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A LAW ENFORCEMENT INFORMATION SYSTEM

The New Zealand Government announced in July 1972 that it was proceeding with plans to store Court, police, driving licence and car registration records in a nationwide computerised databank in Wanganui (*a*). I would like to examine the proposal with particular regard to questions of privacy and confidentiality.

In September 1971 the Ministry of Transport introduced legislation providing for a number of changes in the law (*b*). This statute repealed and substituted Part III of the Transport Act 1962. Section 27 of the 1971 Amendment re-enacted with minor changes s. 28A of the principal Act which had been introduced in 1966 (*c*). Section 27 now provides for a central register of all motor drivers' licences showing the full name, address and date of birth of the licence holder, the date of issue, number and date of expiry of the licence, and particulars of disqualifications, and their removal. The changes made by the 1971 Amendment do not affect the present discussion. In introducing the Bill the Minister of Transport stated that it made changes *inter alia*, to allow the establishment of a central computer system for the issue of motor drivers' licences. This move followed an E.D.P. feasibility study which pointed to a number of advantages which would result from such a system (*d*). It is to be noted that the 1971 Amendment contains no reference to an E.D.P. system, and that no legal framework was provided for computerisation in relation to security, privacy or confidentiality. In reply to a request to permit interested parties to make submissions on privacy, the Minister of Transport stated that security on access to the Ministry's E.D.P. files would be stringently controlled and there would be precautions to prevent any abuse of privacy. Because there would be no change in the availability of information and adequate control would be placed on the access to the E.D.P. records it was not proposed to call for submissions (*e*). In November 1971 it was stated that central computer control for the issuing of Ministry of Transport drivers' licences should begin towards the end of next year (1972) (*f*).

In May 1972 the Chairman of the Cabinet Committee on State Services, Mr Thomson, announced that the Government had authorised an investigation into a specially designed electronic data processing system for law enforcement agencies which could give the Ministry of Transport, the Justice and Police Departments modern computer-based communications sending rapid up-to-date information at any centre. The system would have a central computer. Police and transport officials would be able to send for information on criminals, criminal history records, motor vehicles, drivers' licences and associated subjects 24 hours a day (*g*). In reply to submissions on the problems of privacy and confidentiality made to the Government, the Minister of Justice pointed out that a special sub-committee of the Law Revision Commission had been set up previously to prepare a report on computer data banks and privacy. The report

(*a*) "State plans nationwide personal computer file", New Zealand Herald (14 July 1972).

(*b*) "Computer to keep track of every driver in country", New Zealand Herald (22 September 1971).

(*c*) Transport Amendment Bill 1971 (No. 94-1) which has become the Transport Amendment Act 1971.

(*d*) Hon. J. B. Gordon, N.Z.P.D. (21 September 1971) 3400-3401.

(*e*) Letter from Minister of Transport (10 October 1971).

(*f*) W. Page, "Licensed to drive by computer", Auckland Star (17 November 1971).

would constitute a comprehensive review upon which any necessary legislation could be based. As far as the Secretary for Justice was aware it was not intended that any department, body or persons other than the three departments involved, would have direct access to the information stored in the system. Certain information would only be avaialble to the department providing it. The Minister gave an assurance that the most important aspect of privacy had not been overlooked and particular attention will be paid to this as part of the system development. Those responsible for law enforcement should, subject to necessary safeguards, be provided with the facilities which modern technology can provide to enable them to carry out their functions for the public good (*h*).

In July 1972 the Government announced that it would invite E.D.P. companies to submit proposals on the system to be called the New Zealand Law Enforcement Information System. It would not be designed as a reference file on every New Zealander. It would contain information already on record. It would not involve invasion of the privacy of the individual. On-the-spot identification of car ownership could perhaps reduce the incidence of crime in which which motor vehicles were involved. There would be no inter-facing with private sector computers and no exchange of information. Full safeguards to prevent unauthorised access or use of the information were being designed into the system (*i*). Cabinet had approved computer companies being invited to submit proposals for the development, design and implementation of such a system in March 1972, and it was not made clear why the actual announcement was made at this later date. Mr Thomson has stated that distribution of the specifications has been restricted to recognised companies with the capability of designing and implementing an E.D.P. information system to New Zealand specifications. This decision has been taken on the grounds of confidentiality and copies of the specifications are not available for general distribution (*j*).

One detailed account of the system has appeared in the press. According to this account each station will have its own operator who will feed inquiries to the staff at Wanganui. The operator will have a station, subsection and locking-in code. Unless all three are complied with the message will be rejected. A traffic inquiry would not be able to get any information other than traffic records. The codes are to be changed at irregular intervals. A record of each day's requests by a particular operator will be sent to the operator's superior who will be "a high-ranking officer." It is expected that legislation will provide a means whereby checks can be made if an individual feels he is being harassed. Information will only be sent to the requesting office. Original records will be destroyed after they have been recorded in the system. A police inquiry will be answered within five to thirty seconds. Legislation will work in the field of individual rights rather than lay down the workings of the computer (*k*).

The Law Enforcement Information System has raised considerable public fears of an insidious electronic invasion of privacy (*l*). The manner in which the System has been introduced has given the public no reason to abandon such fears. Why was the original Transport Ministry databank announced in September 1971, and a much wider system decided upon by Cabinet in March 1972? Why are the privacy measures not being revealed to the public, despite repeated general guarantees from the Government? The course adopted by the Government in announcing the system is disturbing.

In reviewing the few available facts released by the Government on the law enforcement databank, the first question to be asked is why such an expensive computer databank is needed. The Government has stated that "all the system will do is to make information available to law enforcement departments more swiftly." "On-the-spot" identification of car ownership by means of this centre could perhaps reduce the incidence of crime in which motor vehicles were involved (*m*). But the present manual system for retrieval of motor vehicle registration particulars appears to have functioned efficiently in the past. No detailed public explanation has been given by the Government why law enforcement departments need information more swiftly. It is assumed, without any publicly revealed supporting facts, that the projected system will be more efficient than existing

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(*g*) "Government looks at computer aid for law", Auckland Star (20 May 1972).
(*h*) Letter from Minister of Justice (5 July 1972).
(*i*) "Computer won't invade privacy", Auckland Star (14 July 1972).
(*j*) Letter from Hon. D. Thomson (28 July 1972).
(*k*) "Law to keep eye on Alec", New Zealand Herald (15 July 1972).
(*l*) cf. Editorial, "The Right to Privacy", New Zealand Herald (18 July 1972).
(*m*) Hon. D. Thomson, Chairman, Cabinet Committee on State Services, as quoted in "State plans nationwide personal computer filo", New Zealand Herald (14 July 1972).

manual methods of obtaining information. If efficiency is sought, why is the system to be located in one or two new computer databanks in Wanganui, and not in the existing Government Computer Centre at Wellington?

The record of public and government controlled electronic data processing in New Zealand suggests a number of problems. The Department of Statistics has referred to the "difficulty faced in getting a satisfactory computer service" from the Government Computer Centre (*n*). As the Centre will not publish annual reports and refuses to reveal details on its plans or operation, apart from the information in the annual reports of government departments and occasional press and magazine articles, the taxpayer has no means of examining this complaint about a government operation having a total expenditure for 1971-1972 of $1,877,938 (*o*). The Waterfront Industry Commission, according to a newspaper report, ordered a computer system for its Wellington head office with ten terminals in main ports. After a few months use the Commission apparently decided that the system was not fully suited for its needs (*p*). School certificate and nursing examination results processed by the Government Computer Centre in 1970 allegedly led to mistaken notification of results (*q*). It must be emphasised that the instances quoted are taken from newspaper reports and any full discussion would require a detailed examination of the operation of the systems concerned. There have been a number of other complaints of errors in government computing (*r*).

The assumption that central government databanks must be more efficient than existing manual systems in any particular case may be correct. But it certainly requires detailed demonstration to the taxpayer. The utilisation of computers to increase management capability is a path "strewn with sad failures" (*s*). A major problem is the possibility that (*t*):

> "... we are going to create systems of such unparalleled inefficiency, that relying on anything they generate will lead to an even worse mess."

The assumption of efficiency without publicly available proof in the case of the proposed Law Enforcement Information System is a major defect from the point of view of the taxpayer.

The Government has not made public any indication of the cost of the system. If the public is to make any logical assessment of the need for the system it must know how much it will cost, and what improved service it will get for the very large expenditure which is no doubt involved in setting up a central computer facility with numerous points of access spread throughout New Zealand. This cost must take into account the invasion of privacy and confidentiality involved in the system.

The Government has stated that the system "will not be designed as a personal reference file on every New Zealander (*u*)." It has been suggested that the proposed system will identify individuals by means of a code composed of the full name, date and place of birth (*v*). It is clear that there must be some means of uniquely identifying the individuals on whom information is stored. A unique identification system in such a databank containing information on all owners of vehicles and Court records would in itself cover the majority of adult New Zealanders, and furnish a possible basis for extension of the data base to contain other proposed government-backed databanks. The New Zealand Computer Society has devoted a considerable amount of study to this problem (*w*). The State Services Commission allegedly refused to allow Government employees in Wellington to take part in the study in any official capacity (*x*). The subject is highly controversial, and there has been considerable public support for the conclusion reached in the Report that there should not be such a system (*y*). However the proposed Law Enforcement databank would require just such a unique identification system as has been discussed by the New Zealand Computer Society.

(*n*) *Report of the Government Statistician for the Year ended 31 March 1972*, App. H. Rep. H. 39, at page 25.

(*o*) The amount is taken from the *First Report of the Controller and Auditor-General for the Year ended 31 March 1972*, App. H. Rep. B.1 (Pt. II) at page 57.

(*p*) C. James, "Computers not the answer", New Zealand Herald (3 January 1972).

(*q*) "Many cards were incorrect", New Zealand Herald (2 February 1971).

(*r*) I. Macdonald "Computer-magic or idiot with a memory", New Zealand Herald (24 June 1972).

(*s*) Mr H. W. Nelson, Burrough Corporation, U.S.A., as quoted in "Path strewn with failures", New Zealand Herald (18 August 1969).

(*t*) R. Malik, "The Databank Society—Can we cope?" New Scientist and Science Journal (1971) 497, 498.

(*u*) Hon. D. Thomson, Chairman Cabinet Committee on State Services as quoted in "State plans nationwide personal computer file" New Zealand Herald (14 July 1972).

(*v*) J. Eagles "Big Brother era near" Sunday Herald (16 July 1972).

(*w*) *Investigation of a Unique Identification System*, A Report prepared by the New Zealand Computer Society (May 1972).

(*x*) ibid., at page 13.

(*y*) Editorial "Privacy in Peril", New Zealand Herald (13 May 1972).

An essential feature of the proposal is the provision for remote access (*z*). New Jersey law enforcement agencies have prepared for a Statewide Enforcement and Intelligence Network (S.E.I.N.E.) to tie together more than 560 municipalities, the entire Department of Law and Public Safety and all 45 state police stations (*a*). New Jersey has a population of 7,170,000. The purpose of the proposed New Zealand System is efficient and speedy access. It will therefore require a large number of terminals. Such a number of terminals present great and perhaps insoluble problems of access control and safeguards (*b*), above and beyond the problems presented by the central computer facility itself.

No firm indication or legal guarantee has been given as to what information will be stored, and its accuracy. According to a newspaper report it will include the full name, date of birth, sex, address and occupation, date of issue of driving licence, endorsements and legal or medical requirements (such as wearing glasses while driving), full details of car, and (from Court records), nationality, race, criminal convictions, traffic infringements and parking offences (*c*). Much of this information is unchecked and may well be inaccurate. Some items such as race are certainly highly dubious. There is no legal guarantee that further information will not be added. This would furnish what is "in some respects a personal reference file of most adult New Zealanders (*d*)." There would be no legal means by which the individual on whom information was held could check what information was held, and if it were accurate. Nor could he ascertain who had been given access to it.

The Government has stated that if anyone had reason to be disturbed by information he thought had been recorded he could make representations and this would be checked out (*e*). This statement does not indicate how the individual can ascertain what information is held, who would check it out, and what guarantees there would be as to the accuracy of the checking out. Nor does it answer the primary question; why should the Government be permitted to store such information in a central computerised databank? The individual has no legal right to redress; he will be dependent on the discretion of a civil servant.

A most serious complaint against the establishment of such a system without legally enforceable privacy and confidentiality safeguards is that it ignores experience in such matters abroad, and particularly in the United States. Computer technology to be utilised in this system will no doubt be taken from the United States or the United Kingdom. It is hardly conceivable that the Law Enforcement Information System will provide better safeguards than those developed in those countries. One U.S. government department has used stored information to blacklist scientists. The U.S. Army stored personal data on a wide number of notable Americans including Martin Luther King, Dr Spock and Joan Baez (*f*). Such information has already allegedly leaked to the press (*g*). If the U.S. Army cannot safeguard its databanks, it may be asked how can the New Zealand Government, with its lesser resources, do so? This problem may already have arisen in New Zealand. Mr Roger Boshier, a lecturer at the University of Auckland, has been stated in a newspaper article to hold print-outs of the Security Intelligence Service computer programme which include the Service's A1 to F6 security classifications (*h*). The Government has been quoted as saying that the Service has no computer(*i*). If the allegations of Mr Boshier were correct, they would demonstrate that information can be obtained from a very highly confidential government computer databank by unauthorised persons. In that case the Law Enforcement System would clearly be open to such access. If Mr Boshier's allegations are incorrect, the public should be officially informed as to the precise nature of the document which he, according to the newspaper report, alleges to be a Security Service databank print-out. If there is any foundation to this and other allegations of such a nature, whether the material is ob-

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(*z*) "Govt. looks at computer aid for law", Auckland Star (20 May 1972).

(*a*) "New Jersey computer-based crime fighting system", 3 (2) Law and Computer Technology (1970) 54.

(*b*) cf. A. R. Miller, "Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society", 67 Mich. L.R. (1969) 1091 at 1113-1114.

(*c*) "Privacy", New Zealand Herald (22 July 1972).

(*d*) *Report of the Government Statistician for the Year ended 31 March 1972 (supra)* at page 26.

(*e*) "Equal pay proposals", New Zealand Herald (22 July 1972).

(*f*) "Drifting Toward 1984", Time (29 March 1971).

(*g*) C. H. Pyle, "The Army watches civilian politics" 2 (12) Washington Monthly (1970) 6 at 13.

(*h*) T. Bell, "Big Brother watched . . .", Sunday Herald (7 May 1972).

(*i*) "Checks made in year total 13,000", New Zealand Herald (2 August 1972).

tained from a computer databank or from ordinary files, the most serious doubts would be raised as to the security of information in the proposed Law Enforcement System. Computer security is far from complete (*j*):

> ". . . a great deal more has to be done if systems are to be truly secure. If you were to ask why we manufacturers aren't further along on safeguards, built into the system and available for general use—we could probably cite two reasons: first, with the development of a whole new generation of computers, we had to put other things first. In the development of operating systems we had to give priority to throughput and other requirements that taxed the limited memory capacity. And, second, there was little market demand for data security."

A basic problem of such a system is that of access by other government departments. It is submitted that, on the law as it stands at present, a number of government departments will be obliged, in the course of their duties, to seek such access, and there are no legal means by which the taxpayer on whom information is held will be informed of such access, or can prevent it. Two illustrations may be taken for this purpose.

It has been stated, in a newspaper report, that after the information has been fed into the Law Enforcement computer and checked, the original records will be destroyed (*k*). If this is indeed done the system will be the only source of the relevant information. Even if the original files are preserved it is difficult to envisage government departments requiring access to the information going to the original files rather than the computerised information.

By law, the Commissioner of Inland Revenue shall at all times have full and free access to all "books and documents", whether in the custody or under the control of a public officer or any other person whatsoever. This applies "notwithstanding anything to the contrary in any other Act (*l*)." It is no defence to prove that such production would incriminate the person concerned because the whole purpose of such an order is to facilitate investigations to prevent defrauding the Revenue (*m*). It would appear that this section covers computerised records, as the Act defines "books and documents" as including "all books, accounts, rolls, *records, registers*, papers and other documents (*n*)." A further provision of the same Act requires every person, including any officer in a government department or public authority to produce any "books or documents" within the meaning of the Act, and to furnish in writing any information (*o*). The latter provision is subject to common law privileges (*p*). However there is no established common law privilege regarding the communication of information from one government department to another. It would therefore appear that the Inland Revenue will have full legal access to the Law Enforcement System.

The Security Intelligence Service "shall . . .cooperate as far as practicable and necessary with such State Services and other public authorities in New Zealand and abroad as are capable of assisting the . . . Service in the performance of its duties (*q*)." It is therefore the duty of the Service to obtain information relevant to it from the proposed Law Enforcement databank, although the Service is not a law enforcement agency (*r*). It is difficult to conceive that the Service will not require either direct or remote access to a databank covering the vast majority of adult New Zealanders. If the Service were denied access it would have to seek the same information by other much more expensive means. The citizen, on the present law, has no means of knowing of such access, no method of preventing it, no means of proving such access if it happened, and no remedy in the unlikely event that he were to hear of the access.

It has been suggested that pressure for the issue of a unique identification system seems inevitable, and that there will be an increasing demand for its introduction by government agencies (*s*). The argument of increased efficiency has already led to the development of

(*j*) T. V. Learson of I.B.M., Joint Computer Conference (16 May 1972).

(*k*) "Law to keep eye on Alec", New Zealand Herald (15 July 1972).

(*l*) s. 13 (1), Inland Revenue Department Act 1952.

(*m*) *Commissioners of Customs and Excise* v. *Ingram* [1948] 1 All E.R. 927.

(*n*) s. 2, Inland Revenue Department Act 1952.

(*o*) s. 14 (1), Inland Revenue Department Act 1952.

(*p*) Gresson J. in *Commissioner of Inland Revenue* v. *West-Walker* [1954] N.Z.L.R. 191 at 213.

(*q*) s. 4 (1), New Zealand Security Intelligence Service Act 1969.

(*r*) s. 4 (2), New Zealand Security Intelligence Service Act 1969.

(*s*) *Report of the Auckland Study Group on Unique Identification* (1972).

(*t*) H. N. Vautier, "Emergence or Emergency—the development of computer-based hospital information systems in New Zealand" 3rd National Conference, New Zealand Computer Society (August 1972).

(*u*) *Report of the Ministry of Defence for the Year ended 31 March 1972* App. H. Rep. H. 4, at page 30.

(*v*) *Report of the Government Statistician for the Year ended 31 March 1971* App. H. Rep. H. 39, at page 15.

plans for a comprehensive computer-based hospital information system (*t*), an Army personnel data base system (*u*), and a central register of enterprises (*v*). All these proposals have already been the subject of intensive research and all involve unique identification of individuals. There can be little doubt that there will be strong future pressure to establish the unique identifier to be used by the Law Enforcement computer as a common standard for the other government-backed systems, and also to store all the information in one or two centres. There are no legal guarantees that this will not indeed be done. This tendency is in contradiction to the experience of the United States where such proposals have met with very strong public opposition and were discontinued. The present public apprehension in this country is that such a system will be introduced piece-meal to avoid public reaction. Such apprehension is hardly calmed by the history of the development of the Law Enforcement System.

The Ministry of Justice has pointed out that a subcommittee of the Law Revision Commission is investigating the whole question of personal privacy and computer data and a further report is expected next year (*w*). Yet the decision to invite E.D.P. companies to submit proposals for the Law Enforcement System was reached by Government in March 1972 and made public in July 1972. It may be presumed that the specifications have already been sent to the companies selected. By the time the expected Law Revision Commission report is ready the government will have signed binding contracts for the Law Enforcement computer, and any recommendations made by the Commission will not be able to change this system. Any safeguards will have to be incorporated in the existing system, and substantial changes will be prohibited by the large additional cost. This underlines the view that if any substantial changes are recommended by the Law Revision Commission they may not be implemented if they are too expensive. But, if they are too costly, they will raise the question whether the invasion of privacy and confidentiality represented by the system is not more important than any putative increased (and no doubt very expensive) efficiency. This fundamental question has already been decided by the Government.

This problem is well-illustrated by a finding of the Younger Committee. One possible privacy safeguard is the enactment of legislation compelling databanks to provide print-outs to all persons about whom information is stored. Such a provision is far from being a matter of fanciful speculation. It was included, as an instance, in the Bill presented by Mr Kenneth Baker, Conservative M.P. for Acton, to the House of Commons in 1969 (*x*). I.C.L. informed the Younger Committee that this was feasible but would impose a "disproportionately heavy burden on any installation." The minimum estimated cost given to the Committee by various sources for such a print-out was £33 per 1,000 persons. The maximum total cost of a print-out given to the Committee was £500 per 1,000 (*y*). Applying the lower figure, and taking the minimum number of persons covered by the proposed Law Enforcement System to be 862,000 (*z*), the cost of a single initial comprehensive print-out would be (at least) about $56,000, apart from the cost of installing printers. This takes no account of individuals not owning cars, and the frequent necessity for further print-outs when information is up-dated. It is submitted that such a comprehensive duty will be ruled out in the case of the Law Enforcement System on the grounds of cost alone. However, had this been taken into account before the system was ordered, as part of the cost of safeguarding privacy, it might have been decided not to proceed with the system. This single instance emphasises the fact that adequate privacy and confidentiality safeguards must be designed before any such system is ordered and their cost taken into account. It would appear that this fundamental matter was not fully considered when ordering the Law Enforcement System.

The present discussion has outlined some of the existing problems raised by the Law Enforcement Information System. It has not attempted to provide an exhaustive examination. Such a commentary would have required a lengthy investigation of such matters as the storage of out-dated material, what type of information may be stored and physical security of computers, which have been dealt with elsewhere (*a*).

Dicey defined the rule of law as "the supremacy throughout all our institutions of the

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(*w*) "Look at data fears", Sunday Herald (16 July 1972).

(*x*) s. 4 (1), Data Surveillance Bill 1969.

(*y*) Cmnd. 5012 (July 1972) 189.

(*z*) The number of licensed cars in New Zealand in 1970.

(*a*) See F. M. Auburn, "Computers and Privacy" [1971] N.Z.L.J. 465 and "Legal Problems of Storage and Processing of Electronic Data," University of Tasmania L.R. (1972) (to be published).

(*b*) A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 9th ed. (1945) 471.

ordinary law of the land (*b*)." The Law Enforcement System is independent of legal supervision and safeguards and a violation of the rule of law. The proposal ignores such severe criticisms levelled at computerised law enforcement systems overseas as that of Professor Vern Countryman of Harvard (*c*). At present there is only one jurisdiction having fully operational and comprehensive computer privacy legislation, the West German State of Hesse (*d*). The First Report of Dr Birkelbach, the Data Protection Commissioner is therefore of particular significance. In discussing a computerised police information system Dr Birkelbach stated that (*e*):

> "Construction and maintenance of such a system can only be justified on behalf of the more highly valued interest of the common weal if communication and use of such information is regulated as strictly as possible and if optimal safeguards against illegal leakage and uses exist."

The proposed Law Enforcement Information System does not comply with these criteria, and should not be established until these criteria are satisfied in the form of legally enforceable guarantees of the individual's privacy and confidentiality.

F. M. AUBURN.

(*c*) V. Countryman, "The Diminishing Right of Privacy: The Personal Dossier and the Computer" 49 Texas L.R. (1971) 837 at 854.

(*d*) 41 Gesetz- und Verordnungsblatt fur das Land Hessen, Teil I (1970) 625-627.

(*e*) *Erster Tatigkeitsbericht des Hessischen Datenschutzbeauftragten* (29 March 1972) 24.

SUMMARY OF RECENT LAW

BANKRUPTCY AND INSOLVENCY—PRACTICE

Bankruptcy notice—Validity of—Omission of creditor's full address—Address for service not creditor's address—Insolvency Rules 1970 (S.R. 1970/245), Form 15. The bankruptcy notice served on the debtor contained no address of the creditor other than Auckland. The notice, however, contained an address for service. *Held*, The notice was defective. The address for service was not an address for payment nor was it an address where the debtor could secure or compound the debt to the satisfaction of the creditor. (*Re Twidle* [1916] N.Z.L.R. 748 at 749 and *Re McIntyre* [1955] N.Z.L.R. 337, applied. *Re Trueman* [1959] N.Z.L.R. 737 and *Re Beauchamp* [1904] 1 K.B. 572, 583, referred to.) *Re Matheson, ex parte Watson* (Supreme Court, Auckland. 26, 27 April 1972. Henry J.).

BANKRUPTCY—OFFENCES

Bankrupt incurring a debt which he did not expect to be able to repay—Debt payable at some undefined future date—Whether such a debt will support a conviction—Insolvency Act 1967, s. 126 (1) (a). An essential ingredient of the offence by a person who subsequently becomes bankrupt, of incurring debt which he did not expect to be able to pay must be his expectation of what his financial position will be at the time the debt falls due. Thus a debt due at some unascertained future date, to be decided by the bankrupt, will not support a conviction. *Gould* v. *Maru* (1971. 12 November. 1972. 17 February, before Mr J. K. Patterson S.M. at Lower Hutt).

CARRIERS—MEASURE OF DAMAGES

Limitation of liability—"Package or unit"—Whether a railway container holding many cartons of goods is a package or unit—Carriers Act 1948, s. 6 (1) (a)—Whether fundamental breach ousts operation of limitation of liability. A railway container holding many hundreds of individual cartons is one package or unit for the purposes of s. 6 (1) (a) of the Carriers Act 1948 so that, unless the consignor declares the value and pays extra charges, the limit of the carriers liability for loss is $40. Even if the non-delivery of a substantial number of the cartons, because of loss during transit amount to a fundamental breach of the contract of carriage this does not affect the operation of the limitation. (*Whaite* v. *The Lancashire and Yorkshire Railway Co. Ltd.* (1874) 9 Ex 67; *Studebaker Distributors Ltd.* v. *Charlton Steam Shipping Co.* [1938] 1 K.B. 459; [1937] 4 All E.R. 304; *Drinkrow* v. *Hammond and McIntyre Ltd.* [1954] N.Z.L.R. 442; *N.Z. Railways* v. *Progressive Engineering Co. Ltd.* [1968] N.Z.L.R. 1053; *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1966] 2 All E.R. 61, and *H. & E. Van Der Sterren* v. *Cibernetics (Holdings) Pty. Ltd.* (1970) 44 A.L.J.R. 157, referred to.) *Bycroft Mackintosh Limited* v. *Alltrans Group (N.Z.) Limited* (1971. 14 September, 8 November, before Mr M. L. Morgan S.M. at Auckland).

CLUBS AND OTHER VOLUNTARY ASSOCIATIONS—RULES

Counting of votes on resolution not in accordance with rules—Clear majority vote in favour of resolution—Resolution valid despite irregularity in counting. The plaintiff sought an injunction based on the validity of a resolution of "no confidence" in the plaintiff as president of the defendant association purported to have been passed at its annual general meeting at which between 700 and 800 members were present. The irregularity upon which the plaintiff founded his claim that the resolution was invalid was that the clear majority on a show of hands was not counted by an executive officer of the Association in accordance with the rules. *Held*, The Court ought not to interfere with the clearly expressed will of the majority of the members merely because the method of ascertaining that majority was not strictly complied with. (*Macdougall* v. *Gardiner* (1875) 1 Ch. D. 13, 25. applied. *Harben* v. *Phillips* (1883) 23 Ch. D. 14, 39, 40, 41, referred to.

The Court refused to interfere with the resolution of the majority whether by way of declaration, injunction or otherwise. *Swan* v. *Massey University Students Association* (Supreme Court, Palmerston North. 19, 28 April 1972. Henry J.).

CONTRACT—VALIDITY

Illegality—Contract concluded on a Sunday—Whether void—Police Offences Act 1927, s. 18. Even if, in the case of the sale of a car, part of the negotiations take place in a public place and on a Sunday, with the possibility that an offence has been committed against s. 18 of the Police Offences Act 1927, this would result only in a possible prosecution. It does not render the contract illegal and void. (*O'Neill* v. *O'Connell & Anor.* 72 C.L.R. 101, referred to. *Wanganui Motors Limited* v. *Toomey* (1972. 2. 9, 29 February, before Mr J. C. K. Fabian S.M. at Wanganui).

CRIMINAL LAW—CRIMES AGAINST PUBLIC WELFARE

Interfering with human remains—Whether mere possession of a skull constitutes the crime—Crimes Act 1961, s. 150. To constitute the crime of interference with human remains there must be some element of mutilation of the body. Mere possession of a part of a body is not sufficient. *Police* v. *Entwistle* (1972. 31 January, before Mr J. D. Murray S.M. at Dunedin).

CRIMINAL LAW—POLICE OFFENCES

Indecent language—Whether a word is intrinsically obscene—Whether circumstances of utterance are relevant. It cannot be said that any given word must necessarily be held to be obscene. The circumstances in which the words, in this case "bullshit" and "fuck" were uttered and the context in which they were spoken must be taken into account. *Police* v. *Piper and Others* (1972. 21. 28 April; 5 May, before Mr D. B. Wilson S.M. at Wellington).

EVIDENCE

Evidence taken at another Court before the hearing but not formally tendered at the hearing—Whether the Court can take cognisance of such evidecne. When evidence has been taken in another Court before the hearing, the Court of hearing cannot take notice of such evidence unless it is formally tendered at the hearing. *Quaere* whether the plaintiff can tender evidence taken on the application of the defendant. *Eide and Company Limited* v. *Britt* (1971. 13 May; 16 December. 1972. 3 February, before Mr J. C. K. Fabion S.M. at Wanganui).

HUSBAND AND WIFE—DOMESTIC PROCEEDINGS

Orders for maintenance of children—Wife left home after child born—Husband's petition to declare marriage null and void under s. 18 (2) (2) of the Matrimonial Proceedings Act 1963 dismissed for lack of proof as to paternity of child—Application by wife for maintenance of child—Refusal to permit blood test of child—Court required to be satisfied as to paternity of child—No jurisdiction to order blood test—Maintenance order suspended until blood test of child taken—Domestic Proceedings Act 1968, s. 35. This was an appeal against an order that the husband pay maintenance for his wife and for a child. On 22 January 1969 the respondent informed the appellant that she was pregnant and by reason of that announcement the parties were married on 1 March 1969 and the child was born on 1 August 1969. On 16 September 1969 the respondent left the appellant's parents' home as a result of an argument in which the respondent said the appellant was not or may not have been the father of the child and in which she disclosed an act of intercourse with another man on 15 November 1968. The appellant filed a petition to have the marriage declared null and void on the grounds that at the time of the marriage the wife was pregnant by another man. Turner J. dismissed the petition holding that the husband had not rebutted the presumption that the child was his but not holding that he was the father of the child. The respondent had persistently refused to allow the child to undergo a blood test. *Held*, 1. Since s. 35 of the Domestic Proceedings Act 1968 provides that "If the Court is *satisfied* that the *father* is not providing sufficient maintenance" the Court is required to satisfy itself that the defendant *is* the father and the principle of *res judicata* does not apply. 2. The jurisdiction conferred upon the Court under s. 35 (*supra*) is inquisitorial. 3 Unlike the High Court in England the Supreme Court has no jurisdiction to order a blood test in such circumstances. (*Re L.* [1968] P. 119; [1968] 1 All E.R. 20, referred to.). 4. It would be wrong to allow the question of paternity to be decided on the basis of presumption of legitimacy when it was possible by modern methods to obtain positive evidence. (*Re L.* (*supra*) at p. 155; 23, referred to.) 5. The Court drew an adverse inference from the unreasonable refusal by the mother to permit the child to have a blood test. (*B.* v. *B. and E.* [1969] 1 W.L.R. 1800, 1803; [1969] 3 All E.R. 1106, 1108, followed.) Payment of maintenance for the child was, suspended until such time as the respondent agreed that the child should have a blood test. *J.* v. *J.* (Supreme Court. Wellington. 9, 10 March; 20 April 1972. Beattie J.).

INCOME TAX—INTERPRETATION

"Business of life insurance"—"Surplus funds"—Method of assessment of Life Insurance Companies—Presumption against double taxation—Meaning of "double taxation"—Land and Income Tax Act 1954, ss. 149, 151—Land and Income Tax Amendment Act 1966, s. 30. The objector, an Australian company, carried on business in New Zealand. The Commissioner contended that the objector carried on the business of "life and other insurance" but the objector claimed that its business was confined to "life insurance". The objector sometimes issued life insurance policies with additional benefits which arose on the death by accident or permanent disablement by accident or disease of the assured. The assured had the right to discontinue the additional benefits on any anniversary of the commencing date of the policy but the objector had no right to cancel such benefits. The objector contended that the additional benefits were part of its business of life insurance and that it was assessable for income tax only under s. 149 of the Land and Income Tax Act 1954. The Commissioner claimed that the objector's profits from the additional benefits were assessable under s. 151 and that in terms of s. 149 the assessable income of the objector was the amount of "surplus funds" allotted in each year irrespective of the source or composition of the "surplus funds" and that the income assessable under s. 151 was not deductible from the "surplus funds" assessable under s. 149. This in effect resulted in double taxation of the taxpayer on profits derived from the additional benefits. Since s. 149 was repealed in 1966 and re-enacted somewhat differently the case dealt with the position under the old s. 149 and then with the new s. 149; the latter only related to income for the year 1967. *Held*, 1. As "the

business of life insurance" was not defined in the Act any approach to the interpretation thereof must first take into account the scope and purpose of the Act in which it appears. (*S.I.M.U. Insurance Association* v. *Fire Service Council* [1952] N.Z.L.R. 163, 181, followed.) 2. The expression "the business of life insurance" was not to be extended in its meaning unless it was clear that this was contemplated by the Legislature. 3. The additional benefits arose only upon the contingency of accident or sickness and differed from the traditional types of life insurance policy. 4. The distinction existing between the life policy and the additional benefit was of such a nature as to mean that the additional benefit was not to be regarded as part and parcel of the basic life policy. (*National Mutual Life Association of Australasia Ltd.* v. *Federal Commissioner of Taxation* (1959) 102 C.L.R. 29, referred to.) 5 The new s. 149, although differently phraséd to the former s. 149, was confined to the business of life insurance as distinct from any other business. 6. The "surplus funds" referred to in the former s. 149 relate to "surplus funds" derived from the business of life insurance and no allotment by the company of other profits to its policy holders could make such profits "surplus funds" for the purposes of that section. 7. The Commissioner's contention resulted in double taxation and there is a presumption against double taxation i.e. that the same person should not pay tax twice on the same money, which is only rebutted if double taxation is plainly demanded by the words of the statute and the words of the statute did not so demand. (*Commissioner of Taxes* v. *Luttrell* [1949] N.Z.L.R. 823, 846, applied.) 8. The "surplus funds" referred to in the new s. 149 inserted by the 1966 amendment relate to surplus funds derived from the business of life insurance. *National Mutual Life Association of Australasia Limited* v. *Commissioner of Inland Revenue* (Supreme Court, Wellington. 27, 28, 30 March; 26 April 1972. Quilliam J.).

Export goods exported from New Zealand by a taxpayer—Duty free shop—Delivering goods at airport on embarkation to passenger—Duty free shop owner of goods exported at the time of sale—Land and Income Tax Act 1954, s. 129B (1) (Land and Income Tax Amendment Act (No. 2) 1963, s. 20). Statutes—Interpretation—Benevolent construction—Acts Interpretation Act 1924, s. 5 (j). The respondent was the owner of two duty-free shops in Christchurch, one in the City and one at the Airport. The respondent held an import licence for the importation of duty-free goods for supply of duty free shops only. The goods when imported were entered for warehousing under the Customs Act and delivered to bonded warehouses. Goods sold from duty free shops had to be paid for in foreign currency. The goods when sold were entered for export and the respondent was under a duty pursuant to s. 109 of the Customs Act 1966 to "forthwith export the goods to a country outside New Zealand". On the purchase of goods the customer received a docket on which it was stated—"The goods described on this docket MUST be claimed by you prior to boarding the plane . . ." and "NOTE duty free goods are for export only and must not be retained, consumed or otherwise disposed of in New Zealand". If the aircraft should return to the airport the goods have to be returned to the respondent's care. All foreign currency received by the respondent was accounted for, through the banking system, to the Reserve Bank. The question was whether in the circumstances the goods sold to the purchasers were "Export goods . . . exported from New Zealand by a taxpayer" (the respondent) within the provisions of s. 129B (1) of the Land and Income Tax Act 1954. *Held*, 1. Pursuant to s. 19 and Rule 5 of s. 20 of the Sale of Goods Act 1908 the property in such goods passed to the purchasers when the goods were handed to them at the Airport. 2. The Court interpreted s. 129B by applying s. 5 (j) of the Acts Interpretation Act 1924 and by giving to it "such fair, large, and liberal construction and interpretation as will best insure the attainment of the object of the Act . . . according to its true intent, meaning and spirit". (*Escoigne Properties Ltd.* v. *Inland Revenue Commissioners* [1958] A.C. 549 565; [1958] 1 All E.R. 406, 414, referred to.) 3. A vendor may export by taking or sending. 4. Section 129B of the Land and Income Tax Act 1954 does not require the exporter to be the owner of the goods *at the time of export* but only that he should be the owner at the time of sale. 5. The respondent exported the goods in question by sending them out of New Zealand. Judgment of Wilson J. [1972] N.Z.L.R. 472, affirmed. *Commissioner of Inland Revenue* v. *International Importing Limited* (Court of Appeal. Wellington. 4, 5, 31 May 1972. Turner P., Richmond and Macarthur JJ.).

INTOXICATING LIQUORS—LICENCES

Application for a new club charter—Application in respect of premises not yet built—Whether Commission has power to grant a charter in respect of such premises. Section 166 of the Sale of Liquor Act 1962 setting out the conditions to be fulfilled before a club charter can be granted is so worded that the charter can only be granted in respect of existing premises, so that the Commission has no power to grant a charter in respect of premises to be built, nor can the Commission give any commitment that a charter will be granted when the building is complete. *Grammar Club Incorporated's Application* (1972. 12 April; 12 May, before the Licensing Control Commission (Mr R. D. Jamieson S.M., Chairman, Mr C. L. Spencer and Mr R. S. Austin) at Auckland).

Chartered Club—Application to extend charter to allow the sale of liquor for consumption off the club premises—Principles to be applied. On an application to extend a club charter to allow the club to sell liquor to its members for consumption off the premises, the Commission has a general discretion. One matter to be taken into account is other sources accessible to members from which liquor can be purchased. However the Commission does not want its discretion fettered and is not to be understood as saying this is the only consideration. *Manurewa Cosmopolitan Club Incorporated's Application* (1972. 11, 28 April, before the Licensing Control Commission (Mr R. D. Jamieson S.M., Chairman, Mr C. L. Spencer and Mr R. S. Austin) at Auckland).

MASTER AND SERVANT—INDUSTRIAL INJURIES AND WORKMEN'S COMPENSATION

Personal injury by accident—Arising out of or in the course of employment—Scope of employment—Farm employee mowing rough grass within house enclosure on Sunday injured—Service occupancy of house—Distinction between domestic and farm work. This case turns upon the distinction between domestic and farm work in which the plaintiff, an employee of the defendant a farm owner, suffered an injury to his eye while mowing some rough grass on a Sunday with his own mower with petrol supplied by the farm. The plaintiff occupied a cottage which stood in an enclosed triangular area of approximately one-third of an acre. This area was

in three categories, the greater part being the house lawn, adjacent to it was the house garden and immediately next to this was an area of rougher grass than house lawn in which there were a number of fruit trees. The accident took place in the area of the fruit trees. The plaintiff worked irregular hours as dictated by the requirement of the farm and on the particular Sunday morning he had repaired a farm generator. It was agreed that the grass in this area if allowed to grow too long would constitute a fire hazard. The question was whether at the time and in the circumstances under which the accident occurred the plaintiff was a "worker" within the Workers' Compensation Act 1956. *Held*, 1. The plaintiff's hours of work and responsibilities on the farm were such that his occupation of the farm house was intimately and directly associated with the farm work that he was required to do, and that he was a service occupier. (*Ramsbottom* v. *Snelson* [1948] 1 K.B. 473; [1948] 1 All E.R. 201, applied.) 2. Before the Workers' Compensation Act 1956 can apply it must be shown that the worker was doing something in discharge of a duty to his employer directly or indirectly imposed upon him byhiscontract of employment. (*St Helens Colliery Co. Ltd.* v. *Hewitson* [1924] A.C. 59 and *Workers' Compensation Board* v. *C.P.R. and Noell* [1952] 3 D.L.R. 641, applied.) 3. In cutting the grass round the fruit trees the plaintiff was in some degree fulfilling a duty he had as a farm employee of protecting his employer's general farm property from a possible fire risk. 4. The accident arose out of and in the course of his employment. *Honeywill* v. *Grigg* (Compensation Court, Dunedin. 28 April; 19 May 1972. Blair J.).

NEGLIGENCE—MASTER AND SERVANT

Distinction between employee and independent contractor—Tests to be applied—Onus of proof. In deciding whether a person providing a service is an employee or an independent contractor the tests involved include the question of who has control of the people providing the service, whether payment is made on a time or job basis, who provides the tools, and who selects the workers. There is also the question of whether the work, although done for a business is integrated into that business. The onus, and it is a heavy one, of shifting liability from the permanent employer to the person for whom the service is rendered, is on the permanent employer. (*Hargreaves* v. *Mayhead Brothers Ltd. and Anor.* [1971] N.Z.L.R. 559, referred to.) *The Peppertree Fashions Limited* v. *V. H. Farnsworth Limited and Blows Rentals Limited* (1971. 4, 27 August; 13 October, before Mr M. L. Morgan S.M. at Auckland).

TORT—NATURE OF TORTS

Distinction between actions of tort and actions of contract—Subcontractor tendering price for material to contractor—Contractor successfully tendering for head contract on subcontractor's price—Subcontractor revoking tender before acceptance by contractor—Contractor paying more for materials—No duty on subcontractor to make careful estimate for tender price. In this case it was sought to invoke the principle of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465; [1963] 2 All E.R. 575. The plaintiff, a building contractor, was interested in tendering for a building contract and in order to do so required subcontractors for doing doing specified work or supplying material. The defendant, a timber merchant, quoted for the supply of timber. The plaintiff intending to accept the defendant's quote based his own tender thereon and entered into the building contract on 17 September 1970. On 23 September 1970 the defendant on discovering a mistake in its calculations revoked its offer to supply timber as quoted. The plaintiff had to take the next highest quote for timber at an increase of $3,274.06 and sued the defendant for that sum. At no time before revocation had the plaintiff accepted the defendant's offer. *Held*, 1. The defendant's quote was no more than the expression of an intention to become bound by contract if the offer were accepted. It was under no duty to make *vis-a-vis* to the plaintiff offerce a careful estimation of the price sought. 2. The law on offer and acceptance is not to be qualified by some new duty of care, the breach of which would result in an action for negligence. 3. The plaintiff had no recourse to the *Hedley Byrne* principle when it had suffered loss by its own failure to exercise its legal right to accept the offer before it was revoked. *Holman Construction Limited* v. *Delta Timber Company Limited* (Supreme Court, Hamilton. 24, 25 May 1972. Henry J.).

WORK AND LABOUR—WAGES AND CONTRACTORS' LIENS ACT 1939

Notice of lien by subcontractor after carrying out subcontract—Subsequent abandonment of work by contractor—Employer arranging completion—Reasonable expenses of completion set off as damages against sums payable to contractor. Wages and Contractors' Liens Act 1939, ss. 20, 21 22 31, 35. In 1968 a contract was entered into between the respondent Council and R. J. S. Ltd. for the building of a centennial hall. Between 28 June to 6 September 1968 the appellant supplied materials to R. J. S. Ltd. for the hall. On 15 October 1968 the appellant gave notice of lien. At that date four progress payments had been made, the last being made on 2 October 1968. The amount retained pursuant to s. 32 of the Wages Protection and Contractors' Liens Act 1939 was $1,100, although if the contractor had completed the respondent would have held $5,000. In October the subcontractors who at that time had done no work for R.J.S. Ltd. intimated that they would not complete unless the respondent paid them, and the original joiners said that they would not continue until they were paid. On 17 October 1968 a different joinery firm was authorised by letter from the architect to proceed with the joinery and was advised that R.J.S. Ltd. had agreed to this. The four subcontractors were notified on 17 October 1968 by the architect to cease work. On 21 October the architect by a further letter advised the subcontractors that the financial position had been clarified and that they should file claims with the respondent for the full amount of their work and it was arranged that the respondent would pay. The appellant claimed to be paid $2,908.99 out of the lien retention moneys. The respondent had paid $5,000 to complete the hall. *Held*, 1. The respondent having taken over the completion of the work itself and having served no notice as prescribed could not be regarded as having acted under s. 35 of the Wages and Contractors' Liens Act 1939. 2. The contractor had abandoned the work and the respondent was entitled to damages against the contractor and expenses reasonably incurred in mitigating the damages by completion were recoverable as damages and brought into account. 3. Under cl. 2 of the building contract the employer has to pay the contractor as and when specified in the conditions. As the introductory recital to the contract stated—"And whereas the contractor has agreed to execute and *fully complete* . . . the said works . . . for the sum of $18,064 and as cl. 29 provided—"When the contractor shall have completely performed the work" he would be entitled to an architect's certificate of

completion, the rules as to "entire" contracts applied to the final payment. 4. Although the contract remained on foot, since the contractor did not complete, the only moneys which ever became payable to the contractor were the four progress payments. (Per Richmond J.) The abandonment of the work by the contractor was a repudiation and the respondent was thereby discharged from further contractual obligations. (Per Turner P.) 5. The expenses reasonably incurred by the respondent in completing the works were recoverable as damages and could be set off against the only moneys which ever became payable to the contractor. (*J. J. Craig Ltd.* v. *Gillman Packaging Ltd.* [1962] N.Z.L.R. 201, applied.) 6. Section 31 of the Act is in the nature of a machinery provision and there can be no breach thereunder unless there is a sum payable to the contractor by the employer to which the charge created by s. 21 (1) can attach. (*Taupo-Totara Timber Co. Ltd.* v. *Smith & Egden* (1911) 30 N.Z.L.R. 77 and *Stern* v. *Redpath & Sons Ltd.* [1950] N.Z.L.R. 50, applied.) 7. Section 20 (1) (b) of the Act does not apply to an employer who is forced by the contractor's breach into making other arrangements for the completion of the work. 8. Section 20 (1) (c) did not apply to the appellant because it had given its notice of lien after and not before it completed its part of the work. 9. The payments made by the respondent did not come within s. 22 because such payments were made in good faith and were not made for the purpose of defeating or impairing the appellant's claim to a lien, nor were the moneys paid in reduction of the contract price. 10. The cross-appeal was allowed as the sum of $829.14 which was ordered to be paid to the appellant by Wilson J. had been so ordered under a misapprehension as to the retention moneys available and the judgment entered against the respondent in the Supreme Court was vacated. The judgment of Wilson J. [1970] N.Z.L.R. 961, affirmed on slightly different grounds. *Ashby Bergh and Company Limited* v. *Ross Borough* (Court of Appeal, Wellington. 14, 15 March; 26 May 1972. Turner P., Richmond and Macarthur JJ.).

OBITUARY

Ian Douglas Mears:

A widely-known Hamilton Solicitor who had a life-long association with the city of Hamilton, died suddenly at his home on Monday, 12th June, 1972. He was Ian Douglas Mears, aged 57 years.

Mr Mears was born in Hamilton. He was the son of Mr E. J. Mears who helped to establish the well-known Hamilton firm of lawyers, MacDiarmid, Mears & Gray. Mr Ian Mears was educated at Hamilton Boys' High School and Waitaki Boys' High School. It was while he was studying for his law degree at the University of Auckland during the depression years that his father died suddenly, aged 51 years and Ian joined the family firm, completing his law degree by extra-mural study. He was capped in May, 1939.

Perturbed at the trend of affairs in Europe and the very apparent unpreparedness of New Zealand, Ian Mears was a volunteer member of the 2nd Medium Battery, R.N.Z.A. from 1936 until the outbreak of the Second World War, when as a Sergeant he volunteered for overseas service. After service on the guns in the early part of the war, he successfully passed an Officers' Training School in Cairo and served in the Middle East, Greece and Italy until late in 1944 when he returned to N.Z. for demobilisation. He held the rank of Captain and was Troop Commander of 47 Battery, 5th Field Regt. R.N.Z.A.

Mr Mears was President of the Hamilton High School Old Boys' Association in 1947 and 1948. He was a keen member of the Hamilton Golf Club and a former Club Captain. He was Intermediate Golf Champion at St Andrews in 1939. He was a foundation member of the Hamilton Squash Club and won the "B" Grade Championship in 1939. He was a foundation member of the Officers' Club, Hamilton and drew up its original Constituion, also serving on the executive. He was a member of the Junior Chamber of Commerce. He was Chairman of the Services Postponement Committee from 1962 until the time of his death. He was a member of the Hamilton Club since 1945 and a former President of the Hamilton District Law Society. He attended a Law Conference in Sydney in 1965 and an International Bar Association Conference in Tokyo in 1970. He missed only one N.Z. Law Conference since they recommenced after the war.

He was a member of the D. V. Bryant Trust Board for many years and an active member of the Hamilton Japan Society.

Mr Mears married Miss Joan Pinfold of Hamilton and they have two daughters. The elder, Victoria, is a science student at Massey University and the younger, Joanna, a student at the Wellington Polytechnic Journalism School.

Mr Mears' grandfather Mr, J. S. Bond was Mayor of Hamilton from 1905-1909 and his father-in-law, Dr F. D. Pinfold was Mayor of Hamilton from 1931-1933.

BILLS BEFORE PARLIAMENT

Apprentices Amendment
Appropriation
Aviation Crimes
Carter Observatory Amendment
Children's Health Camps
Clean Air
Clean Air (No. 2)
Coal Mines Amendment
Counties Amendment
Customs Amendment
Electoral Amendment
Equal Pay
Estate and Gift Duties Amendment
Factories Amendment
Finance
Fire Services
Fire Services Amendment
(Flat and Office Ownership) Unit Titles
Hydatids Amendment (No. 2)
Indecent Publications Amendment
Land and Income Tax Amendment (No. 2)
Land and Income Tax (Annual)
Machinery Amendment
Marlborough Sounds Maritime Park
Mental Health Amendment
Ministry of Energy Resources
Minister of Local Government
Municipal Corporations Amendment
National Art Gallery, Museum, and War Memorial
New Zealand Superannuation
Occupational Therapy Amendment
Preservation of Privacy
Public Revenues Amendment
Rent Appeal Boards
Republic of Bangladesh
Republic of Sri Lanka
Shipping and Seamen Amendment
Shops and Offices Amendment
Soil Conservation and Rivers Control Amendment
Stamp and Cheque Duties Amendment.
Syndicates
Tobacco Growing Industry Amendment
Trustee Companies Amendment
University of Albany
Wool Marketing Corporation

STATUTES ENACTED

Imprest Supply
Land and Income Tax Amendment
Ministry of Agriculture and Fisheries Amendment
Ministry of Transport Amendment

REGULATIONS

Regulations Gazetted 24 to 31 August 1972 are as follows:

Customs Tariff Amendment Order (No. 14) 1972 (S.R. 1972/180)
Customs Tariff Amendment Order (No. 15) 1972 (S.R. 1972/188)
Dairy Factory Managers Regulations 1941, Amendment No. 11 (S.R. 1972/181)
Electoral Regulations 1957, Amendment No. 4 (S.R. 1972/189)
General Harbour (Ship, Cargo, and Dock Safety) Regulations 1968, Amendment No. 1 (S.R. 1972/190)
Hospital Board (Review Committee) Regulations 1972 (S.R. 1972/191)
Income Tax (Withholding Payments) Regulations 1967, Amendment No. 4 (S.R. 1972/182)
Interest on Deposits Exemption Notice 1972 (S.R. 1972/193)
Interest on Deposits Regulations 1972, Amendment No. 2 (S.R. 1972/192)
Maori Welfare Regulations 1963, Amendment No. 1 (S.R. 1972/194)
Oyster Fishing Regulations 1946, Amendment No. 7 (S.R. 1972/183)
Police Regulations 1959, Amendment No. 16 (S.R. 1972/195)
Shipping (Anchors and Chain Cables) Rules 1972 (S.R. 1972/184)
Shipping and Seamen Amendment Act Commencement Order 1972 (S.R. 1972/185)
Smoke Restriction Regulations Application Notice (No. 2) 1972 (S.R. 1972/187)
Weights and Measures Metric Equivalents Order 1972 (S.R. 1972/186)

Teaching an Expensive Lesson—According to the *Honolulu Star Bulletin*, a former war hero and heroin addict is making plans for a "new life" with an unprecedented $250,000 jury award that was expressed by the jury as being "intended to teach the City a lesson."

Jurors who heard the case stated that they wanted to "punish the people involved so that this wouldn't happen again. This could happen to anyone. Members of our own families, our friends, even us. That was the sole reason behind it—so that it wouldn't happen again."

The jury had awarded the plaintiff $200,000 in punitive damages and $50,000 special damages after hearing a claim for false arrest. The plaintiff had been arrested and held without bail for almost two weeks before murder charges against him were suddenly and unexpectedly dropped.

Plaintiff's counsel was as surprised as the rest. The attorney is quoted as saying "It's the first time I've heard in my career of the jury giving more than the lawyer asks for in final argument."

THE LAW OF OBSCENITY

Much recent comment could lead one to conclude that the entire law of obscenity was an eccentric excrescence on the face of society, designed for lawyers by lawyers (assisted by policemen and prodnoses)—with the predominant purpose (a perverse one it might be thought) of provoking a substantial segment of society to hold the law in contempt.

The hue-and-cry has been extended to include almost everyone who finds himself concerned with the enforcement of this branch of the law. Some legal commentators have joined in the hunt. Listen to this from a recent issue of that eminently valuable journal LAW GUARDIAN: "Rather than spend time and public money on chasing the semantic will-o'-the-wisps of 'obscenity', 'depravity' and 'corruption' the police forces and the Director of Public Prosecutions might concentrate their efforts on combating the growth of violent crime". Much the same comment has been made, often less temperately, about Judges, counsel and, inevitably perhaps, about those favourite Aunt Sallies—the parliamentary draftsmen. Particular scorn has been reserved for those Lords of Appeal who ventured, in the Ladies' Directory Case (*Shaw* v. *D.P.P.* [1961] 2 W.L.R. 897), to assert that the publication of advertisements on behalf of prostitutes could amount to a crime; the "five elderly lawyers" involved have been cast in the role of "Big Brother, wigged and gowned on the judicial bench" (Professor R. M. Jackson quoted in *The Obscenity Laws*, Deutsch, 1969, p. 29).

Now lawyers should, of course, be concerned at this. For as LAW GUARDIAN has also pointed out: "The danger is that if any significant proportion of people come to hold lawyers and Judges in contempt because they dislike the way they handle such matters as pornography . . . the rule of law itself is in jeopardy."

But this does not mean that lawyers should be expected to bear the whole, or even a substantial part, of the blame for present discontents. Critics should recognise, first of all, that the prosecuting authorities in this country (be they the Attorney-General or the Director of Public Prosecutions or the humblest constable in the land) have only a limited discretion as to the extent to which they should, or should not, enforce the law as it has been laid down by Parliament and the Courts. As the Court of Appeal made clear, less than three years ago:

Sir Geoffrey Howe, Q.C., M.P., the Solicitor-General, addressed the Cambridge University Law Society on this matter during the Lent Term.

"The law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the *raison d'etre* of their existence. . . . The law must be sensibly interpreted so as to give effect to the intentions of Parliament; and the police must see that it is enforced" (*Ex parte Blackburn* [1968] 2 Q.B. 118, 138, 148). The prosecuting pianist may or may not be doing his best; but he cannot fairly be blamed for the tone and style of the legislative instrument with which he is obliged to perform.

Nor was any substantial part of the present law designed by lawyers. Both the Obscene Publications Act 1959 and the Theatres Act 1968 (the two principal statutes in this field) were the result of prolonged and careful study by parliamentarians who saw themselves as pioneering and carrying through to a successful conclusion a major, liberating reform. These statutes, it was asserted, revealed the legislature at its best —modernising the law where successive Governments had feared to tread. Even the most recent provision of the criminal law (to be found, remarkably enough, in s. 4 of the Unsolicited Goods and Services Act 1971) had much the same kind of origin. For it was a private member's amendment to a private member's Bill that led Parliament to make it an offence to send or cause to be sent to any person "any book, magazine or leaflet (or advertising material for any such publication) which he knows or ought reasonably to know is unsolicited, and which describes or illustrates human sexual techniques".

And finally it is not fair to blame the Judges for the way in which, as it has been argued, they have failed to see that the law is "sensibly interpreted so as to give effect to the intentions of Parliament". For the Judges, Lord Salmon in particular, have expressed sympathy with the Director of Public Prosecutions (who told one publisher that he was unable to answer his questions "not because I wish to be unhelpful but because I get no help from the Act") and

also with the trial Judge in the *Last Exit to Brooklyn* case, who was said to have thrown the jury in at the deep end of s. 4 (of the 1959 Act) and "left them to sink or swim in its dark waters". Section 4, of course, allows the defence to argue that publication was for the public good.

Are we then to give up the struggle? Should we then join with the Society of Conservative Lawyers in having "no difficulty in rejecting the existing definition which includes the test of 'tending to deprave or corrupt' "? And then go on (not, I emphasise, as the Conservative Lawyers would have us do) to conclude, with the Arts Council Working Party that "obscenity is incapable of objective definition and is therefore an unsatisfactory subject for the criminal law."

I am not persuaded that this would be the right conclusion. Obscenity is not, as some argue a "phantom crime" with which only narrow-minded obsessives from remote rural vicarages are unnaturally concerned. Even some of the most articulate critics and wholesale reformers of the present law acknowledge that society requires some ultimate defences not only against depravity, but also against those who would deprave others. How then to respond to this dilemma? What kind of law do we want? What wickedness do we wish to punish? And what sort of victim do we wish to protect?

Legislators, Judges and draftsmen are all alike in the position of a coachman who is invited to drive to an address that we are unable to specify. This is the argument developed by the authors of the Arts Council Working Party's Report. Nobody knows exactly where we want to go. All we seem to know is where we don't want to go. We don't want to end up in a situation where it is a crime to shock or even disgust. We don't want repression for the sake of repression. We don't want to indict bad taste or bad manners. We don't want to shackle the arts. So what *do* we want? This is important because we can have the law we want. Do we, for instance, want simplicity, so that everyone can understand what is criminal and what is not? Do we want one and the same test of criminality for all kinds of publication? The same for books, films and plays? The same for posters put on display where every passerby is bound to see them? The same for articles sent through the post which might affront a sensitive post-office worker? The same for the unsolicited advertising material which is pushed through our letter-boxes nearly every day? Or do we want a little more refinement? Do we, for instance, want a different test for that which is shown in private, as opposed to that which is open to public view? And do we wish to make a different test for each different type of audience, viewer, or reader? Do we for example wish to provide special protection for children, young people, the mentally backward—maiden ladies even? This is what we have to decide.

Some people will still respond to those questions by arguing that all laws against obscenity are unnecessary, undesirable and unworkable—and that they should accordingly be swept away. Danish experience is often cited to justify the conclusion that this beguilingly simple solution will lead to a sharp decline in the practically unattractive consequences of pornography.

The approach is one which appeals to an instinctive libertarian. I have certainly been disposed, at times, to believe that we should take the same kind of axe to the licensing or the gaming laws. As a member of the Latey Committee, I was certainly disposed (albeit with some important reservations) to take the risk of liberating the 18-year-olds from the shackles of "infancy". But experience, even in the fields I have mentioned, has persuaded us to resile from the consequences of complete freedom. The Betting Gaming and Lotteries Act of 1963, the statute which freed us all to frequent (or even to promote) casinos and bingo halls, was sharply restricted only five years later by the Gaming Act 1968—an island of "reaction" in the stream of statutory "permissiveness" that was flowing through Westminster at that time.

Even in Denmark the slate has not been wiped as clean as some would have us believe. It is, of course, true that since July 1969 it has not in Denmark been an offence to sell or publish obscene literature or pictures. But there are certain important exceptions to this general proposition. It remains unlawful to sell obscene pictures or objects to anyone under 16 years of age. And the Danes have taken considerable care to prevent the imposition of obscene material on people who do not wish to see it. A Dane can still be sent to prison for up to four years if by obscene behaviour he violates public decency or gives public offence. (I assume incidentally that this offence can only be committed in a public place.) It is interesting, is it not, to observe that, in these fields at least Denmark still has to make do with the same elusively slippery word, "obscene"? These are not the only ways in which Danish law restricts intrusive obscenity. At the same time as their general law was being liberalised. Danish police bylaws were tightened up in order to prevent the exhibition or distribution of offensive publications or pictures in public places. The word "offensive", says the Information Department

of the Danish Foreign Office, is "more comprehensive than 'obscene' ". The bylaws also prohibit delivery of offensive publications or pictures to the occupants of any house, except to people who have expressly ordered such material. Notice, once again, the more comprehensive word "offensive".

The practical answers to the questions are plainly not as clear-cut as some people think. Is there any foundation of principle from which we can proceed? Some commentators, most notably perhaps Professor Hart, have tried to found a general case on John Stuart Mill's classic dictum that "the only purpose for which power can be rightfully exercised over any member of a civilised society, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." Lord Devlin has demonstrated (in *The Enforcement of Morals*, O.U.P., p. 108) how even Mill himself "wavered" in the application of his own doctrine to the pimp and the gaming-house proprietor—by acknowledging the possibility of restricting the influence of solicitations which are not "disinterested". Certainly Professor Hart's approach looked less convincing by the time Lord Devlin had analysed his attempt to build a principle upon Mill's foundations. For Professor Hart is obliged to make what he describes as "a modification" of Mill's principles. This is the way in which he enables himself to defend what he calls "paternalistic" interventions by the modern criminal law, for example in the field of drugs. Professor Hart lists a number of factors (thoughtlessness, "inner psychological compulsion", pressure by others "of a kind too subtle to be susceptible of proof in a law Court", even the "pursuit of merely transitory desires") which justify "a general decline in the belief that individuals know their own interests best". (*Law, Liberty and Morality*, O.U.P., p. 32-3). This is the way in which Professor Hart, contrary perhaps to his own intentions, compels one to abandon Mill's attractively simple principle. For the professor amply succeeds in justifying the use of the criminal law to prevent harm being done to others, even when the victims consent to or assist in the acts which are harmful to them. We need note only that Professor Hart marches along this road not under Lord Devlin's banner of morality but under the banner of paternalism—of a father who is not in heaven but on earth.

The "principles" suggested by the Wolfenden Committee (on Homosexual Offences and Prostitution) turn out to be equally uncertain pointers to law reform. We need have no difficulty in agreeing with the committee that "it is wrong to equate the sphere of crime with that of sin" (H.M.S.O. Cmnd. 247 para. 61). Once our society acknowledged the notion of freedom of conscience, we moved irretrievably away from the situation in which we could pray quite simply for the Queen's Magistrates to execute justice "to the punishment of wickedness and vice and the maintenance of the true religion and virtue". Once we have reached this point, one wonders whether the Wolfenden Committee did much to clarify the position by asserting simply that "there must remain *a* realm of private morality and immorality which is in brief and, crude terms, not the law's business"? "A" realm—yes; but how is it possible in practice to identify the frontiers of this realm, so that the idea can be of any consistent value to those who have to make the law?

Are we not driven back to a situation that is probably less unsatisfactory for a Tory than for most other people, where we have to try to arrive at a fair, reasonable and sane balance in each given situation? I say "less unsatisfactory for a Tory" because Conservatives do not believe that every question is capable of a rigid doctrinal answer. Surely the distinguished Tory thinker, Mr T. E. Utley, was right to conclude quite simply that "legislation about morals, which so often raises passionate controversy, is peculiarly unsuitable for the attentions of either confirmed, professional 'reactionaries' or confirmed, undiscriminating 'progressives' " (*What Laws May Cure*, C.P.C. p. 11).

Is it possible to proceed from this pragmatic premise towards a workable solution to the *general* problem of obscene or pornographic publications and theatrical productions? I speak of a "workable" solution advisedly. For before a law can be regarded as workable, we should also expect it to be enforceable with tolerable impartiality and predictability. And we should expect it to be enforceable at a cost, in terms of legal and police manpower (and good will) that is not disproportionate to the value of the result which we aim to achieve. This was the objective that was in the mind of the reformers who produced the Obscene Publications Act and the Theatres Act. They were seeking to escape from the old and confusing case law. They were seeking also to secure for every defendant the possibility of having his case considered by a jury, instead of by a Magistrate sitting alone. And they were seeking too to make it plain that a work which might otherwise be regarded as obscene should nonetheless be regarded as legitimate if the defence could show, by expert evidence if necessary, that its publication was justified as being for the public good in the

interests of literature or the arts. It is worth remembering, incidentally, that the writers who gave evidence to the Parliamentary Select Committee whose recommendations led to the 1968 Theatres Act, were not then denouncing the1959 Obscene Publications Act. On the contrary, they were positively seeking to be subject to that very code. Yet this is now the law which is so widely criticised as unsatisfactory. The jury, originally commended as the bastion of freedom (and still applauded in that role by those publishers who are fortunate enough to be acquitted) is now condemned by some as the instrument of uncertainty. But, almost in the same breath, the critics also complain of the fact that no prosecution can be brought under the Theatres Act without the consent of the Attorney-General. This provision originally recommended by the Parliamentary Committee as a protection against frivolous prosecutions is now seen by some critics as another instrument of inconsistency.

And the definition of obscenity itself is under attack from two sides. The carefully considered words of the legislators: "if its effect is, if taken as a whole, such as to tend to deprave and corrupt"—and here I insert the judicial gloss, "a significant proportion" of—"persons who are likely, having regard to all relevant circumstances, to read" the offending publication, are said by some to leave the question too much at large for the jury.

It is said by the Arts Council Working Party, for example, to be unacceptable simply to agree with Lord Salmon that "the jury must set the standards of what is acceptable, of what is for the public good in the age in which we live" (*R* v. *Calder and Boyars* [1968] 3 W.L.R. 974, 987). And yet, when the same Judge had earlier in the same case attempted to fill out this simple proposition by giving specific illustrations of depravity, he was also criticised—and perhaps understandably so. For if one takes Lord Salmon's words at their face value (and I suspect it does him an injustice to do so), it may be thought surprising to find him suggesting that corruption or depravity may be found in a publication which tends only "to induce erotic desires of a heterosexual kind". On one view this might lead to conviction for the publishers of many of the advertisements that adorn the London Underground. And yet one sees what Lord Salmon could have had in mind. It is no doubt a matter of degree. And one sees more clearly still what he may have had in mind when he gives the further example of corruption which tends "to promote homosexuality or other sexual perversions". But even this example begins to look less convicing and of less practical value, if one starts trying to produce a *generally* acceptable definition of what is meant by a "sexual perversion".

Is there any escape from this verbal treadmill? I doubt it. Any attempt to paraphrase the alternative words ("corrupt", "deprave" and so on) seems doomed to failure. Even to try to distinguish between that which is merely "shocking" or "offensive" and that which is "indecent" "obscene" or "pornographic" is very often illusory.

The recent attempt by some Conservative lawyers (*The Pollution of the Mind*, Society of Conservative Lawyers), to redraw the definition as a whole may seem to leave unchanged the central nature of the problem. "Any material", they suggest, "shall be obscene if (1) it grossly affronts contemporary community standards of decency, and (2) the dominant theme of the material taken as a whole (a) appeals to a lewd or filthy interest in sex, or (b) is repellent". The words are, of course, different from the familiar ones, "deprave or corrupt". But they are specifically commended by these authors as likely to "respond to the changing climate of public opinion". Do they not confront us still with the same difficulty, which means that the jury will be left "to set the standards of what is acceptable . . . in the age in which we live"? Is there any choice, in the context of any *general* proscription of obscenity, between the Danish position and the perfectly respectable alternative advocated by Lord Devlin, which leaves it in the last resort to "the man in the street . . . the right-minded man . . . the man in the jury box to make 'the moral judgment of society' " (*The Enforcement of Morals*, p. 15).

If this is really the choice that confronts us, it may be seriously doubted whether anything like a majority of our society would now be in favour of the Danish solution. It may be thought that there is growing, rather than diminishing, concern at the extent to which the offensively obscene seems to affront us with increasing frequency. And it may be noted that even a liberal commentator like Professor R. M. Jackson quite readily accepts the case against a substantial residue of pornographic material. "There is", he says, "in reality no difficulty at all in recognising 'hard core pornography' when one sees it. These seizures are not contested in Court for the very good reason that no defence is possible" (*The Obscenity Laws*, p. 75).

And yet, one wonders. For every case that is plain beyond doubt there are probably another half-dozen, better publicised, in which the law (Judges, lawyers and police authorities alike) are

seen to be struggling with much more arguable concepts, on the ragged and controversial frontiers of censorship and taste. And in that kind of situation the law itself, and the whole of our legal system, can sometimes be the loser. Can we, as lawyers concerned that the rule of law should command general respect, be entirely content with that state of affairs? Can we be content with a situation in which the Courts have been left to fill in those vacuums that have been left by the legislature, by developing (or resurrecting, as some would argue) the concept of a conspiracy to corrupt public morals? Her Majesty's Judges seem to have earned more kicks than ha'pence for their efforts on this front. Yet, is it not desirable, from almost any point of view, for the criminal law to be able to prevent the commercial publication of advertisements for prostitution? Is it not desirable for the criminal law to be able to prevent the commercial publication of advertisements for homosexuality? Is it not desirable for the criminal law to be able to prevent public invitations to indulge in sexual perversion if those invitations are made in a way which outrages public decency?

Is it possible to identify, more clearly than has been attempted so far, the undoubted areas of legitimate public concern about obscenity or indecency or whatever we may choose to call it, with a view to producing explicit and enforceable laws in those fields? Is it possible to identify the three main areas of public concern in another section of the Wolfenden Report? The Committee saw the function of the criminal law as being "to preserve public order and decency, to protect the ctizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."

Might it be possible to begin by agreeing that young people, as one identifiable group, are clearly entitled to protection from obscene or indecent material? Would it perhaps be possible to develop this idea of specific protection for youth from the concept that is embodied in the provisions of the Children and Young Persons (Harmful Publications) Act 1955. That Act aims to prevent the supply of horror comics to people less than 18 years old. Could a law along these lines be extended to serve a slightly wider purpose?

Might it be possible to agree too upon the desirability of prohibiting the distribution or display in any public place of any obscene or indecent material or exhibition? Might not a simple provision along these lines replace the overlapping, yet incomplete, rag-bag of provisions in statutes like the Vagrancy Acts, the Police Clauses Act 1847 and the Indecent Advertisements Act 1889? The Society of Conservative Lawyers suggest that this particular objective could be met by prohibiting any indecent material displayed in a public place if it is "grossly offensive to the public at large". And the Arts Council Working Party was prepared to commend not dissimilar provisions. Would not a provision along these lines meet one of the most powerfully felt causes of present discontent—the intrusive and uninvited, nature of much offensive material?

At present the provisions of s. 11 of the Post Office Act 1953 prohibit the sending of obscene or indecent material by post, even to someone who has expressly ordered it. But the door-to-door delivery of such material to householders who have not requested it, is subject to the differently drafted provision in the Unsolicited Goods and Services Act. Might it not be possible to evolve from a reorganisation of these provisions, an effective but discriminatory way of protecting the ordinary householder or family from this kind of intrusion of uninvited but offensive material?

Could provision along these lines meet, more effectively than the present law, the real and principal causes of grievance? Certainly it would be difficult to argue, would it not, that any of these suggestions would involve any meaningful erosion of literary or artistic freedom? For each would be directed to a specific area of legitimate concern about obscene material; corruption of the young, affront to public decency and invasion of privacy. Is it perhaps possible that the provision of clear protection on these three fronts would go so far towards meeting the real grievances of our society that the existing, more general, restraints on obscene publications might lapse into virtual disuse?

The problem of more general protection against "hardcore" pornography would still remain to be considered. It is not difficult to sympathise with those who are understandably concerned at the potential threat to literary freedom that is posed by any general obscenity law. Might they perhaps enjoy a more sympathetic hearing from the rest of society, if they were willing first of all to join in trying to frame some rules that would regulate those matters, such as invasion of privacy, which *do* arouse widespread concern, and which do not directly affect the question of freedom of the arts?

THE MACHINERY OF LAW REFORM IN SELECTED COUNTRIES

This is a precis of information provided by a number of overseas law reform agencies in answer to a questionnaire sent to them by Dr J. L. Robson, as well as information relating to the New Zealand Law Revision Commission.

I. Membership and Staff of Law Reform Agencies

A. England: Law Commission (established by Statute in 1965)

(1) Five full-time Commissioners: the Chairman is a High Court Judge, one Queen's Counsel, one Solicitor and two former law teachers. Salary £9,500 p.a. Appointed for five years with the possibility of reappointment.

(2) Twenty-one full-time legal staff members of whom four are draftsmen seconded for a two-year term each from the Office of the Parliamentary Counsel. A fluctuating number of outsiders are commissioned part-time or full-time to carry out particular tasks.

(3) Sixteen secretarial staff members.

B. Scotland: Law Commission (established by Statute in 1965)

(1) Two full-time Commissioners, including Chairman, and three part-time Commissioners: the Chairman was a Judge, the other full-time Commissioner was a Queen's Counsel and the three part-time Commissioners were law teachers.

(2) Seven full-time legal staff members, of whom one is a draftsman, plus one part-time draftsman.

(3) Seven secretarial staff members.

C. Ontario: Law Reform Commission (established by Statute in 1964)

(1) Full-time Chairman and Vice-Chairman and three part-time Commissioners: the Chairman is a Queen's Counsel and former law teacher, the Vice-Chairman is a former Chief Justice of the High Court of Ontario, the three part-time Commissioners are all Queen's Counsel in private practice. The Chairman's salary is approximately that of a Judge of the Supreme Court of Ottawa. The Commissioners are not appointed for a term, but serve at the pleasure of the Crown.

(2) Four full-time legal staff members plus one full-time and two part-time for a special project.

(3) Eight secretarial staff members.

D. British Columbia: Law Reform Commission (established by Statute in 1969)

(1) Part-time Chairman and one part-time and one full-time Commissioner.

(2) One Director of Research.

(3) Two secretarial staff members.

E. Canada: Law Reform Commission (established by Statute in 1971)

(1) Four full-time Commissioners, including Chairman and Vice-Chairman, and two part-time Commissioners: the Chairman is a Judge of the Supreme Court of Ontario, the Vice-Chairman is a Judge of the Superior Court of Quebec. the other two full-time Commissioners are former teachers of law and the two part-time Commissioners are in private practice with law teaching experience. The Chairman and Vice-Chairman are paid the salary of a Judge, while the other full-time Commissioners are paid $32,000 p.a. Full-time Commissioners are appointed for a maximum of seven years, part-time Commissioners for three years.

(2) Ten professional research people to date, but 25 by 1 August 1972.

(3) Twenty secretarial staff members.

F. Western Australia: Law Reform Committee (established in 1968)

(1) Three part-time Committee members: one representative each from the Law Society, the Law School and the Crown Law Office. The Law Society representative is paid a fee of $3,500 p.a., the Law School is paid a fee of $1,500 for its representative, and the Crown Law representative is unpaid. There is no specific term of office.

(2) Three full-time legal staff members.

(3) One secretary.

G. New South Wales: Law Reform Commission (established by Statute in 1967)

(1) Four full-time Commissioners, including the Chairman who is a Judge, a barrister, a solicitor and a law teacher, and two part-time Commissioners.

(2) Five full-time legal staff members in 1969.

(3) Not available.

H. California: Law Revision Commission (operating at least since 1960)

(1) Nine part-time Commissioners: Two legislative members and seven, appointed by the Governor, who are all practising lawyers. They are paid a per diem allowance and travelling expenses and are appointed for four years.

(2) Four full-time legal staff members.

(3) Three secretarial staff members.

I. *New York*: Law Revision Commission (established in 1934)

(1) Seven part-time Commissioners: two legislative members and five appointed by the Governor of whom four must be qualified lawyers and two of those teachers of law. One need not be a lawyer, but this has happened only once. Commissioners are paid $13,936.

(2) Four full-time legal staff members and one part-time.

(3) Five secretarial staff members.

J. *New Zealand*: Law Revision Commission (established in 1965)

(1) Eighteen part-time members: the Chairman is the Minister of Justice and the Deputy-Chairman is the former Secretary of Justice. The other members are a Judge of the Court of Appeal, a former Minister of Justice, a member of the Parliamentary Opposition, the Solicitor-General, the present Secretary of Justice, four professors of law, Counsel to the Law Drafting Office and six practising or retired members of the legal profession, three of whom are Queen's Counsel. There are also five standing law reform committees which are autonomous bodies appointed by and directly responsible to the Minister of Justice. They are not sub-committees of the Law Revision Commission. Their membership is part-time and comprises approximately the same proportion of practising, academic and government lawyers as the Commission.

(2) The secretaries of the Commission and the Committees usually are members of the Legal Advisory Section of the Department of Justice. The Commission and the Committees have no full-time staff outside the Department.

(3) Secretarial staff is provided by the Department of Justice.

II. Procedure for Law Reform

A. England

(1) Projects are either part of one of the Commission's programmes, approved by the Lord Chancellor, or proposals referred to the Commission.

(2) Research work is carried out within the Commission by "teams" which deal with each item in the programmes. Each team consists of one or more of the Commissioners and one or more of the legal staff. The four main teams deal with the codification of Landlord and Tenant Law, Family Law, Contract Law and Criminal Law. There are also Working Parties which include outside experts and from time to time specialist reports are commissioned.

(3) Consultation with interested bodies and persons occurs through the publication and circulation of Working Papers on each subject. Each Working Paper sets out the present law and its difficulties, reviews criticisms of it and canvasses various solutions. Provisional conclusions are also included.

(4) The comments on the Working Papers are analysed and a Report is prepared by the team for the Commissioners to consider and to reach policy decisions. At this stage the Parliamentary Draftsman prepares draft Clauses for the Report.

(5) The final Reports go to the Lord Chancellor who lays them before Parliament. The Government or Private Members may then introduce the draft Bills.

B. Scotland

Basically the same as England, except that Reports go to the Secretary of State for Scotland and the Lord Advocate.

C. Ontario

(1) Projects may be initiated by the Commission or referred to it by the Attorney-General or other interested persons.

(2) Research work is carried out either internally or externally. If internally, a draft report will be prepared by the Legal Research Officer who refers policy matters to the Commission for decision from time to time. Once the Commission approves the draft in principle it makes detailed criticisms and suggestions before the final draft is prepared. If the research work is carried out externally, which happens in the case of the more complex projects, the Commissioners will appoint a project director who specialises in the area who will organise a research programme sometimes using law teachers, students and sociological or statistical studies. The project is controlled by the Commission and the project director meets with the Commission to give progress reports. A working paper is presented to the Commission which is generally used as the basis of a Commission report.

(3) As a general policy the Commission will consult with every interest in the community or government that might be affected by or be able to contribute to a proposal for legislative reform.

(4) Draft legislation is included in only about 20 percent of the reports because it is the Attorney-General who directs the Parliamentary Counsel to turn a report into a bill and because they are not available for the Commission.

(5) The Commission reports to the Attorney-General for Ontario.

D. British Columbia

(1) Proposals may be referred to the Commission by anyone and the Commission prepares a programme.

(2) The Commission retains persons with special knowledge on a part-time basis to carry out its research.

(3) Commission personnel will prepare working papers, based on the research material, which will be circulated for public criticism and comment.

(4) The final report will then be prepared, but draft legislation will generally not be included.

(5) The Commission reports to the Attorney-General.

E. Canada

(1) Proposals may be referred to the Commission by anyone or be initiated by the Commission. The Commission prepares a programme.

(2) The programme is divided into six major projects each headed by a project director and two to four Commission research officers. In addition, contracts are given out to specialists.

(3) A research team will prepare a study paper which will be circulated for comments to Judges, the legal profession and groups having a definite and professional interest. Then, the research team will prepare a working paper which will be considered by the Commission before it goes out widely to the public and press (10,000 copies).

(4) In the light of the comments and criticisms received the research team will prepare a report for the Commission. At this point, draftsmen will be called in to prepare legislation.

(5) The Commission reports to the Minister of Justice.

F. Western Australia

(1) Proposals may be referred to the Committee by anyone.

(2) Research work is carried out by the legal staff, but the Committee may co-opt temporary additional members to form specialist sub-committees and it may also retain the services of experts in particular fields on a contractual basis.

(3) Consultation with interested parties is achieved by the issue of widely circulated working papers on most of the projects undertaken. It is the practice of the permanent staff as part of their research work to consult persons having specialised knowledge of matters connected with projects.

(4) The reports of the Committee often include draft bills prepared by the Committee and not by Parliamentary draftsmen.

(5) The Committee reports to the Attorney-General. The reports are confidential to him.

G. New South Wales

(1) Proposals may only come from the Attorney-General.

(2) Research is carried out by the Commission's staff.

(3) Informal consultations are carried out before the Commission reports.

(4) Draft bills are attached to their reports.

(5) The Commission reports to the Attorney-General.

H. California

(1) The Commission is only authorised to study topics which have been approved by the Legislature.

(2) Research is carried out by the Commission's staff and by law teachers who are retained to prepare background studies. They are paid an honorarium, and not full compensation for their work, because it is recognised that they are performing a public service.

(3) Tentative proposals are distributed widely to interested persons and organisations. The recommendations of the Commission are made only after the comments and views have been considered. The Commission is not a rubber stamp for the views of the staff.

(4) The Commission drafts all its own bills which are included in its reports.

(5) The Commission reports to the Governor and the Legislature.

I. *New York*

(1) Proposals may be referred to the Commission by anyone and the Commission may initiate its own proposals.

(2) Research is carried out by the Commission's staff, but $25,000 is available for contract research by law teachers and practitioners or economists and sociologists.

(3) A research study is prepared within the Commission and then approved by the Commission. Apart from consultation with the Bar Association, however, there does not appear to be wide consultation before the research report is presented.

(4) The Commission prepares draft bills for all its reports. Circulation of recommendations takes place once the bill is introduced.

(5) The Commission reports to the legislature.

J. New Zealand

(1) The Commission approves a programme prepared for it by the Department of Justice and allocates items to the standing Committees or, sometimes, an *ad hoc* committee. Proposals are also referred to the Commission and sometimes directly to a standing Committee by the Minister of Justice who receives suggestions from any person or organisation. The Committees also occasionally suggest items.

(2) Research is carried out by the five standing Committees which have been established in the areas of Property Law and Equity, Torts and General Law, Public and Administrative Law, Contracts and Commercial Law and Criminal Law. The Committees utilise the services of the Legal Advisory Section of the Department of Justice, individual practitioners and law teachers.

(3) As a general rule working papers are prepared by the Committees and circulated to interested persons.

(4) A few of the reports have draft bills attached.

(5) The Commission and the standing Committees report directly to the Minister of Justice.

III. General Comments by Three Overseas Agencies

1. The Secretary of the English Law Commission: Law reform is necessarily slow work if it is to be properly researched and the proposed changes well thought out and related to the rest of the law. A law reform agency of part-time volunteers will not suffer from public and Parliamentary impatience in doing the work in the same way as an institution of paid whole timers. We ought to have more leisure to reflect than sudden pressures of public and Parliamentary opinion allow us.

2. The Chairman of the Ontario Law Reform Commission: The major difficulty lies with keeping abreast of research and the volumes of raw data that must be translated into properly written Commission reports that are both scholarly and useful for the practical purpose of being turned into legislation by the Government. More full-time Commissioners, who would supervise and prepare particular reports might solve such production difficulties as exist. However, this might lead to other problems not experienced at present—e.g. the identification of a Commissioner with a particular report could cause problems where the social or legal policies involved are especially controversial, as many invariably are. In addition, part-time Commissioners bring into the meetings invaluable experience gained from day to day in the practice of law.

3. The Executive Secretary of the California Law Revision Commission: The members of the Commission who are engaged in private practice find the demands of the Commission on their time extremely heavy. However, the State could not afford nor could it obtain the services of men of the quality appointed to the Commission if they were to be employed on a full-time basis.

Practising lawyers who have broad experience and are recognised for their good judgment are an essential part of a law reform agency. The Commission is not engaged in an ivory tower activity. We are trying to draft legislation that will have some reasonable chance of legislative acceptance. Accordingly, we must necessarily take into account the practical problems of securing enactment of legislation and must sometimes compromise what might be an ideal solution to a problem by recognising practical considerations.

ODE UPON A FENCE

(or "How Poetic Justice Can Be Done In a Cross Fencing Notice")

For argument my neighbour's fence
Is such a fertile field,
Yet ground around, to anyone,
Does not a ha'pence yield.
It stands upon a sandy bank,
To shield him from the wind,
When he demanded forty dollars,
I looked at him and grinned.
I did not ask him for this fence,
It is no use to me,
It serves but to divert the wind,
Which bloweth westerly.
A little man of bustle, noise,
Did it erect for him,
This most expensive boundary fence,
With bottom lined with tin.
Seven uprights, five by three,
Two rails to hold the board,
More than a hundred dollars total cost,
Much less I could afford!
They took away my nice clean oil,
To oil the posts and rails,
Colour with the oil did mix,
Then charged me for the nails!
My garage, twelve years on its spot,
Is thought across his line
And when I seek surveyor's advice
It is, and quite a lot.
Yet I refuse to pay a half,
This fence is not for me,
At least a foot within his side
Of our mutual boundary.
A lawyer's letter has arrived,
By post just yesterday,
Which firmly if politely,
Suggests that I should pay,
And so avoid litigation's painful pinch.
Well, litigate and be damned!
Who pays for someone else's fence,
Upon some other's land?

J.F.

THE JAMAICAN SCENE

The wigs are off and the Attorneys are at it. That has been the scene in Jamaica since 3 January 1972, when the Legal Profession Act 1971 (or most of its sections) came into force.

The ancient title Attorney was known in the highest circules of the legal professions in the time of Littleton and it was said that it "signifieth one that is set in the turne, stead or place of another . . . and same be publicke, as Attorneys at Law, . . .". The latter portion of this definition applied in England and Wales prior to 1873, but then the title of Attorney was abolished in England by the Supreme Court of Judicature Act 1873. The amendment by that statute provided that Solicitors, Attorneys, or Proctors should henceforth be called Solicitors of the Supreme Court. The Act of 1971 in Jamaica brought about fusion of the legal profession and today practitioners are styled Attorneys-at-Law. There is now no distinction between the two former branches. All solicitors and barristers already admitted to practise were automatically enrolled as Attorneys-at-Law without the payment of any fee, but all new or subsequent Attorneys must obtain a practising certificate from the General Legal Council, for which there will be a fee of JA. $20 for Attorneys of less than five years' standing and JA. $40 for those of more than five years' standing.

The most overt manifestation of the change is that wigs will no longer be worn. Of course the use of wigs in regions like the Caribbean has been a nonsense for centuries and, put in its best light, was an innocent stupidity imposed by a foreign judiciary. We are aware here of those rare occasions when it gets hot enough in Court for even the most illustrious of Her Majesty's Judges to discard their wigs. In another Caribbean territory, Guyana wigs were discarded in 1970. In Jamaica, the correct apparel is now a black gown for all Attorneys other than Queen's Counsel worn over a jacket of dark material such as dark grey or black. A dark tie is to be worn with a white shirt, buttoned, with a collar and trousers of a dark material. Shoes and socks are also obligatory. Queen's Counsel are allowed to continue to use the gowns now in use and lady Attorneys are to wear the same type of gowns as the men but otherwise their mode of dress is to be left to their good sense and decorum. Judges will normally wear a black silk gown, instead of the existing scarlet criminal robes, a hood or facing of a colour and design to be decided upon by the Judges for use at criminal proceedings and ceremonial occasions. Judges will wear under their gown either a jacket or a sleeved waistcoat or a long sleeved tunic buttoned to the neck of a design to be decided by the Judges.

In the recently established Faculty of Law of the University of the West Indies, training for the profession of Attorney-at-Law will necessarily be uniprofessional. The student will do a three-year academic course leading to a law degree, with the first of those years being worked in academic isolation in some branch of the University or at the University of Guyana, and the final two years will be undertaken at the Cane Hill University Campus in Barbados. At the end of the academic course, the graduate will be required to carry out two years of professional practice at a law school in the Caribbean area and may be required to satisfy individual territorial requirements. Such independent thinking may lead to a marked reduction in the numbers from the Caribbean seeking professional legal qualifications in the United Kingdom. Could one say that Ormrod had been upstaged? Whether or not, this contributor's view is that one of the practical years could be of more benefit if taken at the commencement of the course before the university training and the last practical year's work could then be undertaken at a higher practitioner's level.

Section 21 of the Legal Profession Act marks a revolutionary step. Any Attorney may undertake work for a client without payment if he considers the case to have merit; payment will be available only out of any amount awarded as damages! Americans may appreciate this change, but already we can see the cobwebs in the common law here severely disturbed. It is said that the client will be safeguarded from excessive charges in that if he feels that the fee has been unfair and unreasonable, he has a right of appeal to the Court.

A problem of immense practical importance concerns the unavailability of law reports and statutes. In March 1971 the Law Society of Jamaica protested at the lack of copies of the Laws of Jamaica, including current legislation of the utmost importance and the ancillary regulations without which Acts themselves are useless. There are reported improvements since

then but such elemental problems seem to be of far more consequence than attractive discussions on a mode of dress.

Perhaps an even more important problem concerns the standards of the Judiciary. In 1968, a member of the Bar in Jamaica wrote a critical letter to the most prominent daily newspaper. He criticised the Minister of Legal Affairs and Attorney-General about his statement that the standards of the Judiciary had risen and not fallen. The salaries paid to the Judiciary are disgracefully low in relation to what can be earned as a private practitioner. The consequences are obvious. Against this background we can therefore appreciate more fully some of the reported instances from the Supreme Court in that territory. More recently, in December 1971, a Judge of the Supreme Court rather mysteriously, in the middle of proceedings, is reported as having said: "Gentlemen, I am not feeling well, not because the body is sick but the mind is. And since the disease may spread and the symptoms may very well be matters of public interest, I will tell you something. Over the last three or four years there has been a steady erosion tending to affect the administration of justice in Jamaica and its tentacles have now reached the Supreme Court . . . to use a medical term, a comminuted fracture by the Judiciary would have been sustained at the expense of the public."

Another symptom of discontent was the action of a prominent Silk in August 1969, Mr Ian Ramsay Q.C. who returned to the Governor-General of Jamaica the instruments appointing him as Queen's Counsel and in an accompanying letter is reported to have written: "It is my opinion that the rank of Q.C., once a badge of merit and courage, has now become meaningless; and the state of the administration of justice, particularly of the Judges with certain exceptions, is deplorable:"

An agreement was reached in September 1970 on the formation of an Association of Commonwealth Caribbean Judges. It was stated that the principal objectives of the proposed Association are to maintain the rule of law and encourage and promote the independecne of the Judiciary and the importance of the administration of justice in the participating territories. The Bahamas, Barbados, British Honduras (Belise), Cayman Islands, Guyana, Jamaica, Trinidad and Tobago and the West Indies Associated States were all represented at this conference of Heads of Judiciary.

In Jamaica, the constitution of the independent territory provides for its own Privy Council and on occasions, the uninitiated may suffer some confusion because that territory continues to preserve the right of a citizen in an independent state to appeal to the Judicial Committee of a Privy Council of a foreign state, namely the United Kingdom.

For some years, the profession in the Commonwealth Caribbean have been considering the establishment of a Regional Court of Appeal. At a conference of the Commonwealth Caribbean Lawyers in March 1970, Sir Hugh Wooding Q.C., an eminent lawyer from Trinidad, who has himself sat in the Judicial Committee of the Privy Council of the United Kingdom, gave a brilliant talk on the question of appeals to the Privy Council. At that conference, on the motion of the representatives from Jamaica, seconded by those from Barbados, the conference decided that the Council of the organisation of the Commonwealth Caribbean Organisations be directed to appoint a Representatives' Committee to present detailed proposals for the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council. Some six months later, at a meeting of the Attorneys-General of the Commonwealth Caribbean, there was no absolute unanimity and there, a Chief Minister (it is true, of the smallest territory) hesitated in his commitment on the grounds that these matters did not deserve priority treatment over the other pressing problems of the area. Sir William Douglas, the Chief Justice of Barbados, regards it as hopeless to borrow other people's solutions. He thought that the main tasks were to create something new and relevant to the Caribbean situation. He is reported as also criticising the remoteness and insensitivity of the Judicial Committee of the Privy Council to the realities of West Indian life. At the second conference of the Attorneys-General of the Commonwealth Caribbean in March 1971, where the proposal for the establishment of a Regional Court of Appeal was considered, the Jamaican Bar was, surprisingly not represented. BILLY STRACHAN in *The Law Guardian*.

Bombs Awhey—According to the *Sunday Times* an Auckland Magistrate recently rushed to the Auckland Central Police Station with a parcel he thought contained a bomb. Explosive experts were called in to examine the parcel, but when they opened it they found it to contain only samples of cheese and margarine sent by a South Island relative.

CORRESPONDENCE

Re: **Dalhousie Legal Aid Service**

Sir,

At the beginning of the year I developed a deep interest in the Clinical Law Programme here and in March was appointed Director of the Dalhousie Legal Aid Service. The Service came into being in June of 1970 because of the inadequacy of legal aid service in the Halifax Metropolitan areas. The Service is staffed by fifteen students during the academic year who work part-time at the legal aid office and who receive a course of instruction in dealing with the problems of poor people. I should point out that there is a huge unmet need for legal services in Nova Scotia, where 42.6 percent of the working population fall below the Federal poverty line. Students involved in the programme are awarded three course credits for work in the Clinical Programme. During the long vacation the students are employed full-time in various capacities on legal aid and related activities which include advice and counselling, Court appearances and research. In addition to myself, we have one other full-time lawyer, and the services of a retired Justice of the Supreme Court of Nova Scotia who has proved to be a tremendous asset to the Service.

The Service is funded by the Federal government. The total working budget for the coming year will come close to $85,000. The Service has handled two and a half thousand cases since June 1970. This does not include the numerous telephone inquiries, or referrals which are handled by the Service and which have been statistically calculated as being in excess of over two hundred per week. The Service's case load is made up of a large amount of Family and Juvenile Court work (45%), criminal work, mainly in Magistrates' Courts (30%), and the remainder of the case load is made up of consumer and employment matters, housing matters and welfare problems.

The students involved in the programme have full rights of appearance in the Family and Magistrates' Courts. Appeals to the County Court and Supreme Court of Nova Scotia can only be taken by myself and our staff lawyer.

The service aspect is only one part of our total programme. There is a large service-related research function which takes up a good deal of time, and has kept me occupied full-time in Halifax over the summer. Last summer the Service carried out an intense survey of the Family and Juvenile Courts and came up with far-reaching recommendations for changes in the delivery of legal services in that area. These recommendations were put before the Federal government who have just announced funding of a full-time Family Court project which would make legal services available to people in the Family Courts themselves. We are also carrying out research work in the areas of welfare, housing, education and consumer law. We are working on projects in conjunction with the local Blind Rights Action Movement and the Nova Scotia Indians. We are presently engaged in a feasibility study in the area of training paralegal professionals, and I have just received confirmation of a grant of an additional $15,000 to carry this training programme on in the coming academic year.

Coming from New Zealand, it was quite a shock to see students practising law and appearing in Court without having formally completed their LL.B. Degree. However, when one views the large gap that exists between the present systems available for the delivery of legal services and the needs of the huge section of the community living below the poverty line, it is clear that this is perhaps the only way that these people can have some access to legal advice. The problems associated with educating third and fourth generation poor people of their legal rights and attempting to overcome their inherent distrust of lawyers as such is immense. Personally, I was amazed at the quality of the work done at the Clinic and, all in all, I am finding it an extremely rewarding and challenging experience.

Yours sincerely,

I. B. COWIE, Assistant Professor of Law and Executive Director of Dalhousie Legal Aid Service, Halifax, Nova Scotia.

[This letter was originally addressed to Mr E. H. Abernethy, who referred it to the JOURNAL for publication in view of its wide interest to practitioners and its relevance to the New Zealand situation. JDP.]

Sign of the Times—"It is no longer regarded as smart to be unsmart—even the hippies seem to be getting the message." WALTER KOBY, Chairman of the British Tie Manufacturers' Association.