A number of significant policy issues would be involved in any decision to establish a mediation programme. Some of these issues are examined in this note, but that examination is clearly not exhaustive. The range and complexity of the issues which arise point to a need for wide-ranging consultation and for careful planning of any mediation programme.

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LAW REFORM—A FULL-TIME COMMISSION?

Stimulated by a paper[1] by Professor D. L. Mathieson the New Zealand Law Society appointed a sub-committee comprising Professor Mathieson and five practising lawyers to examine the various possibilities for restructuring the existing New Zealand law reform machinery.[2] Its recommendations form the basis of a 24-page submission made by the New Zealand Law Society to the Minister of Justice early in 1981.

The paper briefly describes the present procedures, discusses alleged deficiencies and calls, by way of remedy, for a modest full-time Law Reform Commission and revised procedures for processing the Commission's recommendations through the legislature. Not surprisingly the paper makes some valid criticisms of the present machinery (it would be a remarkable system which could not benefit from some change) but its proposed solutions to what it sees as irredeemable weaknesses are open to question.

The Society recognises that the present system of five Standing Law Reform Committees comprising practising lawyers, academic and government lawyers has much to commend it. It concludes that in terms of quantity and usually of quality the various committees have an enviable record. Moreover some 40 out of 71 recommendations have been implemented by the legislature. Why then the desire for change? The reasons given fall under two broad heads. First, a number of detailed criticisms are made about existing procedures of the various Standing Committees. These encompass suggestions of no efficient overall control; inefficient use of time; a process which is too slow and repetitive; a lack of expertise in each member of a committee on every topic dealt with by it; lack of lay representation; insufficient backup by way of research and drafting staff; lack of effective follow-up procedures following completion of a report and time wasted by members on drafting details. Given this melancholy recital it is perhaps surprising to find the Society in the next paragraph stating that "five Standing Committees have produced reports many of which have

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[1] *Revised Law Reform Machinery—A Practical Proposal* (1978) NZLJ 442.

[2] For a description of the present procedures see D. B. Collins (1976) NZLJ 441; G. S. Orr (1980) 10 Victoria University of Wellington Law Review 391 and J. H. Farrar (1980) 1 Canta L.R. 104.

been highly regarded by overseas law reform agencies". Can a system which produces results of this calibre be as deficient as the Society claims? Or is there an element of special pleading here? This is not the place to engage in a detailed discussion of the various alleged defects in the Standing Committee system. There is some force in some of them. But most, if not all, are capable of being remedied by the injection of modest additional resources or in some cases, by the utilisation of resources at present available, for example, funds held by the Department of Justice to commission research on specific topics. A case can be made for more effective oversight of the law reform programme and indeed for better forward planning. This, and more effective use of the time of Committees, are matters capable of being remedied without radical change to the present system. If the case for such change rested solely on the alleged disadvantages of the present system it would be far from compelling particularly given the relatively high success rate in the implimentation of recommendations.

But the Society's case for change does not rest solely on the foregoing matters. It sees in the future a need to tackle much broader law reform projects than have so far been attempted. Specifically, it contemplated two categories of task as standing out. One is the codification of various branches of the law. The other what it describes as wide-ranging reviews of a complicated network of laws and practice, e.g. the topic of police investigation of crime or the protection of privacy in its many aspects. "Huge tasks such as these are too large for a small standing committee and require a structure which enables day to day leadership by a full-time Law Reform Commissioner, assisted by adequate researchers responsible to him."

The Society assumes, without any discussion, that such "huge tasks" need to be undertaken. This overlooks, for instance, the basic question as to whether codification of a complete branch of the law is either necessary or desirable. There are respectable arguments both for and against codification. In the New Zealand context, a topic by topic approach has much to commend it and is more easily manageable.

It is readily conceded that "huge tasks" of the kind contemplated by the Society, assuming they are thought necessary, would be beyond the competence of the relatively small part-time standing committees. But likewise it seems they would be beyond the competence of the modest full-time body proposed by the Society. A much larger organisation would be required if such a Commission was not to become hopelessly engulfed. In the New Zealand context the more sensible and practical course would be to appoint one or more Task Forces to undertake specific major projects. The Chairman could, where desirable, come from the High Court bench for the relatively limited period required and then return to his judicial duties. In this way the particular expertise of the judge could be matched to the task in hand. This is not howover what the Society proposes.

The Law Society proposes the dismantlement of the present system including the five Standing Committees. It would substitute for it a full-time Law Reform Commissioner, a Deputy Commissioner, say five research officers and a system of ad hoc committees. The Commissioner must be either drawn from the High Court bench or be appointed a High Court judge from the bar. He would serve for five years only and then

either return to or assume High Court duties. Only in this way, the Society asserts, can the Commission have the necessary status. Either the Commissioner, or his Deputy, would chair each ad hoc committee appointed to consider topics undertaken by the Commission.

In proposing this new arrangement the Society has been heavily influenced by the existence overseas of a variety of full-time Law Reform Commissions. That they exist is undoubted. That they are as successful let alone more successful than our present system is neither considered nor debated by the Society. The one established fact is that they are enormously more expensive. Has the Society undertaken any kind of cost-benefit analysis? It seems not.

There are other fundamental questions raised by the Society's proposals. If the new Commission is to undertake a number of "huge tasks" and presumbaly some lesser ones also, the Commissioner and his Deputy will require to be legal paragons capable of wisely and knowledgeably chairing a wide range of disparate topics with equal facility. Is this a realistic expectation? Admittedly they will be assisted by ad hoc committees but if their role is intended to be one of leadership and inspiration it is likely to founder. How many ad hoc committees are envisaged? Presumably a dozen or more. The Commissioner is expected to have a major public relations function. He and his deputy will be supervising a variety of administrative arrangements and at the same time be chairing and leading discussions, settling draft reports, negotiating direct with the Minister of Justice and attending before Parliamentary Select Committees. All on the basis of a mini-commission. There is more than a distinct possibility that the proposed cure will be worse than the alleged malady.

The proposal to substitute for the five Standing Committees a system of an ad hoc committee for each topic deserves some examination. The Society rightly points out that not all members of a Standing Committee have expert knowledge of each topic considered by the committee. Nor, incidentally, would the proposed Commissioner or his Deputy. But the existing situation is not necessarily a disadvantage in all cases and in any event needs to be set off against the advantages of continuity and corporate outlook over a range of problems. There will however be occasions when a problem within a particular standing committee's jurisdiction would be better handled by an ad hoc committee specially selected for the purpose. The ad hoc Committee on Defamation is a case in point. But this practice can be resorted to along with the present standing committee system as readily as under the Society's proposals. Where desirable there can be overlapping membership. While, therefore, there may well be advantages in greater use of ad hoc committees this should not be seen as requiring the disbanding of the standing committees. The Public and Administrative Law Reform Committee for example has an honourable record of constructive reforms most of which have been speedily implemented. It would be a retrograde step to dismantle this Committee.

The Society was favourably impressed by the recommendations made by an Australian Senate Committee as to processing the reports of the Australian Law Reform Commission and recommends that they be adopted and applied to New Zealand. Briefly these involve, in the New Zealand context, removing from the Minister of Justice his present constitutional right

to decide what action, if any, he will take in respect to a Law Reform Commission report and imposing on him, and the Government, compulsory procedures vested in the Speaker of the House, to ensure early reference of all such reports to a Parliamentary Select Committee. Not surprisingly the Australian government rejected this proposal[3] and the Minister of Justice in New Zealand is unlikely to find it acceptable. The proposal is politically naive assuming as it does that in a given area of law-making, which may have important social and political ramifications, the responsibility of government to decide on its legislative programme should, in important respects, be subsumed by a non-elective, non-responsible body of lawyers. A constitutional innovation of this magnitude would require much more compelling reasons than those advanced by the Society. It overlooks that the secret of the relative success of the Standing Committees in seeing their reports implemented has been the close and harmonious relationship between the Minister, his department and the law reform agencies. Any attempt to circumvent this is likely to be counter-productive. It is apparent from the Society's report that it wishes to avoid or side-step the present procedure whereby the Minister of Justice seeks advice of his department on a Committee's recommendation. But a Minister is entitled if he chooses, and he generally does, to seek the comments of his advisers on recommendation for legislative change. The Society is unlikely to convince any Minister of Justice that he should forego this opportunity.

The Society further proposes that once a report has been tabled in Parliament under its suggested procedure, the Commission should be able publicly to seek reactions to its proposals and to analyse these and report further to the Minister. The aim, it is said, being to reduce the amount of guess-work as to the state of public opinion. Does the Society consider that politicians are unable to ascertain and gauge public opinion? Or is this rather a not very subtle way of enabling the Commission to gather wider support for its proposals? There seems to be more than a hint that the Society envisages the Commission as being akin to a fourth arm of government. If so, this suggests that the Society has lost sight of what should, in a democratic community, be the legitimate objective of any law reform agency, that is, after appropriate investigation to make recommendations for changes to the law. It is surely the prerogative of the government of the day, after informing itself as it thinks fit, to decide whether or not to implement any such recommendations and to determine their priority relative to other legislative commitments.

In summary the Society has failed to make out a convincing case for fundamental changes to our existing law reform structures. Nor are its proposals for legislative implementation of the Commission's recommendations either constitutionally sound or likely to be politically acceptable.

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[3] See Australian Law Reform Commission Annual Report 1980 pp.3-4.