LAW REFORM IN THE SOUTH PACIFIC

PETER MACFARLANE[*] AND CHAITANYA LAKSHMANs

INTRODUCTION

> Modernisation of the law is a fundamental operational principle for law reform. The Pacific constitutions need to be looked at in this connection, in part to check on the progressive development of particular constitutional provisions like those relating to the electorate and to human rights. The desire for improved provisions for the better expression and protection of human rights has been raised from time to time on a Pacific-wide basis, and will continue to be raised. It is a matter that calls for attention, clearly with the most careful regard to the cultural sensitivities and traditional nature of Pacific societies, but also with regard to the fact that the Pacific is one of those few areas of the world not yet governed by an international or regional framework, instrument or arrangement on human and cultural rights. [1]

For a long time now, law reform has been one of those "catch-cries" going hand in hand with "good governance" and "transparency" and yet, apart from the work being done by the Fiji and Papua New Guinea Law Reform Commissions, there is little commitment to law reform by South Pacific states. The purpose of this article is to outline the work of law reform agencies, demonstrate how the legitimacy of law and good governance can be enhanced by having an active law reform commission and to suggest that consideration be given to a regional, South Pacific Law Reform Commission. Law reform is generally defined as the systemic development of the law, with a view to simplifying, modernizing and consolidating the law and finding more effective methods for the administration of the law so as to improve access to justice.[2]

THE NEED FOR LAW REFORM COMMISSIONS

There are a number of reasons that justify the formation and work of law reform commissions. The first is that these commissions or agencies can assist in the removal of anachronisms, anomalies and inconsistencies in the law. This is not a task that the courts generally embrace. Although it is true that one sometimes sees in a judgment a reference to a need for a change in the law or a suggestion that government should correct an anomaly or inconsistency in the law, the role of the courts is not to get involved in the doing of law reform in any systematic way. The role of the courts is to decide cases according to existing law and this leaves little room for a decision based on what the law ought to be. Law reform is the role of governments; however the fact is that governments generally do not have the time or (in most cases) the expertise or in some cases the political will to engage in this work.

This leads us to the second reason for having law reform commissions, namely that they assist in the development of new approaches to the law in response to changing social, economic and political circumstances. Governments are often slow to respond (if they do so at all) to issues that impact directly on the social and/or cultural traditions of a people. There are no votes in tackling unpopular social issues.

In Australia this was aptly demonstrated in the last (2004) federal elections where abortion was taken off the election agenda because of its divisive nature so far as the public is concerned and the fact that it would likely alienate a large number of voters. This is not to say that the law concerning abortion in the South Pacific is necessarily in need of reform; however it is a potent example of what we mean.

Less controversial but nevertheless important issues that could be the subject of inquiry by a law reform commission in the South Pacific include the assessment of damages for women in cases of wrongful death,[3] the treatment of the mentally ill, laws concerning family protection, the relationship between custom and introduced law, the taking of evidence from children especially in relation to sexual offences or offences of violence, social issues such as HIV/AIDS and how the law should respond in terms of testing, confidentiality and other health matters.[4] However if governments do not address these issues and if there is no law reform agency in place then they will likely remain un-addressed despite the pain, suffering, hardship and prejudice they may cause to those who may be affected.

Apart from this, the fact is that in times of rapid change, legislatures are unable to give detailed consideration to many important issues due to a lack of expertise or a political timetable which does not allow for an independent, detached and consultative approach to the issues. Law reform commissions provide this expert and independent advice based on consultation (inclusiveness) and legal principles and can make recommendations based on best practice rather than on political expediency. This is the reason why law reform agencies or commissions should not be attached to State Law offices or Attorneys General offices. Their recommendations must come from an expert and independent assessment of the law based on relevant policy considerations and informed by wide consultation. Only in this way can they be of assistance to government and hold the confidence of the people.

> From Australia to Zambia most of the jurisdictions of the Commonwealth of Nations have established Law Reform agencies of some kind, to help lawmakers with the reform, modernization and simplification of the law.[5]

The capacity of a law reform commission to engage in wide public debate and consultation is an important aspect of their work.

> Law Reform Commissions have long recognized the need to conduct both wide and targeted consultation to maximize participation in law reform by members of the community.[6]

As noted by Atkinson, public consultations and meetings serve two important purposes; to provide members of the public with an opportunity to raise concerns and express their views and to enable the Commission to perform an educational role.

It is the authors' view that law reform agencies contribute to the strengthening of good governance and legitimacy by engaging communities in public debate over important social, legal, economic and political concerns and by recommending to legislatures areas of law that impede good governance and/or which are inequitable, discriminatory or otherwise in need of reform.

THE EXISTENCE OF LAW REFORM COMMISSIONS IN THE SOUTH PACIFIC

In the South Pacific, law reform agencies have been established in Papua New Guinea, Samoa, Fiji, Vanuatu and the Solomon Islands. In Vanuatu the Law Commission has never been constituted. In Samoa a Commission was established in 2002 but has never been formalized. In the Solomon Islands the Law Reform Commission is reported to have been inactive since the departure of its first chairman over five years ago.[7] There is a record of the existence of the Law Reform Committee of Tonga but nothing

more. Apart from PNG and Fiji, it must be said that the region does not have a strong history or commitment to law reform institutions. This leads to the suggestion that perhaps it is time to consider a regional law reform commission. This is discussed later in this article.

Duties and functions of Law Reform Commissions in the South Pacific

The duties and functions of the Law Reform Commissions in Fiji,[8] Solomon Islands[9] and Papua New Guinea[10] are to take and keep under review all the laws applicable with the view to its systematic development and reform, including:

- the codification of such laws;
- the elimination of anomalies;
- the repeal of obsolete and unnecessary enactments;
- the reduction of separate enactments;
- the making of new laws;
- the adoption of new or more effective and economic methods for the administration of the law and the dispensation of justice;
- the simplification, improvement; and
- modernisation of the laws.

The primary function[11] of the Commission in Vanuatu is to review the laws of Vanuatu to remove anachronisms and anomalies. The Commission when undertaking a review of the laws is required to reflect in its laws the law of the distinctive concepts of custom, the common and civil law legal systems, the reconciliation where appropriate of differences in those concepts[12] and the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of the Vanuatu society, of groups within that society and of individual members of that society.[13]

In Samoa the *Law Reform Commission Act 2002*[14] requires the Commission to act upon references from the Minister for Justice; to research and analyse areas of laws, recommend to the Minister programs for the reforms of the laws, and to consult with and advise the public about its work.

Structures and constitutions of Law Reform Commissions in the Pacific

In Fiji, the Commission consists of a Chairman[15] who is appointed for a period not exceeding four years[16] by the President on the advice of the Prime Minister in consultation the Leader of Opposition. A person is only qualified for appointment as a Chairman if he or she is qualified to be appointed as a Judge of the High Court of Fiji.[17] The other members of the Commission (not less than three Commissioners) are appointed for a period not exceeding three years by the Attorney General. The Executive Officer of the Commission is the Director who is legally qualified and is appointed by the Judicial and Legal Services Commission.[18]

In Papua New Guinea, the Law Reform Commission consists of seven citizens[19] who are appointed by the Minister for Justice by notice in the National Gazette. The Minister appoints one of the seven members as the Chairman,[20] while the Deputy Chairman is elected or appointed by the members of the Commission. The tenure of office for the members is four years[21] and they all are eligible for reappointment. A Judge[22] or a Magistrate can also be appointed to the PNG Law Reform Commission. The Executive Officer of the Commission is the Secretary[23] who is appointed by the Head of State, for a period not exceeding four years.

The Law Reform Commission in Solomon Islands is constituted a Chairman[24] and four other

Commissioners.[25]The Minister for Justice appoints the Commissioners for a period of four[26] years on a part-time basis while the Chairman is appointed by the Judicial and Legal Services Commission on the recommendation of the Minister. The Chairman, whose term of office is for five years, must be a person who has been qualified to practice as a Barrister or Solicitor in any country in the Commonwealth for over five years.[27] In appointing the Commissioners the Minister is required to appoint such persons who appear to him to have knowledge and interest in the following areas;[28] (a) social welfare and religious affairs, (b) criminal administration, or (c) sociology, anthropology or Solomon Islands culture. The Executive Officer of the Commission is the Secretary who is appointed by the Public Service Commission.

The Commission in Samoa consists of a Law Reform Commissioner[29] who is the Chief Executive of the Commission.[30] The Law Reform Commissioner is appointed by the Executive on the advice of the Law Reform Appointment Council. The Commissioner must be a person who holds a recognised law degree, have at least eight years experience as a barrister and Solicitor, have personal and professional qualities for eligibility for appointment to judicial office and meets any further skill and character requirements prescribed by the Executive Council on the advice of the Law Reform Appointment Council.[31] The Commissioner's term is for five years[32] and before any appointment or reappointment is made the position is required to be advertised.[33]

In Vanuatu, the Law Commission consists of a Chairman and four other Members who are appointed by the Minister responsible for Justice.[34] The members of the Commission must have at least one Member who is entitled to practise as a legal practitioner in Vanuatu and not more than two members may be public officers.[35] The term of the Members of the Commission is for a period not more than three years.[36]

THE POSSIBLE ESTABLISHMENT OF A SOUTH PACIFIC LAW REFORM COMMISSION

There are three reasons that commend consideration of the establishment of a regional law reform agency. The first concerns finances and resources.

It is understandable that without outside funding the establishment and support of the work of such agencies in each jurisdiction imposes a difficult financial burden on governments. In terms of priorities, a law reform commission is probably ranked at the lower end of the scale. In times of economic pressure and the increasing need to deliver essential services to the people, there is little incentive for governments to allocate resources to a law reform commission. It is better to put the money into schools or roads. By establishing a regional law reform commission these costs can be shared among member countries, in much the same way that the financial responsibility of the University of the South Pacific (USP) is shared between member nations. In this way all jurisdictions get the benefits that come from an active law reform agency without having to be responsible for all the costs and overheads.[37] Indeed this is something that could be put under the umbrella of the Pacific Islands Forum as part of its (and donor nations) commitment to good governance, law reform and support for the administration of justice. Such an approach is consistent with the regional view taken by the Forum towards economic, trade, environmental and other matters.

The second reason for a regional commission is that there are only limited expertise in the region. Law reform commissions require people who have expertise in law, the social sciences and economics. They also need to be able to engage in consultation with professional and government bodies and with the general public and have a broad understanding of regional issues. By combining existing South Pacific law reform agencies (apart from existing Australian and New Zealand Commissions) and by encouraging

participation by those from the USP with skills in relevant areas, it is suggested that an expert group of part time members could be assembled who could provide independent advice as well as draft legislation for governments. The pro-active nature of such an agency in terms of community consultation would also add a sense of community involvement in law making and law reform.

The third reason for a regional agency is simply that most of the issues in need of consideration by South Pacific law reform commissions are issues that are common across the region. There seems little point in one commission looking at the relationship between custom and introduced law when other commissions have carried out the same task. In much the same way, for example, the work of one agency concerning HIV/AIDS in relation to reporting and confidentiality would be of direct relevance to other regional jurisdictions. One of the strengths of the Pacific lies in the capacity of member states to adopt a regional approach to issues.

A legitimate question of course would be the position of the current (and active) Fiji and PNG Law Reform Commissions. The view of the writers is that the Fiji Law Reform Commission should be broadened to form the South Pacific Law Reform Commission. It could, for the time being, be based in Suva, with offices in each of the regional (member) jurisdictions. This is not to say that it would always have its head office in Suva and as member countries become more committed to the sharing of resources, individual governments might apply to have the head office moved to their own jurisdiction for a time. Membership would be contingent upon a government commitment to assist in funding. It is suggested that each participating jurisdiction has one full time member but that the Commission has power to appoint other persons as part time members for the purposes of a particular reference. References would come to the Commission via the Attorneys-General of each member country. In time the PNG Law Reform Commission might wish to merge with this wider law reform agency.

Apart from the matters mentioned above it is considered by the authors that a regional approach to law reform would strengthen the region's capacity for cooperation and uniformity of laws within the region. This is seen as promoting and strengthening not only economic relationships within the region but also cultural and traditional relationships. This need for a more regional approach was reflected in a recent address by Justice H.E Tuiloma Neroni Slade to the Australasian Law Reform Agencies Conference:

> As between island States themselves there does not appear to be any organized arrangement for regular contact among personnel or for the exchange of information. In view of the significant law reform activities that goes (sic) on in the region ... the observation to be made is whether some organized system for the better spread and sharing of information among the law reform authorities of the Pacific as a region might be in order.[38]

His Honour went on to note that there are significant activities that would be impossible for one country to manage alone and which would need to be carried out 'on the basis of the active partnership and collaboration that exists in the Forum structure of the region.'[39]

The authors suggest that this can best be achieved by a single South Pacific Law Reform Commission and we encourage debate of this issue.

---

[*] Peter MacFarlane is an Associate Professor in the School of Law at the University of the South Pacific. Prior to taking up this appointment he spent two years as full time Law Reform Commissioner for the State of Queensland. This article was written while he was adjunct Professor in the School of

Foreign Service at Georgetown University, Washington DC.

s Chaitanya Lakshman is a Barrister and Solicitor of the High Court of Fiji and a Project Fellow at the Institute of Justice and Applied Legal Studies (IJALS) at the University of the South Pacific. Upon completing his LLB in 1997, he briefly worked at the Fiji Law Reform Commission.

[1] Concluding remarks in an address by Justice H.E Tuiloma Neroni Slade, 'Law Reform Potential in the Pacific Area' Paper presented at the Australasian Law Reform Agencies Conference, Wellington New Zealand, April 2004.

[2] See the *Law Reform Commission Act 1972* (WA) s 11(4) and the *Australian Law Reform Commission Act 1996* (Cth) s 21(1(a)(v).

[3] Currently, at common law, the likelihood of the women remarrying is a matter to be taken into account when assessing her damages for the wrongful death of her husband. Some have argued that this is harsh and unfair. See for example the Queensland Law Reform Commission Report: 'Damages in an action for a wrongful death: The effect of entering into, or of the prospect of entering into, a financially supportive cohabitation relationship, and the effect of the likelihood of divorce or separation on the assessment of damages in a wrongful death claim'; Number 57 (2003).

[4] Some of these areas are already under consideration or form part of the Fiji Law Reform Commission's 2005 work program.

[5] Justice Michael Kirby, in Australian Law Reform Commission, *The Law Reform Digest* (1983) vii.

[6] Roslyn Atkinson, 'Law Reform and Accessibility' (2004) *The Commonwealth Lawyer* 13(2) 29.

[7] Justice H.E Tuiloma Neroni Slade, above n 3.

[8] Section 5 *Fiji Law Reform Commission Act* [Cap 26].

[9] Section 5 *Law Reform Commission Act* [Cap 15] (Solomon Islands).

[10] Section 9 *Law Reform Commission Act 1975* (Papua New Guinea).

[11] Section 7(a) *Law Commission Act* [Cap 115] (Vanuatu).

[12] Section 7(b) – *Law Commission Act* [Cap 115] (Vanuatu).

[13] Section 7(c) *Law Commission Act* [Cap 115] (Vanuatu).

[14] Section 6 *Law Reform Commission Act 2002* (Samoa).

[15] Section 3(2)(a) *Fiji Law Reform Commission Act* [Cap 26].

[16] Section 3(3)(b) *Fiji Law Reform Commission Act* [Cap 26].

[17] Section 3(3)(a) *Fiji Law Reform Commission Act* [Cap 26].

[18] Section 3(7)(a) *Fiji Law Reform Commission Act* [Cap 26].

[19] Section 3(2) *Law Reform Commission Act 1975* (Papua New Guinea).

[20] Section 7(2) *Law Reform Commission Act 1975* (Papua New Guinea).

[21] Section 5(1) *Law Reform Commission Act 1975* (Papua New Guinea).

[22] Section 6 *Law Reform Commission Act 1975* (Papua New Guinea).

[23] Section 15(1) *Law Reform Commission Act 1975* (Papua New Guinea).

[24] Section 3(2)(a) *Law Reform Commission Act* [Cap 15] (Solomon Islands).

[25] Section 3(2)(b) *Law Reform Commission Act* [Cap 15] (Solomon Islands).

[26] Section 4(2) *Law Reform Commission Act* [Cap 15] (Solomon Islands).

[27] Section 3(4) *Law Reform Commission Act* [Cap 15] (Solomon Islands).

[28] Section 3(3) *Law Reform Commission Act* [Cap 15] (Solomon Islands).

[29] Section 10(1) *Law Reform Commission Act 2002* (Samoa).

[30] Section 10(2) *Law Reform Commission Act 2002* (Samoa).

[31] Section 11(2) *Law Reform Commission Act 2002* (Samoa).

[32] Section 11(4) *Law Reform Commission Act 2002* (Samoa).

[33] Section 11(3) *Law Reform Commission Act 2002* (Samoa).

[34] Section 3(1) *Law Commission Act* [Cap 115] (Vanuatu).

[35] Section 3(3) *Law Commission Act* [Cap 115] (Vanuatu).

[36] Section 3(2) *Law Commission Act* [Cap 115] (Vanuatu).

[37] In his address to the Australasian Law Reform Agencies Conference in Wellington, New Zealand in April 2004 (see n 3) Justice Tuiloma Neroni Slade noted that the law reform commission envisaged for Samoa would amount to almost two-thirds of the total budget for the Office of the Attorney General.

[38] Justice Tuiloma Neroni Slade, above n 3.

[39] Ibid.