F W Guest Memorial Lecture 1991

PHILOSOPHIES OF LAW REFORM

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Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

To give a lecture in memory of Professor Frank Guest is a great privilege. I am happy to repeat what I was able to say a few years ago in the Review published by this Law School – as a junior colleague in the teaching of law, I was enriched by Professor Guest's broad wisdom, his experience, his wit and his friendship.[1]

Thinking of his characteristics I have tried, in preparing what I am to say, to be both practical and philosophical, to move, as he did in his outstanding inaugural lecture,[2] back and forth between the facts and the principles, the detail and the theory. I hope also to suggest matters which the legal profession and the university should address.

My topic is one which I think Professor Guest would approve – philosophies of law reform. I consider that large matter by brief and selective answers to four questions:

The first is, what is the question?
The second, what are the facts?
Third, who should handle the particular form and how? and
Fourth, by reference to what principles?

1 What Is the Question?

(i) How wide should the question be?

It is classic advice, according to one of my mentors, to see a matter steadily and to see it whole.[3] Too often hasty and partial glimpses have misled those introducing change. Some of you will recall all too clearly the various enactments relating to tertiary education introduced in 1989 and 1990: the fragmentation of the executive and parliamentary process

* President of the New Zealand Law Commission; Professor Emeritus, Victoria University of Wellington. I am grateful to colleagues for valuable comments on drafts of this paper, which was delivered at the University of Otago on 30 April 1991.

1 K J Keith, "Professor Smillie's Alternative Bill of Rights: a Comment" (1986) 6 Otago LR 208.

2 F W Guest, "Freedom and Status" republished in (1968) 1 Otago LR 265.

3 Sir Alan Danks; eg see Information Authority, *Annual Report and Concluding Report* 1988 AJHR E 27, 2.

meant that for some time no one – including Ministers and their advisers as well as those who were to be affected by the legislation and who wished to make submissions on it – could see the whole edifice. It did not exist. That was bad law making, and although in the end much of the mischief (actual and potential) was undone, time and money were wasted and goodwill damaged. And not all of the mischief has yet been undone. The resulting legislation is unnecessarily difficult.[4]

The limit in section 27 of the Serious Fraud Office Act 1990 on the privilege against self-incrimination provides another instance of a matter being addressed too narrowly. The consequence of such a fragmented approach is likely to be a wilderness of single instances in the statute book, governed by no clear principle, threatening established values and producing apparently arbitrary results. So, if a particular fraud is investigated by the new Office rather than by the police, those suspected or possibly involved are subject to greater duties to cooperate with the investigation.

Those questions were too narrow. In other cases the question addressed is too broad – in a practical or theoretical sense or both. The protection of personal information held by third parties provides a current illustration. Should any reform apply to all information of a personal nature held by anyone at all or should it be limited – for instance to information held in the public sector? The Justice Department has urged the wider approach, the Information Authority the narrower one.[5] The second, narrower answer would not preclude extending an established regime to particular private areas. But pragmatism and prudence, together with the established body of principles and institutions relating to official information, support the advice given by a Canadian expert to a seminar in Wellington last year: for Professor David Flaherty it is better to apply the principles and process to the public sector first. The private sector can be covered later.[6] An example of that progression is the recent extension of the Australian Privacy Act 1988 to information held by credit reporting agencies and credit providers.

(ii) What is the right question?

A second, critical matter about the question is its *content.* Consider the enormous insight that comes from recasting the question of the entitlement to compensation of persons incapacitated by injury or illness so that it is separated from the liability of any wrongdoer or any duty to indemnify, say, of an employer. As long ago as 1897 an English barrister, in introducing a survey of the law of employers' liability and insurance against accident in over forty jurisdictions, recorded the growing conviction that the only satisfactory solution was to be found in abandoning altogether

4 Education Amendment Acts 1989 and 1990. See also *Report of the Legislation Advisory Committee* (Report No 5, March 1990) para 71.

5 Justice Department 1990 Briefing Papers to the Minister of Justice, Ch 6 and *Report of the Information Authority on the Subject of Collection and Use of Personal Information* (May 1988), 1988 AJHR E27 B paras 16-22.

6 See "Protecting Privacy in Surveillance Societies" (May 1990) No 22, Institute of Policy Studies Newsletter (VUW) 5, 8.

the idea of employers' liability. The problem should, he said, be treated as one of putting on a good economic basis a portion of the necessary taxation of the state. He saw precautions against accident and enforcement of penal provisions about safety against employers and employees as essentially distinct.[7]

A personal illustration of this point is provided by my membership of the Royal Commission on the Electoral System. At a critical stage in my thinking I realised that I was not considering the right question. The real question was not: how should we elect our members of parliament? I had started too far down the track and needed to step back. The right question was: what do we have elections for? The main answer to that question these days is to choose a government. We vote to indicate the party we wish to have in government. As a superb essay by Maitland taught me, those who were elected 600 years ago were not in general there to pass laws or to raise taxes or to authorise spending, far less to support a government responsible to them and ultimately to the broad electorate made up of all the people.[8] We are no longer electing a constituency member simply to go to Westminster to help the Queen handle some of her business. The task of those elected people has now been completely transformed. But the means of getting them there and indirectly into government has not been.

A third instance of getting the question right relates to the reform of the law of official secrets or official information. At an early meeting of the Danks Committee, one member (a graduate of this University) stated the question elegantly and clearly by comparing Whitehall with Washington: is official paper the Queen's or is it the people's? Slightly to restate the question: is it the law that official information is secret unless the Queen decides to release it, or that official information is available to its owner — the people — unless there is good reason to withhold it? The Committee and the resulting legislation gave the second answer. The prohibition of Whitehall was replaced by the freedom of Washington.[9]

My last example of finding the right question relates to the matter which Mr Colin Withnall QC considered so interestingly on this occasion last year. Professor John Smillie and Professor Craig Brown have also recently addressed it: who is to bear the cost of restoring defective buildings, especially relatively new dwellinghouses? Those discussions, like the Legal

7 W Gorst Clay, "The Law of Employers' Liability and Insurance against Accidents" (1897) 2 J of the Society of Comparative Legislation 1, 1-2.

8 Introduction to Memoranda de Parliaments 1305, Records of the Parliament in the thirty-third year of the reign of King Edward the First, edited by F W Maitland, Rolls Series 1893, reprinted in Maitland, *Selected Essays* (1936) 1 and in Helen Cam (ed), *Selected Historical Essays of F W Maitland* (1957) 52; see especially his conclusions about the negligible legislative and absent taxing functions compared with the abundance of petitions and judicial business which was the vast bulk of the business of what was an emergent court. See the excellent discussion by G R Elton, *F W Maitland* (1985) 56-59. See also the Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* (December 1986) ch 1.

9 Official Secrets Act 1951, s 6; cf Official Information Act 1982, ss 4, 5, 21 and 24 and the reports of the Committee on Official Information (the Danks Committee).

Research Foundation seminar held in Auckland in March,[10] demonstrate that the relevant issues of tort liability are fascinating, difficult – and productive of complex, costly litigation. The divergent views of the law taken by the New Zealand Court of Appeal and the House of Lords leave many unresolved questions.

What is the standard of care of the builder, the architect, the engineer, the local authority and, potentially, the building certifier? If more than one of them has fallen below the standard, how do rules of contribution operate between them if damage results? Or between them and the owner? And when is the claim, especially in respect of latent defects, time barred? When the questions are asked in this way, the Law Commission's report on limitation defences,[11] the Building Bill before Parliament at the moment, and various Australian proposals regulating occupational liability all become relevant.

But is it sensible to think about who should bear the cost of restoring a building only in terms of the civil liability of a wrongdoer? Again, as with compensation for personal injury, might not the two matters be separated in whole or part? Does not the theory of Sir Owen Woodhouse and his colleagues apply here as well?

Builders and others who carry out their work in a negligent way, breaching the standards expected of them, can be called to account through other proceedings. They might be disciplined under contractual or statutory powers by the relevant occupational body; they might be the subject of a public inquiry; they might be prosecuted in criminal proceedings; and they might as a consequence lose business, for we should keep in mind the wide range of non-legal sanctions and forces for compliance with good standards. And in any event if builders or architects are insured against liability, as they very often are, or if they are no longer in business or not worth suing, are they really being called to account by civil liability?

Restoration of the house can be handled as a matter entirely separate from making the builder, the architect or the local authority responsible. The builder, an association of builders, or the owner, either voluntarily or under a compulsory scheme, might contribute to a fund to meet the cost of restoring defects which become apparent within, say, ten years. As newspaper advertisements indicated a week or two back the New Zealand Master Builders are leading the way with their own voluntary scheme. Legislation in the State of Victoria indicates one way a compulsory scheme might be established. It provides a guarantee to owners of new dwellings. The approved guarantor – the Housing Guarantee Fund Ltd – guarantees for seven years the performance of an approved builder's contract to the building owner and to the owner's successors in title. The guarantor is also obliged to make good loss caused by substandard work (including the move-

10 C S Withnall QC, "Negligence and the House that Jack Built" (1990) 7 Otago LR 189; J Smillie, "Compensation for Latent Building Defects" [1990] NZLJ 310; B Feldthusen and C Brown, "Pure Economic Loss: Who Should Pay, When and How?" in Legal Research Foundation Inc, *Negligence after Murphy* v *Brentwood DC* (seminar proceedings, March 1991).

11 NZLC R6, *Limitation Defences in Civil Proceedings* (1988).

ment of foundations). The maximum libility under the guarantee is $40,000; there are also minima, depending on the time of the claim. All owners contribute a one off payment, fixed at $160 in 1989.[12] To me it is comparable to the life insurance policy I took out as a new house owner to cover my mortgage liabilities.

The advantages of such an approach appear plain. The houses are restored without expensive controversy and perhaps litigation, and money is paid promptly; the overall cost is carried by those who benefit from the building of new houses (their owners) and not by the general ratepayer (as is the case where the local authority, often seen as having the deepest pocket, becomes the principal or sole defendant); and the builder or other person at fault can still be held responsible through distinct proceedings, including under the Victorian legislation the revocation of a defaulting builder's approval and consequent ability to benefit from the scheme.

These examples all illustrate the importance of the questions being asked. They will always affect the answers that emerge to provide a basis for reform, and so require careful and critical consideration.

Some of you will know Gertrude Stein's last words. As she was being taken into the operating theatre, she asked Alice B Toklas "What is the answer?" Alice was silent. "In that case, what is the question?"[13]

2 *What Are the Facts?*

Lawyers rightly insist on establishing the facts. In legal practice that insistence mainly involves the assembling of information on a particular case, its preparation if necessary for trial, the presentation of the evidence at trial, and the writing of the judgment.

Law reform also shows the central importance of assembling the facts. Let me mention aspects of the facts which the Law Commission has brought together in three of its inquiries.

(i) Limitation periods

The Limitation Act 1950 imposes a time limit of six years on the commencement of most civil actions. A survey of the cases filed in a three month period in three High Court registries showed that, for the main categories of claims, the median time between the alleged breach of obligation and the filing of a claim varied between 26 days and eight months. Only 23 of the 347 cases in the sample were filed more than three years after the alleged breach. And a mere nine of these were filed after six years. Those figures quickly helped to put into context a decision on the length of the basic period: should it be six years or three or even less? They also helped to isolate the hard cases involving latent defects, where special attention had to be given to determining when the period began to run and to including a long stop provision.[14]

12 House Contracts Guarantee Act 1987 (Vic), summarised in Building Industry Commission, *Reform of Building Controls* (January 1990).

13 Janet Hobhouse, *Everybody who was Anybody: A Biography of Gertrude Stein* (1975) 230.

14 NZLC PP3, *The Limitation Act 1950* (1987).

(ii) Accident compensation

My second example relates to the accident compensation scheme. Looking back, I think that a principal value of the Law Commission's report on the scheme is its examination of the actual facts.[15] Those facts provide the answer to the frequent claim about the "ruinous costs" of the scheme and its alleged impact on the competitive edge of New Zealand business.

First, the *overall cost.* As a percentage of gross domestic product the cost of the New Zealand scheme was significantly lower than the combined cost of the premiums for workers compensation and compulsory motor vehicle insurance in Australia. Moreover, those two schemes had a narrower cover, not including injuries at home, or in sporting or outdoor activities, or at the hands of the health professions. They also did not include those employers and vehicle owners, most notably the Government, who self insure. The overall cost of the accident compensation scheme is *not* high — seen comparatively. And consider too the average daily cost for each New Zealander of 24 hour cover: about one dollar.

Second, the explanation of *recent increases.* This has caused considerable concern since the mid 1980s, and still does. The report indicates small increases in the real amounts paid to new claimants. But, overall, claim numbers have not changed greatly from year to year. What has increased — as in part is to be expected with a maturing compensation scheme — is the amount being paid to the long term incapacitated. A related serious concern is the increase in the average length of the payment of earnings related compensation; this is connected to a legislative change made in 1985 and to growing unemployment. Overall the increases were comparable with those in workers compensation schemes elsewhere. Small increases could also be attributed to fraud, some of which could be prevented by changing rules and practices.

Third, the *extra cost* which would be involved in differently constituted schemes. The administrative cost of a universal scheme should be considerably less than that of fragmented schemes; by their very nature they generate disputes about coverage. The accident compensation scheme has generally cost less than 10% of total expenditure to administer. On one Commission calculation, the additional costs of other schemes could run to $400 million each year. And that does not cover the cost to the state of providing extra tribunals, courts, judges and associated staff if the number and complexity of disputes increase.

Fourth, the *cost of the levies.* For individual earners and motor vehicle owners these were on the whole lower than comparable figures elsewhere, and the earners' levy provides wider coverage. The earners' levies are even lower now. The reduction that would be achieved by removing the non-work accidents element from the earners' levy would be smaller than that already accorded to many categories of employment in recent years. And the justification for that removal has to be measured against the removal at present of areas of liability, for instance in respect of unsafe buildings,

15 NZLC R3, *The Accident Compensation Scheme* (1987); NZLC R4, *Personal Injury: Prevention and Recovery* (1988).

faulty products or faulty medical procedures. The earners' levy also does not pay for the public hospital costs of work injuries nor for work accidents on the road.

(iii) The structure of the courts

The Law Commission's review of the courts provides my final example of the importance of facts.[16] How many judges of which category are handling how many cases of which character, for how many hours each day and with what results? The general picture gained by answering those questions enables broader thinking and proposals for the reallocation of business: out of the court system entirely, to registrars, and between courts or groups of judges. And it leads to proposals as well about the total numbers of judges and the numbers in particular courts.

The figures showed first that too much business had moved into the top end of the court system, the Court of Appeal and the High Court. That judgment could be made by comparisons with the position after the Beattie reforms in the early 1980s and with the position in comparable jurisdictions, and by reference to trends over a longer period.

Business should be moved down the system. That was broadly agreed. That movement should over time reduce the number of High Court judges – to about 20, we thought in 1989. This compared with the current Victorian Supreme Court figure of 25. (The comparison is not exact: in that state the federal courts exercise relevant jurisdiction, but the Supreme Court judges also provide in effect the Victorian Court of Appeal.)

The figures, secondly, raised questions about the sitting hours of District Court judges. Their average daily sitting hours of about three were to be compared with actual or recommended figures of about five hours for similar or more senior courts elsewhere. Also relevant was the wish of judges in that Court to have heavier and more substantial responsibilities. When taken with the business to be transferred from the High Court, these matters led us to conclude that the numbers of District Court judges might drop from about 100 by 25 or more. The Department of Justice advised that the annual all up cost for the support of each judge of that Court was $350,000 (without provision for superannuation).

To complete this consideration of my second question, I should recall a warning about giving disproportionate attention to facts. It was issued by Jorge Luis Borges in a baroque fragment titled "Of Exactitude in Science". In that Empire of which he wrote the craft of cartography attained perfection to the point that the College of Cartographers evolved a map which was of the same physical size as the Empire and coincided with it point for point. Later generations did not venerate this great map. They judged it to be cumbersome and it was abandoned. Tattered fragments are still to be found sheltering an occasional beast or beggar. No other relic is left in the Empire of the discipline of Geography![17]

16 NZLC PP4, *The Structure of the Courts* (1987); NZLC R7, *The Structure of the Courts* (1989).

17 J L Borges, *A Universal History of Infamy* (1975) 131.

3 Who Should Reform the Law and How?

This question divides into two. First there is the choice between the various bodies which clarify and develop the law: the courts, the executive (by way of subordinate legislation), Parliament, and increasingly, international organisations and processes. Secondly, there are the processes followed *within* each of those bodies and processes.

(i) Reform at an international level

In respect of the choice *between* the various bodies and processes, I mention two matters. Our law and legal system increasingly reflect the internationalisation of law making. About one quarter of our public Acts give effect to or reflect in various ways our international obligations or international standards. In some areas that is obvious; consider international trade, financing and communications, or crimes with an international character, or diplomatic relations, or obligations towards the United Nations and especially now closer economic relations with Australia. But other areas of international obligation or influence may not be as apparent. Extensive areas of labour law, human rights and environmental law are now affected.[18] Who would have imagined a few years ago that the manufacture of certain refrigerants and insulation materials would be regulated by international law? Even within areas where the role of international law is well known, the point can be neglected, as appears from the 1989 budget legislation relating to medicines which put at risk international obligations in respect of intellectual property, and the belated, possibly incomplete recognition in the preparation of the Employment Contracts Bill that International Labour Convention obligations were at least being compromised.[19]

It is true that as law students we were all taught to chant with Albert Venn Dicey that Parliament could make and unmake any law it likes. But even the Parliament which he had principally in mind (Westminster) must now, because of the European Community legislation of 1972 and remarkable judgments of the House of Lords given just last October, be seen as a subordinate law maker.[20] In critical areas the law-making authority has moved to Brussels. That fundamental change in the British constitution was also reflected, I think, by their change in Prime Minister. M Rocard, the Prime Minister of France, gave that matter particular emphasis in his speech in Wellington yesterday.[21]

Two of the earliest Guest lecturers stressed the international element in

18 Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (1987) para 41 and Appendix B. See para 44 and Appendix E of the forthcoming revised edition.

19 Medicines Amendment Act 1989, inserting a new s 32A in the Medicines Act 1981, repealed and replaced by the Medicines Amendment Act 1990; Minimum Wage Amendment Act 1991, s 10, inserting a new s 11B in the Minimum Wage Act 1983.

20 *Factortame Ltd* v *Secretary of State for Transport (No 2)* [1991] 1 AC 603.

21 *Evening Post,* 29 April 1991, p 1; *Dominion,* 30 April 1991, p 1.

our legal system[22] – but have we yet really heard the message? Think of how long we took to heed Maitland's message about administrative law. More than a century ago he was calling his students' attention to the fact that half the cases in the Queen's Bench reports were about rules of administrative law.[23]

(ii) Judicial or legislative reform?

The other aspect of the choice of means I wish to mention is the choice between judicial and legislative development of the law.

Frequently change can be achieved only by legislation. Consider the reports of the Commission relating to Imperial legislation (although the courts over time would have addressed some of the issues it resolved), accident compensation, limitation, court structure, personal property securities, company law, the publication of legislation, emergencies, criminal committal procedures, and interpretation legislation. But within some of those topics, and in respect of others, there is a real question whether review, clarification and reform might be better left to the courts. That question has also been considered in several earlier lectures[24] and recent Commission reports help illuminate how to answer it.

Two recurring issues relating to statutory interpretation are whether Parliament should attempt to state the basic approach, for instance in favour of a purposive interpretation, and whether it should regulate the use of supplementary material, especially Hansard and other parliamentary material. Legislation in those areas is not essential, but is it justifiable none the less? The Commission thought that a purposive direction should be retained in a new Interpretation Act, but that nothing should be said in a new Act about the use of supplementary material. The reasons for the first conclusion were, in brief, that a purposive direction emphasised democratic principle and that removal of it might be misconstrued.[25]

We proposed that there be no provision on supplementary material because legislation could not materially improve the developing law and practice of the courts. Professor Richard Sutton's relevant suggestion in a very perceptive article on law reform some years ago that counsel and judges have regard to law reform reports is being taken up in practice.[26] Legislation is not required. It does not help.[27]

22 J L Robson, "Criminology in Evolution – The Impact of International Congresses" (1973) 3 Otago LR 5; A Szakats, "Comparative Law and Job Security" (1974) 3 Otago LR 137. See also eg David Patrick Moynihan, *On the Law of Nations* (1990), Philip Allot, *Eunomia: New Order for a New World* (1990), and the initiatives being taken by the Ford Foundation, *International Organisations and Law: A Program Paper of the Ford Foundation* (1990).

23 F W Maitland, *The Constitutional History of England* (first published 1908, lectures delivered in 1888) 501, 505.

24 Eg Rt Hon Sir Robin Cooke, "The Courts and Public Controversy" (1983) 5 Otago LR 357 and W D Baragwanath QC, "The Dynamics of the Common Law" (1987) 6 Otago LR 355.

25 NZLC R17, *A New Interpretation Act* (1990) paras 33-65.

26 R J Sutton, "The English Law Commission: A New Philosophy of Law Reform" (1967) 20 Vand L Rev 1009, 1019-1020.

27 R17, paras 124-126.

The Commission's report on a new Interpretation Act discusses another issue which might be addressed either by courts or by Parliament: the effect of statutes on the Crown. The Acts Interpretation Act 1924 provides that Acts do not affect the rights of the Crown unless they expressly state that the Crown is bound. This presumption is contrary to principle. As well the law is uncertain. How might that matter be rectified? The High Court of Australia in the course of 1990 substantially reversed the similar common law rule. A little earlier the Supreme Court of Canada read back the statutory statement of the presumption and accordingly made it easier to find the Crown bound.[28] But those results were not clearcut ones. They were not based on a wide survey of relevant legislative practice and related opinion. They present difficult transitional problems.

The Commission, having reviewed the whole statute book and consulted widely, thought that a clear legislative reversal of the rule with universal impact (with necessary exceptions being maintained or made in specific statutes) was the better answer. And it so recommended.[29]

Our current work on damages provides my other example of the choice between legislative and judicial reform. We have proposed, or are about to, the abolition of three miscellaneous judge-made rules regulating the award of damages.[30] The particular rules are inconsistent with the general principles of damages and have lost whatever other justification they once might have had. The courts here, as elsewhere, have indicated severe doubts about them and generally have been able to distinguish them. Should they be left for judicial execution? We thought not.

The general reasons for proposing legislative action in these cases are greater certainty, the removal of the need to litigate the point, and the resolution of transitional matters which can be achieved by legislation. In the case of the rule in *Addis* v *Gramophone Co* there were two further factors. The Employment Contracts Bill was in the House of Representatives (that was the appropriate measure in which to include our proposal), and more than mere abolition was in issue — a positive rule regulating the appropriate compensation was called for. The Labour Select Committee of the House has already recognised the force of those arguments in the provisions of the Employment Contracts Bill as reported back to the House last week.[31]

(iii) Aspects of the role of the Law Commission

I now turn to the second half of the process question and in particular to aspects of the process leading to action by Parliament. The aspects concern the role of the Law Commission within the wider legislative process. How does it fit with the other components? What is its distinctive role?

28 *Bropho* v *Western Australia* (1990) 171 CLR 1; *R* v *Ouellette* (1980) 111 DLR (3d) 216, 221; *Alberta Government Telephone* v *CRTC* (1989) 61 DLR (4th) 193, 229-233.

29 R17, paras 127-132.

30 NZLC R18, *Aspects of Damages: Employment Contracts and the Rule in Addis* v *Gramophone Co* (1991); NZLC R19, *Aspects of Damages: The Rules in Bain* v *Fothergill and Joyner* v *Weeks* (1991).

31 See now Employment Contracts Act 1991, ss 32, 40.

What does it add? These are big questions. And others should also address them.

I would like to recall the broad responsibilities which Parliament has placed on the Commission, note some characteristics of the matters on our agenda, and mention features of our procedures. That will lead in to the final part of this lecture – principles and philosophies applied in the reform process.

The Law Commission is established as a central body to promote the systematic review, reform and development of the law of New Zealand.[32] It is not established, as some law reform bodies are, simply to respond to ministerial references. The Commission is to keep under review in a systematic way the law of New Zealand – the whole of the law. It can advise on reviews of the law undertaken by departments and public bodies. And it can itself, on its own motion or when requested, make recommendations for the reform and development of the law.

Three characteristics of the topics which the Commission has considered or is considering deserve emphasis.

1 Several topics go to the heart of economic and social policy. We are not limited to black letter law or lawyers' law, whatever that may be. Consider the work on company law, on Maori fisheries and on accident compensation and the possible extension of the scheme to incapacity caused by illness.

2 In the past, separate Royal Commissions or Commissions of Inquiry have been set up to consider topics such as the three I have just mentioned, and I could add the structure of the courts, evidence and criminal procedure. Sir Ivor Richardson in giving this lecture two years ago referred to the Law Commission as a statutory equivalent to a semi permanent Royal Commission with a roving function.[33]

3 The topics cover a wide range – private and public, commercial and criminal, substantive and institutional. That range forces us to see matters in a broad context of policy, substance and process.

The Commission has a wide view of the law and probably also of the legislative process. It is able to inform diverse areas of law making, in part as a consequence of its statutory responsibilities to promote accessible and comprehensible legislation. It is also able to make such contributions because of the wide contacts it has in the legal and professional communities and in the public sector.

(iv) The importance of consultation

The 1989 Annual Report records the Law Commission's gratitude for the enormous amount of work done by many lawyers to assist us. Concern was early expressed that the Commission might lose one advantage of the part-time committee system, namely the participation in the law reform process of practising lawyers, judges, academic lawyers and govern-

32 Law Commission Act 1985, ss 3 and 5.

33 Rt Hon Sir Ivor Richardson, "Commissions of Inquiry" (1989) 7 Otago LR 1.

ment lawyers. There was a corresponding fear that the professional law reformer might become remote from the realities of the law and practice. The Law Commission has deliberately operated so as to preserve and indeed enhance the advantages of the old committees and it is closely involved with the Legislation Advisory Committee, the direct successor of the Public and Administrative Law Reform Committee. We have consulted widely in gathering suggestions for topics that might justify examination and even more in developing our ideas and seeking responses to our discussion papers. The time and effort spent on consultation far exceeds that spent under the previous system.

The interaction with the profession has been improved in a number of respects. The membership of the advisory groups established to help us handle each major topic can be adapted to each topic. Professionals other than lawyers can more easily be brought in. And we have the continuing advantage of an able and increasingly experienced group of researchers and administrators who facilitate the overall project, including the work of those groups.

The participation by others takes several forms. In some cases it is of the kind found in the part time committees – that is of reading research papers, attending meetings, commenting on draft papers and proposals, and sometimes helping with their writing or rewriting. We have for instance just had such a meeting on one aspect of the property law review. In some cases the task is more extensive. It might involve the drafting of legislative proposals (as in company law, evidence and the manual on legislation) or original research (as in the criminal procedure area, where a member of this faculty is providing major help). We have also had many submissions on our major topics, often followed by detailed discussions. That rarely occurred in my experience of the old committees. I should emphasise that I do not wish to denigrate the work of those committees; they did splendid work. We are now able to build on that and do better.

The contribution of non-lawyers is critical. In the company law reference accountants, economists and people in the wider business community provided extensive assistance. This was not just a group of lawyers talking to other lawyers. The work on accident compensation was helped by actuaries and economists; we indeed heard very little from lawyers. The work on the preparation of legislation draws on the knowledge and skill of experts in the English language and in design. And of course in some cases, as with the accident compensation review, many hundreds in the community do not in any event allow us to ignore them.

The practice of wide consultation, not just by the Law Commission of course, is creating expectations which affect other governmental reform processes as well. I can bring this discussion of the third question to a conclusion by a legislative reference rather than a literary one. Parliament in the Official Information Act 1982 states its purpose to be to increase progressively the availability of official information to the people of New Zealand,

> (a) to enable them more effectively to participate in the making and administering of laws and policies, and

(b) to promote ministerial and official accountability,
and thereby to enhance respect for the law and to promote good government.[34] There is a democratic imperative in open processes.

4 By Reference to What Principles?

Where does the Law Commission get its principles from? What legitimacy can its proposals have – especially when it moves into contentious areas of public policy? Again the questions are large. And others could already undertake an interesting review of our reports and papers to extract and analyse the principles, criteria and standards which we invoke.

So, the report on the courts refers to the promises of due process in Magna Carta; neither justice nor right is to be denied or deferred. That report, like the paper on arbitration, mentions the balance between party autonomy and the public policy of uniform, accountable systems of law – a balance at issue in the tertiary education reforms as well. The report *Personal Injury: Prevention and Recovery* (1988) emphasises individual responsibility. The Legislation Advisory Committee report on *Administrative Tribunals* (1989), endorsed by the Commission and the Government, stresses political and ministerial power and responsibility on the one side and the importance of independent adjudication on the other. And the report on limitation defences balances the right to a remedy against the right to peace and quiet.

The company law reports emphasise pragmatism, the experience of others, the need to have balanced, coherent and clear legislation, and the ethical considerations. That last point involves the imposition of constraints on power. Those constraints are related to the propositions that power should be linked to responsibility and that those who are in a stronger bargaining position should not be able to take undue advantage of those with lesser bargaining powers.

In the circumstances my treatment of these matters must be brief. I recall first some sources of relevant principle and, second, some matters of recurring importance. I conclude by referring to the relevance of principle to two matters currently on the public agenda.

So far as the sources of some principles are concerned, I have mentioned that

- the processes of consultation and research the Commission follows will often lead to a broad, informed understanding about the relevant principles and their application;
- international obligations and standards will often and increasingly dictate or suggest an answer;
- the Law Commission Act 1985 emphasises several matters including more accessible and comprehensible law, taking into account te ao Maori (the Maori dimension), and giving consideration to the multicultural character of New Zealand society.

One of the matters which are of recurring importance is the saving of costs. Consider the savings arising from a more efficient and straight-

34 Official Information Act 1981, s 4.

forward company law and personal property securities regime. Or from earlier prosecution disclosure of its case with the prospect of more guilty pleas, the narrowing of the issues in dispute, and a related reduction in committal hearings. Or from more accessible legislation. Or from a significant reduction in the number of judges.

Another recurring matter is the enforcement of the law. Law should so far as possible be written to facilitate compliance and enforcement. That is partly a matter of form, but also one of substance. The history of the accident compensation scheme, for example, shows fraud occurring at the boundary between incapacity caused by injury (covered by the scheme) and incapacity caused by illness (which in general is not covered). The line is of course anomalous and contrary to principle; both major political parties are publicly committed to its removal. While there may be fiscal reasons preventing that at present it is possible to take some steps in that direction. For instance if health benefits were available at a reasonable level and on an even basis to those incapacitated by illness and by injury, the system would be fairer, there would be less incentive to commit fraud, and administration costs would be saved. We did work showing how that could be done.

The Commission emphasised the range of the forces for compliance with the law and the means of resolution of disputes in its work on the courts, arbitration and accident compensation. But the matter often is not adequately addressed: consider for instance the inconsistencies in the provisions of the current Building, Resource Management and Occupational Safety Bills relating to duties and remedies. How should duties be stated in legislation? Who should be able to enforce them? What remedies should be available (offences, injunctions, damages . . .)? What protections (if any) should be afforded to those who might be sued? Along with other legislation, those Bills demonstrate the absence of a general approach to those questions.

A further point is the inestimable value of historical experience and historical understanding. It may be, as Mr F E Smith once told a difficult judge, that we are no wiser as a result of knowing of past experience here and elsewhere, but we are much better informed.[35] We should be able to avoid the mistakes we and others have made. That experience is now increasingly captured in significant documents such as the International Covenants on Human Rights, the New Zealand Bill of Rights Act 1990, and the report of the Legislation Advisory Committee, *Legislative Change: Guidelines on Process and content* (1987). Successive governments have directed that proposed legislation should normally be consistent with the extensive array of agreed principles and rules set out in that Report. The statute book is another huge, often untapped source of principle and precedent. But the reliance on the past should not be unthinking. As Justice Oliver Wendell Holmes said, it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.[36]

35 John Campbell, *F E Smith: First Earl of Birkenhead* (1983) 112.
36 O W Holmes, "The Path of the Law" (1897) 10 Harv L Rev 457, 469.

Against the historical inheritance are the enormous and bewildering changes through which we are passing. The changes are technological (for example, in communications, electronics, manufacturing, weaponry, chemicals); political (consider the period of decolonisation, Eastern Europe in 1989, the European community in 1960 and 1992, or changes in the role of the state); economic (the huge development of the Asian economies, in our case the massive redirection of our trade in just 40 years) . . . I could go on. It is plain that we must have laws which facilitate the efforts of New Zealand and its people to deal with all that change and which appropriately protect us against it.

(i) The Employment Contracts Bill

Out of the vast range of material I select just two illustrations of the relevance and use of principle. The first – an aspect of the Employment Contracts Bill – is one which also demonstrates the political imperative. Law making is a political process. It is about the allocation of rights and duties, powers and liabilities. An early English Parliamentary Counsel promulgated a famous statement: Bills are made to pass as razors are made to sell. The Chairman of the Victorian Law Reform Commission has recently provided two important glosses to that political warning: first the Bill must pass – and Government Bills do not always pass – and second the resulting Act must work.[37]

The Law Commission proposed the statutory reversal of the rule in *Addis* v *Gramophone Co.*[38] That rule denied the employee any damages for the harshness and oppression accompanying the dismissal or for the discredit thrown upon the employee. The limit is inconsistent with the general principles of the law of damages, its scope of application is narrowed in an anomalous way by legislation, its continued force in New Zealand is unclear in the light of recent judicial decisions and criticism, and the application of the rule is uncertain.

That report also sets out in an extensive way two views of employment contracts, economics and the labour market; is the contract of employment a simple exchange of wages for labour and (consistent with that) terminable by either party with little or no notice, or are the elements of an employment contract much more complex, including various intangible matters? Consistently with Professor Guest's view in his inaugural lecture, the Commission took the latter view. So has the Labour Select Committee. That discussion took the Commission into the centre of some of the policy issues involved in that Bill. We had to make a careful, balanced account of those competing philosophies. The greater certainty and clarification that can be achieved by legislation were also raised in that process. Those issues bring me to my last example.

37 See Sir George Engle, "Bills are made to pass as razors are made to sell: practical constraints in the preparation of legislation" (1983) 7 Statute L Rev 23 and David Kelly's paper in the proceedings (to be published by the Victorian Law Reform Commission) of a conference on legislation held in February 1991 at Bond University.

38 [1909] AC 448; NZLC R18, *Aspects of Damages: Employment Contracts and the Rule in Addis* v *Gramophone Co* (1991).

(ii) Retrospective Law

The law should not be retrospective. That is a basic principle in our law, especially but not solely in criminal law. For reasons of justice and for the efficiency of the law we should have notice of the law in advance. Lon Fuller, a great American legal philosopher whose work Professor Peter Sim discussed at the beginning of this series of lectures, noted that the drafters of the New Hampshire Constitution added moral indignation to their statement of the principle.[39] That Constitution declared,

> Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences.

The principle is often invoked, for instance recently by the New Zealand Law Society in respect of taxation legislation; I have touched on it in speaking of damages and the subjection of the Crown to statutes.

The Acts Interpretation Act 1924 contains provisions which state some, but not all, of the rules based on this principle of retrospectivity. Not only are these provisions incomplete, they are also contradictory and more complex than they need to be. It is not surprising that they are sometimes neglected by counsel and judges. The Law Commission proposed a set of three provisions which is more comprehensive (but about one quarter of the length of the present provisions), more accessible, and based expressly on a specified principle. That principle may help resolve the hard marginal cases which will still occur.[40]

This may appear to be a technical matter on which to conclude and I agree it does have some very technical elements. But the principle of non-retrospectivity is about central issues in the development of our legal, constitutional, political and economic systems. It is about vested rights, predictability and certainty. Consider the current controversies about retirement income.

We face a central question of philosophy as well as of law. In the words of the philosopher, Alfred North Whitehead, how is the balance to be struck between continuity and change, between heritage and heresy? Perhaps I can end with a poet who was also a lawyer: Our labour, like the poet's, is the attempt to impose on the confused flowing away of the world, Form –

> Still, cool, clean, obdurate,
> Lasting forever, or at least
> Lasting . . . .[41]

39 P B A Sim, *"Jurisprudence and the Legal Profession – Some Contemporary Trends"* (1969) 2 Otago LR 1.

40 R17, paras 281-310.

41 Archibald MacLeish, *Reasons for Music,* quoted in his "Apologia" (1972) 85 Harv L Rev 1505, 1508-1509.