Report by David Smith of Stephens Lawyers, Wellington, New Zealand
The visit of 7 Vietnamese prosecutors from various parts of Vietnam
25 September to 30 September 2004

Centre for Democratic Institutions (CDI)

Sunday 26 September 2004

The visitors were met at midnight in the presence of his Excellency Tran Hi Hau of the Vietnamese Embassy in Wellington.

The delegation comprised:
1. Dr. Khuat Van Nga - Deputy Procurator General of SPP - head of delegation
2. Mr. Duong Xuan Khinh - Head of Personnel Department of SPP
3. Mr. Ngo Quang Lien - Director of Institute for Procuratorial Science of SPP
4. Mr. Nguyen Huy Phuong - Deputy Chief Procurator of Vinh Phuc's Procuracy
5. Mr. Pham Van Cuong - Deputy Chief Procurator of Thanh Hoa's Procuracy
6. Mr. Pham Van Gon - Deputy Chief Procurator of Ho Chi Minh City's Procuracy
7. Mr. Le Tien - Legal expert, Institute for Procuratorial Science of SPP, interpreter.

At 10am the visitors were picked up and taken around various parts of Wellington City including the Marine Drive, Mt Victoria, the Wellington Cable Car and the Botanical Gardens where lunch was taken. They then went to the Wellington Town Hall for a recital for the New Zealand Piano Quartet, which covered pieces by Beethoven and Schumann.

Monday 27 September 2004

After a half-hour overview briefing sessions at Stephens Lawyers, the first business session was held at Solnet House on the Terrace, Wellington. There the delegates met with His Honour, Judge Patrick Grace and Mr Cosgrave of the Wellington Police.

After an initial presentation by Mr Cosgrave and the Judge an intensive question and answer session as followed through. It addressed the following:

(a) The special nature of New Zealand’s Youth Court, which has succeeded in reducing offending to the point where 80% of young people coming before the Court appear only once.

(b) Descriptions where giving of how family group conferences are used to keep the family involved in rehabilitation of juvenile offenders.

(c) It was accepted that children under 14 are dealt with almost entirely by the Family Court, while those between the ages 14 and 17 are dealt with by the Youth Court but cannot be convicted of a criminal offence. From age 18 onwards the young person is subjected to the normal criminal sanctions in the District Court.
(d) Special attention was paid to recent non-statutory procedures such as the development of District Court diversion whereby first offenders are frequently removed from the Court system on a restorative justice basis having come to some arrangement with their victims. Equally it was noted that the Courts have now developed a “status hearing” system whereby all matters entered for not guilty pleas go before a Judge in a special session to see if the charges can be reduced in nature and number so as to secure guilty pleas thereby reducing the number of defended hearings in the District Court.

(e) Summary proceeding matters were fully discussed and analysed with both Police and judicial perspective being brought to bear. The huge jury trial backlog in Wellington (150+ cases) was discussed. This reflected the way in which the New Zealand High Court has removed a large slice of its criminal jurisdiction down into the District Court.

(f) There was brief discussion about how probation reports originate and the extent to which Judges must follow them.

(g) Bail was analysed in terms of the new Bail Act, which in many cases now throws the onus back onto the defendant to prove that they can be safely given bail. Whereas in the past they had an automatic right to it unless the Police could show solid public interest reasons why bail should not granted. (Copies of all the legislation referred to by the Judge in the course of the discussion was acquired and will be taken back to Vietnam by the visitors).

(h) The nature of the unpaid Justices of the Peace was also mentioned as was the work of Community Magistrates. The visitors asked numerous questions in this area. They were particularly interested to know about how jurors were chosen and to what extent matters actually went as far as a jury trial notwithstanding the large backlogs in the Wellington area. They were told that the overwhelming number of persons coming before the District Court plead guilty with about 10,000 potential offenders being diverted nationally from the judicial system under the diversion scheme.

(i) The visitors also pointed out the similarities with their own system and compared juries with lay assessors.

(j) The session began at 10am and finished at 12.20pm. (It could be noted that His Honour Judge Grace came back from annual leave to conduct the session and he was well thanked by all present).

Lunch was held at the Wellington Club which is adjacent to the Judge’s Building. Special guests at the Luncheon were three Wellington Defence Counsel who were to address the visitors the following at the New Zealand Law Society. Thanks to the excellent interpreting by Mr Le Tien, the lunch proved to be a valuable sounding board. A wide range of topics was discussed in order for tomorrow’s presenters to gauge the differences between the New Zealand and the Vietnamese approach to defence counsel issues.
Supreme Court
At 2pm the visitors meet with His Honour Justice Sir Kenneth Keith at the Wellington University Law School. Sir Kenneth is a noted jurist with a wide range of international law interests. He is, for example, a pending candidate for inclusion on the world Court and as part his candidacy will be visiting Hanoi during October 2004.

Sir Kenneth kindly met with the delegation in his own office and was able to have a useful dialogue with the visitors concerning the new Supreme Court of New Zealand which has just replaced the Privy Council (in London) as the final Court of Appeal for New Zealand. Sir Kenneth gave an indication of the sorts of cases which are already on their way to the new Court. He pointed out that over the last 100 years the Privy Council has only heard two criminal law appeals from New Zealand. This has meant that, in effect, the Court of Appeal has till now been the final Court for criminal matters. Now there is to be an additional tier of appeal.

While the Court of Appeal has three Judges the Supreme Court will have five. Its empowering statute directs it to consider appeals across the full spectrum of legal issues facing New Zealanders. It therefore follows that both substantive and sentencing matters will come before the Court in due course. The business load is expected to be one case a week or approximately 50 per year.

The Supreme Court will never under any circumstances hear evidence (the Court of Appeal occasionally does), but will focus rigorously on legal issues. The suggestion appears to be that the Court will closely parallel the United States Supreme Court. Lengthy briefs will be filed well in advance of the case and the Judges will ask Counsel searching questions on the actual hearing day before giving a written decision. Hearings themselves may be relativity short but the Judges will probably spend a great deal of time discussing their views and delivering judgments. These will probably attempt to summarise a wide philosophy of law and give indications to the lower Courts that will go, perhaps, beyond the particular case in question. Many cases will be weeded out of the Supreme Court but those that are received into the system will be given detailed and lengthy analysis.

It is difficult to be more definitive because the system is so new. The Court heard its first case yesterday (Justice Keith referred to it at length). That case involves a Member of Parliament who has been charged with serious criminal fraud offences. Her party has attempted to have her expelled from Parliament pursuant to certain statutory provisions. The Court of Appeal has however ruled that the Member of Parliament is entitled to stay as a member of Parliament pending the criminal proceedings. There are therefore clear implications for separation of powers and statutory interpretation combined with the presumption of innocent even though the case against the Member of Parliament (brought by the Serious Fraud Office) is a very strong one. The visitors were impressed by that analysis and recognised the rule of law implications involved.

Embassy visit
At 3pm the visitors went to the Vietnamese Embassy and had a closed session with the Ambassador for one hour.

Museum
Following the meeting the visitors went to the New Zealand National Museum (Te Papa) in Wellington and returned to their hotel at 5.15pm.
Tuesday 28 September 2004

The business day began at 9pm with a visit to the New Zealand Law Commission where we had hoped to meet with Commission staff, the Crown Solicitor for Wellington and the Police Prosecutor in charge of the Wellington Prosecution Bureau.

Regrettably the Crown’s Solicitor and the Police representative were unable to attend because of urgent Court commitments. The delegation was addressed by Law Commission’s Consultant, Mr Neville Trendle who is a former assistant Police Commissioner and has a Master Degree (in Law) from the United States. He was supported by the Head of Research, Dr Margaret Thompson and two other senior researchers.

Mr Trendle summarised his view of how the rule of law might best be seen to be working, through the following indicators:

(a) Known law that is properly promulgated and is not retrospective i.e. does not make criminal offences out of matters which were not criminal offences at the time certain acts were committed.

(b) Is no respecter of persons i.e., members of the Executive branch and Parliament are just as liable to the consequences of the criminal law as anyone else. (It was noted that last year a Police Constable was prosecuted for murder before a jury in New Plymouth in a private prosecution brought by a member of the deceased person’s family).

(c) Processes are transparent i.e hearings and trials are held in public using procedures which are publicly established and properly understood.

(d) Those who are brought before the courts:
   (i) fully understand what is being alleged against them; and
   (ii) in complex and serious cases have properly trained counsel to assist them through

(e) The process is one where the prosecution has to prove its case because from the outset the accused person is presumed innocent until proven guilty.

(f) Investigations are fairly conducted with legal advice being available at key points.

It was agreed that in order to achieve these sorts of outcomes the prosecution of criminal offences should, as far as possible, be kept well away from all political influences. The Police personnel who investigated alleged offences should also not themselves be prosecuting them in the courts. They are merely witnesses

The rules for commencing a prosecution should be based on known discretionary and objective criteria and not be random or capricious.

No-one should face a jury trial without the enforcement agency having first demonstrated to a judicial officer that, fundamentally, there was a case calling to for an answer.
It was noted, however, that New Zealand, unlike Australia, Britain and Canada does not have a Director of Public Prosecutions (DPP) or a Crown Prosecution Service as such.

In the District Court minor to medium serious offences are prosecuted by fully trained Police prosecutors. Only when matters progress to jury level well the prosecutor be someone other than a uniformed officer employed by the Police. At the jury trial point a private law firm in each of the 19 High Court centres prosecutes on behalf of the Crown under warrant from the Solicitor-General’s Office (Crown Law Office). There is also an independent panel of local barristers who are brought in for specific cases under contract to the Crown Solicitor whenever the need arises i.e. the Crown Solicitor’s resources are stretched by the workload.

Five years ago the Law Commission undertook an analysis of the position and made a report to the government which recommended that:

(a) New Zealand should not at this stage have a DPP or Crown prosecution service; but

(b) There was at that time insufficient distinction being made between the investigation and prosecution arms of the Police organisation. It was recommended that only specially trained Police prosecutors should work within the Prosecution Service. They should operate in conjunction with Police Head Office Legal Section and with readily available advisory assistance from Crown Solicitors. That recommendation was accepted by the government of the day. It was noted, however, that the issue of a separate civilian prosecution service is unlikely to go away. The matter will very likely be raised again at a future time, sooner rather than later.

Numerous reports done by the Law Commission for the government’s information which relate to criminal law in general and criminal law Court procedures in particular were drawn to the attention of the visitors. Several were handed to them during the meeting. The Law Commission has an extensive website in which all of its reports are catalogued and are retrieval. The address of the website was noted.

There was general discussion about the situation under the various constitutions in Vietnam. Law Commission staff took extensive notes particularly concerning ratios of prosecutors to population and the relationship between a Vietnamese prosecutor and the Judge. It is understood that in Vietnam the prosecutor may have the opportunity of “correcting” perceived mistakes by the Judge. It was also learned that it is not unheard of for lawyers in Vietnam to be both defence counsel and prosecutors provided they are properly qualified for these separate roles. Judges themselves tend to be specially trained as judges.

At this session and others the high quality interpretation work done by Mr Le Tien was appreciated and often commented upon. The visitors took extensive notes and expressed their sincere thanks at the end of the session at around 11 am.

**Jury trial in Wellington**

At 11.15 pm the delegation was taken to the Wellington District Court where by prior arrangement with the Wellington Crown Solicitor, they attended a two-hour segment of a jury trial.
The delegation arrived at an interesting point in a trial involving two defendants who were respectively charged with burglary and receiving stolen goods. The Crown prosecutor’s speech to the jury was coming to its climax when we entered the courtroom. The delegation was able to see how the jury was addressed and the sort of tactics used to persuade them from a prosecutorial standpoint.

Each defendant was separately represented. The final speeches of two quite different sorts of defence counsel were observable. One counsel made heavy-handed use of evidential notes taken in the trial to show up the inconsistencies within Crown evidence given by two complainants who themselves were well known criminals. He also indicated that the interview notes that arose in a Police interview of the suspects was not properly read over to them and was in breach of the Judges Rules.

The other counsel took a more subtle approach and gently reminded the jury re the standard and burden of proof. He kept on emphasising that the jury was the sole judge of fact and that it could not come back next week to change its mind if today it had ignored any matter that it found disquieting. The need for unanimity was also stressed and repeated distinctions drawn between New Zealand and the United Kingdom in that regard.

At the luncheon adjournment we were lucky to have the benefit of the second defence counsel taking time with the delegation to discuss the entire case. He disclosed:

   a) his overall theory of the case;
   b) his reading of the sort of jury that was before him; and
   c) the techniques needed to persuade them to a “not guilty” verdict.

As we had to be at the Law Society in the early afternoon it was not possible to go back to watch the Judge’s summing up. The defence counsel took the visitors through what this would consist of. The Judge had already indicated that his summing up on the law would last approximately 30 minutes. (We have subsequently learned from counsel that the two defendants were acquitted on all charges).

New Zealand Law Society
From 2.30 pm to 4.45 pm the visitors were treated to three presentations at the New Zealand Law Society. These were from Wellington defence counsel, Robert Lithgow, Marlo Greenhough and Sandy Baigent.

Robert Lithgow has had experience in the Crown Law Office as a prosecutor but has spent more time as defence counsel during his 25-year legal career. Using audio visual equipment he took the visitors through the normal gestation period of various prosecution events from the time of arrest through to final disposition in the District Court. Robert pointed out the many opportunities that there are, as the case works through the court process, to have the matter informally reviewed through:

   (a) initial discussion with the Police (often at the Police Station at the time of arrest);
   (b) diversion (with the Police);
   (c) status hearings;
   (d) further discussion with the Police in the form of late plea bargaining.

He also gave some useful descriptions about how people are now being allowed to go out on bail but are confined to their homes on a detention basis backed up by
electronic ankle bracelets. New Zealand prisons have become seriously overcrowded because of levels of offending and increased sentences and home detention is now very common both for bail and as a separate sentence.

(As an aside it could be noted that Robert showed a photograph of himself taken in 1972. The slide photograph showed that there was a Police stamp across the bottom of it. This indicated that Robert had been convicted for refusing to be inducted into New Zealand’s armed forces on the grounds that he was not prepared to serve in Vietnam. It brought a spontaneous round of applause from all seven delegates!)

Sandy Baigent spoke of how criminal legal aid is administered and in particular how New Zealand runs a police detention legal assistance scheme. Under this scheme anyone being interviewed by the Police has an automatic right to have a lawyer present and who is paid for by the State. The lawyer will give advice either by telephone or by personal attendance at the Police Station or wherever the interview is being conducted.

Sandy showed the visitors a standard Police video of an interview. She asked the delegates to note that since video interviewing of suspects has become (nationally) commonplace the number of defences based on inadequate taking of statements by Police has dropped to practically nil. She mentioned that lawyers are very often seen on the interview videos asking that the interview be paused while legal advice is given. The time is very clearly shown on the video so that the court would know when the interview was paused and when it recommenced.

Marlo Greenhough is an expert on domestic violence cases and practises in both the Family and Criminal Courts. She is a longstanding duty solicitor who attends court on a roster to assist, at State expense, people who attend court without a lawyer and who often do not understand that they are eligible for criminal legal aid. If however they do not qualify for legal aid the duty solicitor will give them considerable assistance in dealing with the court even to the point of entering a plea in mitigation on sentencing.

Marlo made the point that New Zealand has a high rate of domestic violence and abuse especially against women and children. Under the Domestic Violence Act 1995, the Court is now able to make orders which if they are breached lead to immediate arrest by the Police.

Prior to 1995, the Police took a rather relaxed attitude to domestic violence. They often used to rely on warnings to the parties especially as women would frequently refuse to give evidence against their husbands as they are entitled to do under New Zealand law. The process now consists largely of:

(a) Obtaining a Domestic Violence Order in the Family Court; and

(b) Enforcing it in the District Court as a criminal matter if the Order is breached in the slightest particular. The system is also backed up compulsory attendance at anger management and other forms of re-education course. A Violence Order stays in place indefinitely until the person against whom it is made arranges for it to be removed by persuading the Court that he or she is no longer a threat to the person who is protected by the Order.
Wednesday 29 September 2004 - Auckland

The first session in the morning was with Mr Robert Hesketh, Director of Proceedings at the Human Rights Commission of New Zealand.

In New Zealand Human Rights are mainly summed up by the right to non-discrimination in the areas of:

(a) employment;
(b) accommodation;
(c) privacy and non harassment;
(d) disability; and
(e) matters involving marital or gender issues; and
(f) schooling.

Mr Hesketh contrasted the discretions imposed upon him as a Prosecutor in Human Rights issues with the discretions conferred upon Crown Solicitors and Police (which had been discussed the previous day at the Law Commission). Copies were handed round.

He gave numerous instances of the sorts of areas where he has been prepared to prosecute and reasons he has invoked on those occasion when prosecution did not take place. Sometimes the aggrieved parties have then taken the matter to the Police on complaint. They have sometimes been able to get criminal proceedings started for sexual assaults and sexual harassment both in the work place and in other parts of the day to day New Zealand environment.

Successful prosecutions are often brought largely to publicise little known parts of the Human Rights legislation and make the wider community become aware the pitfalls in breaching the legislation. Those who infringe may be required to make cash payments of up to $5,000 to the complainant and to undergo special human rights training in the hope that they will not make the same mistakes in the future. Often prosecution does not occur because the complainant is a fragile person and would be able to stand up to the rigours of cross-examination in the relevant tribunal.

It was noted that the Tribunal that deals with discrimination and prosecutions is, by legalisation, given equivalent status with the District Court. Successful prosecutions do not however lead to convictions. Infringers do not acquire a criminal record but they do often receive a measure of bad publicity for their flouting of human rights standards especially in relation to employment and treatment of disabled persons.

Public Defender Office – Auckland
At midday the group visited New Zealand’s experimental public defender office which now employs a total of 21 lawyers in central Auckland and Manukau City.

The group was addressed by the Director, Mr Michael Corry a very experienced lawyer who has just been appointed by the Ministry of Justice to oversee a 5 year pilot study which will report to the Government in 2009. Mr Corry reported as follows:

(a) Expenditure on criminal legal aid is in the order of $40 to $45 million per annum. Not all of it has been wisely spent.

(b) The Courts in Auckland, especially, have been clogged through pointless defences being taken by numerous well known criminal
defendants which have led to trials going on for many months, 
sometimes at a cost of $1 million and with inevitable convictions at the 
end.

(c) The too-ready access to criminal legal aid had meant that young 
lawyers not well trained in criminal law procedures were accessing 
legal aid as a primary source of their own funding. They practised 
without the ability to conduct a competent defences. This was leading 
to many appeals based on the allegation “my lawyer was incompetent, 
therefore I did not have a proper defence” and re-trials are ordered.

(d) At present in Auckland approximately one out of all three criminal 
cases is ending up within the pilot project. To date the results are 
favourable. The Judges especially are commenting on the competence 
of counsel employed by the Legal Services Agency pilot project. A 
good relationship is being worked up with the Police while Crown 
Solicitors are being very supportive of the work being done in the pilot 
project. Mr Corry asserted, however, that whenever a person had a 
presentable defence it was vigorously put forward.

(e) There is proving to be intense competition for jobs in the pilot project. 
When 3 jobs were advertised in the newspaper last month there were 
20 very competent applicants.

(f) It may be that in 2009 the Government will widen the project both 
within Auckland and into the other major centres of New Zealand. The 
objective has always been to ensure that those with a defence worth 
taking obtain it but to weed unmeritorious defences which are costly to 
put forward and are most unlikely to succeed either before a Judge or a 
jury.

(g) The Director asserted that he has had no pressure placed on him by 
external parties either to:
(i) reduce expenditure or
(ii) to reduce the amount of representation given to those people 
who would otherwise qualify for criminal legal aid but are 
content to be represented by a public defender. He believes 
that by choosing well-qualified and professional counsel to 
work in his office a properly independent defence organisation 
will be the result.

(h) Mr Corry observed that in Auckland many counsel doing criminal 
legal aid work were doing so in isolation with minimal professional 
support and were subject to personal burnout after about 5-10 years. It 
has already been noted that since the pilot project started earlier this 
year the office has developed a good esprit de corps. Employees have 
commented that this has been a very supportive environment in which 
to work. It has good legal research facilities and the wide range of 
counsel between very junior and very senior has given the staff ample 
opportunity for support and collegiate discussion of cases.

Because of the late finish at the Public Defender office and the large distance between 
the city and the Mangere Community Law Centre it was decided that there was insufficient time to pay a visit to that organisation. There was brief discussion at to 
how the centre was structured and operated. (It gives excellent professional support
for those people charged with criminal offences who do not qualify for criminal legal aid. The centre like all community law centres is funded by interest paid by banks on solicitor trust accounts and channelled through the Legal Services Agency to the 23 law centres currently operating in New Zealand about $3.5 million per annum.)

**Crown Solicitor**

The final visit was to the Crown Solicitors office in Auckland. The firm concerned is Meredith Connell.

Auckland has a population of over 1 million and is the New Zealand ‘centre’ for:

(a) serious fraud;
(b) very serious drug offending particularly with relation to methamphetamine;
(c) elements or organised crime, much of it connected with drugs, violent sexual offending.

The group was addressed two women partners of the firm in a special room in the building set-up especially for audio visual presentations. The purpose of the session was largely to reinforce and clarify information already acquired in previous sessions. The slide presentation of prosecution flowcharts was very useful in that respect and all misunderstandings in relation to:

(a) diversion;
(b) bail;
(c) preliminary hearings;
(d) pre-trial hearings; and
(e) onus of proof in trials and re (b);
(f) standard of proof re (c) and at trial;

were fully dispelled in a systematic way using a standard presentation. There was intensive questioning from the group. The visit concluded at 4.45pm.

**Thursday 30 September 2004**

The group was taken to Auckland International Airport by shuttle at 10.15am and later in the morning connected with its flight to Singapore after a round of sincere farewells and the presentation to it of a small New Zealand memento.

The group seemed happy with their visits and took away a great deal of printed material together with references to numerous websites which will be of special interest.

**D M Smith**

**Principal**

**Stephens Lawyers**

**Wellington, New Zealand**