v Kupprat[39] Fuld J. said:

> "We must read statutes as they are written and, if the consequence seems unwise, unreasonable or

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39. 160 N.E. (2d.) 38, pp.40

undesirable the argument for change is to be addressed to the Legislature not to the Courts."

A suggestion from a Court may be made more specifically in an opinion which refers to the Commission.

In Germain v Germain[40] Moule J. said:

"This court by sending copies of this opinion to the New York State Law Revision Commission, New York State Bar Association and Eire County Bar Association, is suggesting that remedial legislation be enacted."

Rather than made a suggestion for change in a judicial opinion the court may forward a letter to the Commission directing its attention to the rule of a particular case, which if followed leads to an undesirable result. In 1948 the Commission made a study on the question of whether the court has a discretion to permit a wife to obtain a money judgment for arrears of accrued alimony. This subject was suggested by a letter to the Commission from Justice Francis Martin. Referring to the case of Kaninsky v Kaninsky[41] he says:

"That case has promoted the Court to call to the attention of your Commission the provisions of s.117 1-b of the Civil Practice Act and the decisions construing that section. In conference the Judges were unanimously of the opinion that that section may result in great hardship and that an amendment should be made permitting wide discretion in the Court to which an application

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40. 220 N.Y.S. (2d.) 1013, pp.1016-1017
41. 70 N.Y. Supp. (2d.) 327

is presented.

"A copy of the record, which speaks for itself, is enclosed hencewith for the consideration of your Commission and for such action as it may deem advisable."[42]

The Governor:

There are occasions when the Governor conveys a specific suggestion for study by the Commission. One of the first programmes of research undertaken by the Commission was initiated by a letter from Governor Lehman, who, on September 7, 1934, addressed to the Law Revision Commission a request that the Commission study "the changes in the correction of law made by the Legislature during the regular session by Chapter 731 of the laws of 1934."[43]

Study of the Uniform Commercial Code was undertaken in 1953 at the specific direction of the Governor and engaged the attention of the Commission to the exclusion of all other work until its completion in 1956.

The Commission's studies of the desirability of changes in the Penal Law and in the Code of Criminal Procedure with regard to the establishment of a Commission, to examine the sanity of persons accused of crime; the examination of the Uniform Criminal Extradition Act; and, the question of what should be done respecting the law of felony are examples of other programmes which the Commission has undertaken following a suggestion from the Governor.

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42. MacDonald "The New York Law Revision Commission", 28 M.L.R. 1 pp.11
43. See 1935 Report, Recommendations and Studies of the Law Revision Commission. pp.479

Legislature:

An example of the Legislature directing the Commission to adopt a specific course of study occurred in 1962. That year the Commission was directed by a concurrent resolution of the Senate and Assembly to study the question of whether legislation was advisable to provide general standards for hearing procedures and rule making of Administrative Agencies within the State and for judicial review. The Commission was asked to report to the Legislature its recommendations, including proposals embodying such legislation as it may recommend. This study was not completed until 1968 and was finally enacted in 1970.

Bar Association:

The New York State Bar Association has a special Committee to co-operate with the Commission (known as the "New York State Bar Association Committee to Co-operate with the Commission"). The recommendations of the Commission are studied at the end of the Legislative session by this Committee and are discussed with the Commission at joint meetings which are usually held early in February. In addition to this formal structure proposals indicating a need for change in the law quite frequently come from lawyers with respect to problems disclosed in counselling or in advocacy or in some other way.

Law Reform Commission of Canada:

Rather than concentrate on suggestions for topics of study received from various interested bodies the Canadian Law Reform Commission undertook in its first year a selection of subjects which it proposed to study. The Commission recognised from the outset that this selection of topics,

and the priorities assigned to them, would necessarily limit to some extent the Commission's freedom to study other areas. Therefore, as a preliminary to drafting this programme, the Commission prepared a memorandum outlining possible areas of study to be undertaken by the Commission in its initial years. The memorandum was circulated widely among Canadians with an invitation to submit criticisms and suggestions so that the public might influence the range and composition of the Commission's programme. The Commission believed that extensive consultation with the public in this way accords with (their) wish, in the words of (the) Act, to "receive and consider any proposals for the reform of the law, that may be made.....by any body or person."[44]

The responses to the memorandum confirmed the Commission's belief that it "should focus initially on areas of law that affect the daily lives of Canadians."[45] Hence, in its programme the Commission set out in a broad outline major criminal law studies designed ultimately to produce a system of criminal justice in keeping with the needs of Modern Canadian Society. The programme included, as well as a major study on family law; an evidence study directed to the recommendations of an evidence code; a rather specialised project on expropriation law was also planned to be undertaken.

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44. Law Reform Commission of Canada, first report, Research Program", pp.6
45. Law Reform Commission of Canada, Id. pp.7

Victorian Chief Justices Law Reform Committee:

The Committee has received requests to investigate deficiencies in the law and proposals to remedy them from a wide range of sources. The most prolific enquirer has been the Statute Law Revision Committee which had referred matters to the Committee on 53 occasions up to the end of 1971. Many of these requests were put before the Parliamentary Committee by the Attorney-General and as such they amount to an indirect request from the Government.

Unlike the Statute Law Revision Committee which first requested the co-operation of the Chief Justices Law Reform Committee in 1954, the Government has placed matters before it since its foundation, either through the Law Department (in 14 instances) or the Attorney-General (in 32 instances). In some of these cases the enquiry has been formally addressed to the Chief Justice who has passed it on to his Committee, while in others it has been addressed to the Chief Justice with the express suggestion that it be referred to the Committee. Other sources include Judges on 35 occasions (12 of which were suggestions from the Chief Justice himself), the Law Institute on 6 occasions, the Bar Council 3 times and on two instances suggestions have come from individuals within the profession; law teachers on 6 occasions and there is a miscellaneous category of 13. The source of eleven enquiries, all relating to the 1944-45 period could not be determined.[46]

The only significant inter-relationship between these categories was that prior to 1962 a lower portion of all

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46. These statistics come from F.L. O'Brien, "The Victorian Chief Justices Law Reform Committee", 8 M.U.L.R. 440, pp.461

matters considered by the Committee was referred to the Committee by the Government than the period since 1962, (21.3% for the period 1944-61 in comparison to 34.1% for the period 1962-71). This difference must be accentuated by the fact that many of the matters referred to the Committee since 1962 by the Statute Law Revision Committee were referred to it by the Attorney-General under the power granted to him by s.2 of the Constitution Act 1962 (Now s.38(2) of the Parliamentary Committees Act 1968). This means that since November 1961 the Chief Justices Committee has devoted more of its time to Government sponsored reforms than ever before.

Law Commission of England and Wales:

The Commission is authorised "to receive and consider any proposals for the reform of the law which may be made or referred to them."[47]

The initiative for selecting topics for law reform does not lie solely with the law Commission. Thus, under s.3(e) of the Act, the Commission is empowered "to provide advice and information to government departments and other authorities or bodies concerned at the influence of the government with proposals for the reform or amendment of any branch of the law."[48]

The Commission has the right and duty to originate proposals in the field of reform. These proposals are embodied into a programme which, once it survives the veto of the Lord Chancellor, must be published, and confers upon the Commission independence of action within its limits.

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47. S.3(a) Law Commission Act 1965
48. Sir Leslie Scarman, "Law Reform - The New Pattern", (1967) pp.11

Though requiring the approval of the Lord Chancellor, the Commission's programme is essentially its own creation.

The Commission has a continuing responsibility of vigilance, and the duty as well as the right to bring minor defects to immediate notice with a view to their being cured. According to Sir Leslie Scarman -

> "The Commission in fact devotes a good deal of attention to matters arising outside its programme. They arise from three sources.
>
> (1) Its own vigilance and initiative.
> (2) Requests from Government Departments.
> (3) Suggestions from the public, the judges and the legal profession." 49

In its fourth annual report the Commission believed that "Once we have determined our own priorities, it seems to us that systematic development and reform will best be achieved by adhering closely to our published programmes. Progress will suffer if attention is too often diverted from programme studies to other problems, urgent though some of them may be."[50]

Hence it would appear that of the three sources of material identified by Sir Leslie Scarman the latter two do not receive the same priority as projects initiated by the Commision itself.

Conclusions:

Because of their intimate involvement with the law one would expect members of the legal profession to be amongst the first to recognise inconsistencies in the law and

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49. Sir Leslie Scarman, Id. pp.18
50. The Law Commission, Fourth Annual Report (1969) pp.1-2.

make suggestions to the appropriate authority to consider possibilities for reform. However , it does not automatically follow that lawyers alone come across deficiencies within the law. Those laymen who are motivated to do more than simply complain to their friends about an apparent defect in the law generally tend to direct their grievances to the local Member of Parliament. Thereafter the Attorney-General may have the alleged anomoly bought to his attention. It is suggested that if a full-time law reform body were established in this country then not only members of the legal profession should be encouraged to submit ideas for areas of reform which the "Commission" should study. The layman who has come across a particular defect should also be encouraged to recommend to the "Commission" that they undertake a study in a particular area. This serves a two-fold process. Firstly it circumvents a lot of bureaurocratic machinery which rarely produces a satisfactory remedy as far as the individual is concerned. Secondly, the law reformers themselves are kept in touch with what members of the community expect from the law - the desirability of this proposal has already been dealt with. Although it is impossible to gauge what response a "Commission" would receive from members of the community it is stressed that there is nothing to lose from insisting that a full-time law reform body act as an agency to which all interested parties can refer ideas for changes in the law.

Chapter 7.

Relationship with the Executive and Legislature:

A law reform agency must be structured so as to enable it to co-operate closely with Government, firstly in order to hold the confidence of the Government in its advice, and secondly to assist Government to pass its proposals into law. Yet at the same time, the law reformers must have the ability to exercise their judgments independently for, without independence their advice may be suspect. How then can a compromise be reached between these two considerations? Before attempting to formulate a proposal which may have application to this country attention will be focussed on the relationship some foreign law reform bodies have with their respective Legislatures and Executives.

Law Commission of England and Wales:

According to Sir Leslie Scarman[51] it would no doubt have been convenient to have incorporated a law reform agency within the Ministry of Justice, thereby assuring that it had a direct and influential access to the levers of power. However, such an arrangement would likely have deprived such an agency of the services of an active judge within its membership. It is unlikely that any law reform body which appeared to the public to be no more than a section of a department of State would enjoy the reputation for independency necessary for the stability of a law reform body.

The Government (via the Lord Chancellor) is able to impose

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51. Sir Leslie Scarman "Inside the English Law Commission" A.B. A.L.J.Vol. 57. pp.869

a veto on any inquiry which the Law Commission proposes. Thus the Commission was unable to pursue further an inquiry into liability for "dangerous things and activities" when it came to the conclusion that what was involved was the whole principle of liability for negligence in personal injury cases which it was not allowed to question even by launching an investigation. Similarly, the Commission's proposal that an inquiry should be undertaken on a broad basis into administrative law, although not by the Commission but by a widely representative committee or Royal Commission, was not accepted. The Commission was asked by the Government to undertake as a first step a more modest inquiry into the present remedies for judicial control of administrative decisions.

On the other hand, the Law Commission has enjoyed, according to Sir Leslie Scarman, considerable success. Of its forty-two reports, at the time of his retirement, fifteen had found their way onto the Statute Books and another nine were currently before Parliament. Today of the 54 reports, twenty-three have been enacted, or form the basis of legislation.

The reasons for the success of the English Law Commission lie, it is suggested not only in its expertise and independence, but also because of its ability to pursuade Parliament to enact those proposals which it suggests. It does this in two ways: the first is by drafting a proposed Bill with every report. The second is in its close liaison with the "feeling of Government". The Commission is not permitted to embark on any course of study which would be

politically unacceptable to the Government of the day. Nor is the Commission permitted to engage, it is suspected, in topics of study which, because of their nature, are conpidered low priority when the time of Parliament is allocated.

Victorian Chief Justices Law Reform Committee.

The view has always been taken that some matters broadly labelled "policy" are not within the scope of the Victorian Chief Justices Law Reform Committee.

No attempt has ever been made to state what are the elements of a subject which brings it within the "policy" or "political" heading: these are treated as being self-evident. For example, in 1968 there was a request from the Attorney-General to consider the desirability of defining the present laws of abortion with more certainty. While the Committee was not asked to comment on the need for relaxation of the present law it took the view that the nature of the problem "was such as to make it impractical to produce a solution without entering into the questions of 'policy', and in addition the political nature of the problem made it undesirable that the Committee should carry out an enquiry."[52]

Since the Offices of Solicitor-General and Attorney-General were split in 1952 the Solicitor-General has been an active member of the Committee and it seems that his presence has greatly benefited the Committee because he possesses an intimate knowledge of the ways of government.

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52. F.C. O'Brien, "The Victorian Chief Justices Law Reform Committee", 8 M.U.L.R.440 pp.450

No Attorney-General has even attended a Committee meeting although Henning C.J. did invite the then holder of that office, Mr. I. MacFarlan, to the first meeting in 1944.

Until 1953 the Attorney-General was regarded as a nominal member of the Committee and was sent copies of the agenda and other papers circulated by the secretary. In 1955, after the rejection of a proposal to permit the use of prior convictions in subsequent civil proceedings as proof of the substance of the criminal offence, there seems to have been a drift in the relations between the Committee and the Government. The misunderstanding was eventually resolved and the Chief Justice instructed the Secretary to invite the Attorney-General to future meetings.

There is some evidence to show that the failure to act on certain recommendations of the Committee did strain relations with the Government in the 1950's. Four major Bills on Crown Immunity in Tort, Invitation of Actions, Transfer of Land, and Trustees had been prepared by the Committee between 1944 and 1948 but had not been enacted by the end of 1951. The clash with the Attorney-General in 1955 appeared to clear the air for since then there has been no indication of friction over failure to implement committee recommendations. In part this may be accounted for by the Committee's readiness to take into account political realities when making recommendations. It may also be that the Committee is not upset by the rejection of half of its total number of recommendations, and considers a success rate of 40% as satisfactory. It is essential to recognise that the

Committee has no more than an advisory role: one must accept that the government which it advises has the right to reject any of its recommendations. Also, the greater the support the greater is the incentive to accept recommendations so as to justify to the taxpayer expenditure of his money on what would otherwise be a bureaucratic luxury. At present, of course, the Victorian Government is under no such obligation.

New York Law Revision Commission.

In its relationship with the legislature the Commission has been scrupulous in its recognition of legislative supremacy. It has sought to avoid recommendations on topics in which the primary question was one of policy rather than one of law. This practice has been based on the opinion that the best work of the Commission can be done in areas in which lawyers have more to offer in solving the question than other skilled persons or groups.

When the Commission does recommend legislation, it attempts in all ways possible to convince that body of the correctness of the Commission's position. It does this firstly by submitting its full recommendation to each member of the Legislature individually. Secondly, it appends to each of its Bills a short statutory note as an explanation of the change. Thirdly the Commission attempts to identify every serious objection made to its proposal and it also attempts to consider them. Fourthly it maintains contact with the Legislative Committees considering its Bills, and with their clerks, and later with the Office of the Counsel to the Governor. Fifthly, it presents orally both explanation

and argument at a joint hearing of all the legislative committees considering its Bills during each session. Finally it sends its Executive Secretary to the Capitol during the course of the Session for the purpose of obtaining such information as it may require with respect to all of these matters, and for the purpose of transmitting to the Legislative Committees such actions as the Commission itself has taken with regard to measures which are before them .

The legislative success rate of the Commission would appear to be somewhere in the vicinity of 65%. A great deal of the reason for this must stem from the very cordial relations which exist between the Commission, the Lggislature and the Executive.

Conclusions:

It has been said by one commentator[53] that "Very little legislation ever originates within the Legislature itself. The Legislature is the tribunal to which are brought proposed changes in the rules governing our lives. That tribunal, weighing the arguments for and against, renders judgment by the adoption or rejection of the proposed amendment to the law." This may be an over-simplification, however, it emphasises the point that the legislature must be informed, and before enacting it must have confidence in those who inform and advise. This confidence can be

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53. Moffat. "The Legislative Process", 24 Cornell L.Q.223, pp.229

bought about by a high standard of advice and by ensuring that a sound basis of understanding links the legislature and the body responsible for making recommendations. If these two factors co-exist then there is every chance of a law reform commission enjoying a reasonable rate of legislative success.

Constitutionally, the Minister of Justice is responsible for law reform in New Zealand. He is Chairman of the Law Revision Commission and the Permanent Head of his Department is Deputy Chairman. Professor Northey sees (but does explain) advantages to this. "It is highly desirable that the Minister of Justice should remain Chairman of the Commission. No other Commission enjoys the advantages that flow from the New Zealand practice."[54]

It is highly desirable that a law reform agency in this country be fully aware of what measures of reform are likely to be acceptable to Parliament, and more importantly, to the Government of the day. It would be pointless for a law reform body to spend time and effort in developing a proposal which, because of its substance, was unacceptable as a matter of policy to the Government of the day, or which, because of its subject matter was not considered to warrant any sort of legislative priority. Obviously if liaison can be maintained between the law reformers and those in Parliament then a lot will have been done to overcome these problems.

This liaison can be maintained in one of at least three

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54. Northey, "The Mechanics of Law Reform", 1970. NZLJ.278, pp.282

ways. Firstly, as at the present time, the Attorney-General or a delegate of his, can be a member of the law reform agency. This is a practical arrangement which may work effectively where the law reform body is a part-time organisation. Where the law reform body is engaged on a full-time basis then obviously the Attorney-General would have to resort to a delegate.

The second way is for the law reform body to consult regularly with the Attorney-General (similar to the way the Executive Secretary of the New York Law Revision Commission consults with the Capitol each week). If there was some regular consultation from the law reform body to the Attorney-General, then it would be a needless duplication for the Attorney-General to have a delegate in the law reform body. Hence it is suggested that in a full-time New Zealand Law Reform Body the Administrative Secretary should consult regularly with the Attorney-General.

The third method is to permit the Attorney-General to scrutinize the proposed work of the law reformers (similar to the present arrangement for the Law Commission of England and Wales). However, if there is regular consultation between the Administrative Secretary and the Attorney-General there would be very little to be gained from empowering the Attorney-General to prohibit the law reform body from studying a particular topic.

Chapter 8.

CONCLUSIONS - A LAW COMMISSION FOR NEW ZEALAND.

In rejecting the proposal to establish in this country a law Commission similar to that in England and Wales, the Hon. J.R. Hanan said:

> "Few reforms of the law concern only lawyers, and most of them have varying social, economic or even moral implications that lawyers are perhaps no more fitted than others to weigh. To some degree almost every substantial measure is a policy measure, however divorced it may be from party politics in the ordinary sense."[55]

For this reason the former Attorney-General advocated the retention of the Law Revision Commission under the Chairmanship of the Minister of Justice and that those engaged in research should be "part-timers".

The scheme envisaged in this paper would, it is suggested, remedy those defects which the Hon. Mr. Hanan saw in adopting an "English Styled" Law Commission in this country.

In the light of overseas experience and taking into account local circumstances, it is suggested that a complete reappraisal needs to be made of the process of law reform in this country; in particular the following innovations should be made.

(a) To recommend to the Legislature amendments to

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55. The Law in a Changing Society, pp.18

to present enactments or proposed enactments.

(b) Of initiating additions to the law by recommending to the legislature reforms which the commission considers to be desirable.

(c) Of acting as an agency to which any interested parties can refer ideas for changes in the law.

(d) Of informing the community at large by use of the media, of any changes in the law which are recommended by the commission.

Five commissioners should be appointed to serve on the Commission, with one coming from the Judiciary, one from the Universities, and at least one should be a practitioner.

Each commissioner should be appointed for a minimum period of five years with provision that each appointee remain with the Commission until the completion of whatever project he or she is working on at the end of the five year period.

It is suggested that each Commissioner should receive a salary equivalent to that of a Supreme Court Judge.

The staff of the Commission would need to consist of an Administrative Secretary who should receive a salary approximating that of a Magistrate; at least one law draftsman (who, because of his expertise and skill would have to be paid a rate equivalent to that he would receive if working in the Parliamentary Counsel Offices), and as many research officers as the Commission deemed necessary (initially one would expect not more than about fifteen).

The functions of the Administrative Secretary would include: the delegation of research projects to the

research officers, ensuring that all interested parties receive copies of project studies so that they can make constructive submissions, the preparation of an annual report on the workings and achievements of the law reform body, publicising to the community the effects of the organisation's work which is enacted, to consult with the Attorney-General at regular intervals about projects which the Commission intends to study and the likelihood of suc h proposals being enacted.

The function of the law draftsmen would be to prepare draft Bills which encompass all of the proposals contained in the Commissioner's reports.

It is envisaged that a project would be assigned to a research officer (or team of research officers if the need arose) by the Administrative Secretary. The research officer(s) working under the supervision of a "Commissioner" would then prepare a report outlining the present state of the law; where the failings of the present law exist, and a suggestion of what changes should be made. This study would then be widely publicised to all interested parties who would be asked to forward written submissions to the Commissioner. Once all the submissions are received it is suggested that the research officers concerned and the Commissioners should go into Committee to analyse the proposals and submissions. From there it would be the duty of the original researchers to prepare a report on the findings of the Committee. This report would have to be endorsed by the Committee. The report, together

with the draft Bill would then have to be tabled before Parliament. If either the Government or a member elected to introduce the Bill then one of the original researchers and the supervising Commissioner should be available to sit on the floor of the House and act as advisors during the passage of the Bill.

The changes suggested in this paper are by no means original. However, if there is a weight of tradition against the proposals which have been outlined then "it is worth remembering that the apparent heresies of one generation become the orthodoxies of the next."[56]

In 1966 the Honourable Sir Edmund Davies, at a panel discussion of the Canadian Bar Association, in reference to England's Law Commission, said;

> "...Now at last we have a body of men sitting in constant session whose one calling is law reform. The distinction between them and those who (however self-sacrificially) sit spasmodically and snatch, as it were, a day or a half-day out of a busy life in Courts or the lecture room is immense. We now have a body of lawyers who can made a broad survey of the whole field of law, conduct or direct research, reflect upon its results, and work at the problems it presents day in, day out. With these facilities, and granted a reasonable degree of support from the profession and from the public, I hope and believe that, though it would be an exaggeration to say that the law Commission is set on a fair course, its journeys through the seas of obsolete, unintelligible, unnecessary and

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56. "Woodhouse Report" pp.31

insupportable laws may not infrequently bring it safely to harbour."[57]

If the principles outlined in this paper are ever adopted then perhaps one day a similar comment will be made of the "New Zealand Law Commission".

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57. A. Marshall, J.C.B.A. May 1971, pp.3

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