

THE MACHINERY OF LAW REFORM IN
NEW ZEALAND

Department of Justice,
Wellington,
New Zealand.

This booklet gives a sketch of the working of the law reform machinery established by the late Mr J.R. Hanan in 1965 and foreshadowed in the statement issued by him earlier in that year, "The Law in a Changing Society". It is purely descriptive in character, and passes no judgments. Nor does it concern itself, except in passing, with the substance of the reforms that have been made or recommended.

Essentially the booklet is a companion-piece and a sequel to "The Law in a Changing Society". I believe that it may be helpful to have this up-to-date account of the way in which the Law Revision Commission, the various reform committees, and the Department of Justice are carrying out the functions entrusted to them. I commend it to all in New Zealand and overseas who are interested in the revision of the law, and particularly to those who have read "The Law in a Changing Society".

A handwritten signature in black ink, appearing to read 'J.L. Robson', written in a cursive style.

J.L. Robson
Secretary for Justice

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Law reform in a systematic way began in New Zealand when the Hon. H.G.R. Mason took office in 1935 as Attorney-General and Minister of Justice in the country's first Labour Government. In 1936, a legally qualified officer specialising in law reform was appointed to the Department of Justice, and in 1937 a Law Reform Committee was inaugurated.

Much of the original impetus for the establishment of a permanent law reform body came from a paper read and discussed at the 1936 Dominion Legal Conference. The Conference unanimously carried the following resolution :-

"That this Conference recommends the establishment of a Standing Committee along the lines of the Law Revision Committee in England, to consider and report on all matters committed to it relating to the Administration of Justice and the Reform of the Law; and the Honourable the Attorney-General be asked to bring before the Honourable the Acting Chief Justice the proceedings of the Conference and to confer with him on the establishment of the above Committee." (1)

Although the idea of the Law Revision Committee was inspired by the Law Reform Committee established in England by Lord Sankey, its constitution and method of working were very different. Essentially, its object was to bring together in the work of improving

(1) There is a full report of the proceedings in (1936) 12 New Zealand Law Journal 86-93. For a brief survey of New Zealand's law reform history prior to 1937, and of the Law Revision Committee's achievements during its first 18 years of existence, see B.J. Cameron in (1956) 32 New Zealand Law Journal, 72, 88 and 106.

the law representatives of all the interests that could contribute to that goal. Its chairman was the Attorney-General and it included a nominee of the Parliamentary Opposition and for many years the chairman of the Statutes Revision Committee of Parliament, the Permanent Heads of the principal legal Departments of State, (1) and representatives of the Law Society and of the University law faculties. The Judiciary by its own decision did not take part in the work of the Committee.

The possibility that the law reform system established by Mr Mason might be in need of overhaul appears to have been first officially suggested in the annual report of the Department of Justice presented in 1961. A large part of that report was devoted to a special survey of the subject of law reform.

After describing the formation of the Law Revision Committee, the report continues :-

"The constitution of the Committee has not been reviewed since it was set up, and it may be that the question whether improvements could be made should be looked at."

There the matter rested for some time. Then, in speaking to a conference on law reform held at Auckland, in April 1965, the Minister of Justice, the Hon. J.R. Hanan, made the following comments :-

"There is an increasingly universal recognition ... of the need for review to be systematic and informed if Parliament is to adequately carry out its role of developing the law. There must be efficient machinery for the study of the law and the formulation of proposals for its reform.

(1) The Solicitor-General, the Law Draftsman and the Secretary for Justice.

Here in New Zealand we have been some distance ahead of most other common law jurisdictions in this matter. This is something that I think outsiders often appreciate better than we do ourselves. With our two principal agencies for reviewing the law - the Law Revision Committee and the Department of Justice - working in close liaison we have had in effect a law commission during the last 30 years. I am aware that our existing machinery is imperfect, but in my opinion the sensible thing is to improve it rather than to start again, and I can tell you that I hope soon to announce proposals to improve the efficiency of law revision in New Zealand."

Later that year, he issued a comprehensive policy statement on law reform entitled "The Law in a Changing Society". This is now out of print, but its central proposals are reproduced here:-

"The present Law Revision Committee might be reconstituted as a Law Revision Commission of twelve or so members appointed by and under the chairmanship of the Minister of Justice, to be responsible for the oversight of the law reform programme. The new Commission should certainly include members of the Legislature, practising lawyers and law teachers, and should probably include laymen, in addition to the Permanent Heads of the three main legal departments of State. Since obviously the whole law cannot be reformed at once, it would be the Commission's task to map out the territory, to decide priorities, to allocate particular items to standing committees, special committees or other bodies, and to review progress annually. The Commission would naturally bear in mind that deliberation is better than haste and that proper study is not susceptible of being done to a rigid timetable.

In addition to the Law Revision Commission there might be a number of standing committees, covering various parts of the law, to which proposals can be referred. The committees would consider suggestions much as does the present Law Revision Committee and they could request reports from sub-committees, individuals or Government departments. The committees, which might consist of six or eight members, would make reports direct to the Minister of Justice and where suitable these reports should be published. One such committee might work in the field of

public and administrative law, another in property and trustee law. Another perhaps might concern itself with contracts and commercial law and a fourth might undertake the revision of the company law. Experience might indicate the desirability of other committees or a modification of the province of existing ones.....

It bears repeating that an effective and comprehensive policy of law reform requires that no part of the general law should be outside the scope of the machinery for law revision.

The Law Revision Commission might also be free to suggest a need for the examination of any legislation, but it would not itself undertake this task or directly arrange for it to be done."

Copies of this statement were published in booklet form, and circulated to Members of Parliament, the judiciary, the legal profession, law faculties, the Press, Government departments and other interested persons and bodies in New Zealand and overseas.

In December 1965 Mr Hanan announced the establishment and membership of the Law Revision Commission, broadly in accordance with the proposals quoted from "The Law in a Changing Society". He said the proposals had been favourably received, and he had decided to begin putting them into effect. The new Law Revision Commission met for the first time on 25 February 1966. In June that year, the Minister announced the membership of the standing committees on law reform.

The role of the Minister and his Department:

Constitutionally, the Minister of Justice is responsible to Parliament for law reform in New Zealand. He is chairman of the Law Revision Commission and the Permanent Head of his Department is deputy chairman.(1)

(1) It should be noted however that since 1935 the person who has held the office of Minister of Justice has also been Attorney-General. In many other Commonwealth jurisdictions law reform is in the hands of the Attorney-General.

The function of the Commission and of the committees is therefore to advise the Minister, who in accordance with normal constitutional practice also seeks advice from his Department.

The Department of Justice presents an annual report to the Law Revision Commission, summarising progress made and suggesting items for addition to the programme of law reform. It services the Commission and the committees, and provides their secretariat. It provides facilities for research and prepares papers for the assistance of the committees, but its role here has been severely limited by a shortage of qualified staff.

The Department also initiates and prepares proposals for law reform in certain areas that are outside the scope of a standing committee or where the element of social or political policy is predominant, although it does not itself draft bills. For example, the major family law reforms that have been made in the last six years were prepared within the Department, in consultation with practising and academic lawyers and others. In another field, the Department was responsible for preparing the legislation giving effect to the election policy of the Government to establish an Ombudsman and later to extend his jurisdiction to certain classes of local authority.

Finally, the Department of Justice is responsible for making recommendations to the Minister in relation to the inclusion in the Government's legislative programme of the recommendations for reform made by committees.

The Law Revision Commission

The Law Revision Commission does not operate under any statute or other formal constituent document, having been created informally by 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."

At present (September 1969) the Commission has 17 members, many of whom were formerly members of the Law Revision Committee. As already stated, the chairman is the Minister of Justice, and the Permanent Head of the Department of Justice is deputy chairman. One member is a Court of Appeal Judge, and one is a member of the Parliamentary Opposition. The Hon. H.G.R. Mason (who has now retired both from politics and legal practice) is also a member, as are the Solicitor-General, four professors of law, Counsel to the Law Drafting Office and six practising or retired members of the legal profession (three of whom are Queen's Counsel). There are no lay members. The secretary is a qualified lawyer in the Department of Justice.

The law reform committees

There are four standing law reform committees. They are respectively the Property Law and Equity, Torts and General Law, Public and Administrative Law, and Contracts and Commercial Law Reform Committees. The membership of the committees and the Commission is given in the current edition of the New Zealand Law Register. In general terms, approximately the same proportion of practising, academic, and government lawyers may be found on the committees as that outlined above with regard to the Commission. Once again, the secretary of each committee is a lawyer employed in the

Department of Justice.

One point to be noted is that these standing committees do not cover the whole of the general law. Criminal law and family law for example are outside their scope. So too in practice is company law. A review of this branch of the law is now being made by a special Committee under the chairmanship of the Hon. Mr Justice Macarthur. The criminal law was revised by the Crimes Act 1961. At the moment therefore, this field is somewhat quiescent, but it is possible that a Criminal Law Reform Committee may be set up at some future date. The Police Offences Act, which creates the more common minor offences, is to be reviewed by a special committee consisting of a Magistrate as consultant, nominees of the Law Society, and representatives of the Police and of the Department of Justice.

As already mentioned, work on family law reform has been done within the Department of Justice. Further change would perhaps best be approached through ad hoc committees including non-lawyers, rather than by establishing a standing committee. The very large element of social policy and the moral implications in much family law may render this method more appropriate. However, this is a matter for future decision.

It is important to appreciate that the four standing committees are not merely sub-committees of the Law Revision Commission. They are autonomous bodies appointed by and directly responsible to the Minister of Justice. In fact, for practical purposes, each committee is essentially an independent expert commission, with defined areas of responsibility. The Law Revision Commission, on the other hand, is an initiating and supervisory body, and the only limitations on its terms of reference are practical ones. The Commission's task is, as "The Law in a Changing Society" says, -

"to map out the territory, to decide priorities, to allocate particular items to standing committees, special committees or other bodies, and to review progress annually."

Despite the autonomy of the committees, a close liaison exists between them and the Commission, because of the policy of appointing the chairman of each committee a member of the Commission.

The system in operation

At its first meeting in February 1966, the Law Revision Commission approved a fairly comprehensive programme of law reform. It decided the distribution of items on this programme between the standing law reform committees, in one or two cases suggesting an ad hoc committee as the most appropriate body to undertake a study.

Each year (usually in February) the Commission reviews progress in a general way, considers the addition of items to the programme, and advises the Minister which is the most suitable committee to refer these items to. In doing this it has the assistance of a report prepared by the Department of Justice. There is thus a fairly unified and systematic approach to law reform.

In a few cases proposals for study are referred to one of the standing committees directly by the Minister of Justice, although most major matters come from the Commission. Any person or organisation is free to suggest to the Minister new topics which are in need of examination and reform. Such suggestions are received from a wide variety of sources, notably from the New Zealand Law Society and individual legal practitioners. From time to time the standing committees also suggest that a particular topic be examined. These suggestions are made either at the time a problem is noticed by the committee, or in the annual report that each chairman makes to the Minister.

In all cases the standing committees make their reports directly to the Minister of Justice. Where the subject of the report was allocated to the committee by the Commission, a copy is sent to each member of the Commission. Any member is free to make such comments as he thinks fit or at any ordinary meeting of the Commission to raise the question of any report of a committee presented since the previous meeting. There is a formal arrangement that at the request of not less than four members of the Commission the Minister will convene an extraordinary meeting of the Commission to discuss a report. This procedure has not yet been used. In practice the more important reports are usually placed by the Minister on the Commission's agenda.

It is further accepted that no report of a standing committee is to be regarded as carrying the authority of the Commission unless it has been considered and approved at a meeting of the Commission.

Whether or not the report of a standing committee is considered by the Commission, the normal practice is to make it available to the Law Society and to all interested persons for study. There is thus usually a time lag between the presentation of a report and the drafting of any bill based on that report. However this is not to be regarded as a rule without exceptions since the Minister as a member of the Government must necessarily be free to introduce legislation at such time as he thinks proper.

APPENDIX I

As a background to this subject, it is instructive to consider the marked change in attitudes and approach to law reform since the Law Revision Committee was established in 1937. In those days, New Zealand's attitudes towards Britain and the Empire were very different. In the legal world there was much less independence of outlook. We were concerned basically with keeping our law in step with that of England, rather than developing it to suit our own conditions. The theory was that the Empire should be, as it were, one large legal system. Thus, with our laws modelled as closely as possible on England's, we would be able to directly borrow and apply English decisions and textbooks.

This attitude is exemplified in the inaugural address delivered by the Hon. H.G.R. Mason, at the first meeting of the Law Revision Committee on 26 August 1937. While noting that "New Zealand conditions are not necessarily identical with those obtaining in England", he went on to say -

"It will be necessary for us to consider to what extent English reforms are applicable in New Zealand, although as a rule it will be desirable to adopt them as far as possible so that our general law may conform with that of England. Only by that means will the English decisions and textbooks be of greatest value in this Dominion." (emphasis added)

In discussing the Committee's method of operation, Mr Mason said -

"I strongly believe in a policy of cautious progressiveness, particularly in the consideration of matters pertaining to the common law. This Committee will have the advantage of the reports of the English Law Revision Committee from time to time, and I suggest that a convenient method of procedure would be to refer to special sub-committees these reports for comparison of our law with the English law and for a report to be brought down for consideration by a committee as a whole as to the practicability of the adoption of the English proposals. I suggest also that it would be convenient to defer legislative action in New Zealand until we have had an

opportunity of perusing such legislation as may have been introduced in England relating to such matters."

Compare this approach with the much more independent line taken in "The Law in a Changing Society": Mr Hanan mentioned that one fundamental weakness of law reform in New Zealand was the attitude "that important changes in the common law should not normally be made except in accordance with changes that have taken place in England." He thought that this

"... is not good enough, and does not seem compatible with our needs, status or resources. The most fitting attitude, it may be suggested, is to retain the utmost respect for the principles of justice and wisdom that underlie the common law but no longer to test proposed changes by the measure of English law. Reforms in the content of the law ought not to have to await reforms made in England, nor should English reforms necessarily be copied in New Zealand. The primary aim should be to select whatever seems best for New Zealand and freely adapt it to our needs and desires, whether it comes from England or another country or is an original product."

Mr Hanan thought that the "desire for conformity with English law, for the sake of conformity seems now much less strong, and we are witnessing a return to the more independent temper of practice in the late 19th century."

A problem indirectly associated with this change of attitude was whether, in improving our law reform machinery, to follow the British lead of establishing full-time Law Commissions, or to refurbish and upgrade the existing machinery. This was discussed at some length in "The Law in a Changing Society."⁽¹⁾ The Minister considered that a full-time Law Commission

(1) It is also mentioned in Appendix II.

"would in some respects be out of place in the New Zealand setting ... I feel that the benefits that might be derived from a commission on the British model can be better and more effectively achieved by other means." This view is then supported with an analysis of the different constitutional and historical backgrounds of law reform in England and New Zealand.

APPENDIX II

EXTRACT FROM ADDRESS BY HON. MR HANAN
ON THE FUTURE OF LAW REFORM, DELIVERED
AT NEW ZEALAND LAW SOCIETY'S CENTENNIAL
LAW CONFERENCE APRIL 1969

"Like many other countries, not long ago we examined our machinery for law reform. I will not say that we have followed the fashion in this, because we were well up with the field, and opened up the matter with our own needs in mind. And unlike most other countries, we felt that what we had was essentially satisfactory. We therefore chose to overhaul the old motor rather than to get a brand new law commission model. There has been some criticism of this, but it is my conviction that the course we have chosen is the wisest one for us. The proof of the pudding is in the eating, and if we take the pragmatic view and look at the results expressed in legislation our system gains by comparison.

Our main weakness - let me be quite frank about it - is in our facilities for research (which ought to include social as well as purely legal inquiry) and for turning proposals into Parliamentary legislation. Partly it is an absolute shortage of the highly qualified and specialised staff that we need and partly a lack of sufficient finance. These deficiencies I may add are not confined to New Zealand. It is not easy to convince any Minister of Finance that legal research deserves much of a priority among so many competing claims to spend the taxpayers' money. Usually the economic benefits of law reform are impossible to express in costing terms. Even the social benefits are often indirect.

The task is to persuade Governments that law reform is important and that it cannot be done properly on the cheap. This is a slow process, and if we are to get anywhere it is essential to have the support of the legal profession.

However, the point I make now is that this difficulty will still exist if we want to set up a Law Revision Commission closer to those that operate in Great Britain, New South Wales and Ontario, for example.

There is moreover a further danger with a fulltime Commission. By turning the responsibility for law reform over to a more or less autonomous body there may be a risk of losing the necessary close contact with the ordinary political and administrative system. If this happened it could well mean less rather than more reform. What we should be careful to avoid - and we have succeeded in avoiding it in the past - is to have a series of admirable and thoughtful reports most of which simply gather dust in pigeonholes. It is my belief that under our system - in which the different interests including Her Majesty's Opposition participate in the

actual preparation of proposals - we win support for change much more readily than under any conceivable alternative.

The former Law Revision Committee did its best work in fields that from a political point of view were non-contentious. Where a particular matter has political implications, even if it also has an element of "lawyers law", difficulties arise. As the scope of law reform widens and more fundamental problems are attacked the contentious element will inevitably increase. Where there are important political considerations, it may well be best to pursue improvement through the ordinary political process rather than through the normal law reform machinery. It would for instance have been completely unsatisfactory to turn the preparation of legislative proposals for establishing an Ombudsman over to a Law Revision Committee or Commission, however distinguished."

APPENDIX III

REPORTS OF STANDING COMMITTEES
PRESENTED TO THE MINISTER OF JUSTICE
JANUARY 1967 TO SEPTEMBER 1969

CONTRACTS AND COMMERCIAL LAW REFORM COMMITTEE

| <u>Title</u> | <u>Date</u> | <u>Availability</u> |
|---|-------------|---------------------|
| 1. Misrepresentation and Breach of Contract | 1967 | Printed |
| 2. Carriage by Air (interim report) | 1967 | Not printed |
| 3. Carriage of Goods | 1968 | Printed |
| 4. Moneylenders Act 1908 (interim report) | 1968 | Not printed |
| 5. Illegal Contracts | 1969 | Printed |
| 6. Layby Sales | 1969 | Printed |
| 7. Validation of Cheques after Death | 1969 | Printed |

PROPERTY LAW AND EQUITY REFORM COMMITTEE

| | | |
|--|------|-------------|
| 1. Claims by Grandchildren under the Family Protection Act 1955. | 1967 | Not printed |
| 2. Contracts of Sale subject to finance | 1967 | " |
| 3. Strata Titles | 1968 | " |
| 4. Section 80A Property Law Act 1952 | 1968 | " |
| 5. Section 81A Property Law Act 1952 | 1968 | " |
| 6. Contractors' Liens Bill | 1968 | " |
| 7. Contracting with oneself | 1968 | " |

TORTS AND GENERAL LAW REFORM COMMITTEE

| | | |
|--|---|---------|
| 1. Hearsay Evidence | 1967 | Printed |
| 2. Miscellaneous Actions (breach of promise, enticement, seduction, harbouring and damages for adultery) | 1968 | " |
| 3. Occupiers' Liability to Trespassers. | To be presented to Minister soon. Will probably be printed. | |

PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

- | | | |
|---|------|---------|
| 1. Appeals from Administrative Tribunals. | 1968 | Printed |
| 2. Appeals from Administrative Tribunals (second report) | 1969 | " |

APPENDIX IV

MATTERS STILL BEFORE THE COMMITTEES

CONTRACTS & COMMERCIAL LAW REFORM COMMITTEE

Secured transactions.

Sale of goods.

Door to Door Sales Act 1967 - textual review.

Moneylenders

Exclusion clauses in motor vehicle dealers' agreements.

Marine insurance:

(i) Atkinson v. South British Insurance Co. Ltd.
[1968] N.Z.L.R. 45; and

(ii) Renewal of hull policies

Cut-rate comprehensive insurance policies

Nominations in respect of Superannuation and Pension
Funds, as they affect the law of testamentary
dispositions.

Auctions.

PROPERTY LAW & EQUITY REFORM COMMITTEE

Executors and administrators

Landlord and tenant

Fencing Act 1908

Charitable Trusts Act (with special emphasis on schemes)

Trustee Investments

Redundant Easements

Indefeasibility of Title to Land (Frazer v. Walker [1967]
1 All E.R. 649)

Witnessing of wills - In the Estate of Bravda [1968]
2 All E.R. 217

Statutory Forms for Conditions of Sale

TORTS & GENERAL LAW REFORM COMMITTEE

Remaining miscellaneous actions (The actions for loss of
services and of consortium)

Products Liability

Theft of trade secrets and unfair competition

The non-feasance rule

Damage caused by animals

Action for Inducing Breach of Contract

TORTS AND GENERAL LAW REFORM COMMITTEE (contd)

Rule in Hollington v. Hewthorn [1943] K.B. 587
McCallion v. Dodd [1966] N.Z.L.R. 710

PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

Crown Privilege

Judicial Control of Administrative Acts

The Constitution and Procedure of Administrative
Tribunals