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INTER ALIA

Unreasonable, unjust, oppressive, discriminatory

The Local Government Amendment (No 2) Bill is stage 1 of an amalgamation of local bodies legislation. It perpetuates and extends the existing provision for differential rating contained in the Municipal Corporations Act 1954, provisions that were criticised by the Ombudsman Mr G R Laking as recently as December 1976 (see (1977) 1 NZAR 156).

There were, he pointed out, "very few express limits placed upon the discretion vested in the hands of municipal authorities with regard to differential rates". It seemed possible for a Council through differential rating systems "to implement many different and wide-ranging economic, social, cultural, demographic and political policies by essentially fiscal methods".

Worse, it eroded the effectiveness of statutory measures "designed to protect the interests of property owners".

He concluded: "that the provisions of s 92A of the Municipal Corporations Act 1954 which authorise the adoption of differential rating are or may be unreasonable, unjust, oppressive or improperly discriminatory, and I recommended to the Secretary of Local Government that they be reconsidered with a view to ensuring that adequate guidance is given to, or adequate limits placed upon, municipal corporations as to the amount, incidence and purpose of differentials in rating, and to ensuring also that adequate information be made available to the public in sufficient time to give them an adequate opportunity to make representations upon proposals for differential rating being considered by Councils or committees of Councils of municipal authorities. I also brought this recommendation to the attention of the Minister of Local Government".

Short memory?

Probation and law reform and all that

The annual report of the Department of Justice is a thoughtful and thought provoking document, as one would expect of a department with interests ranging from law and order, through family law matters to its responsibilities in the fields of commerce, land transfer and patents.

As with other Government departments, Justice has had its problems with staff shortages. For the Probation Service staffing difficulties left officers squirming on the prongs of Morton's fork. If you cannot do both well, should emphasis be placed on preparing pre-sentence reports or on counselling and supervision work? If the latter suffers at the expense of the former "it could cause Judges and Magistrates to lose confidence in the efficiency of probation as opposed to custodial detention". If preparation of pre-sentence reports is skimped "the inevitable result is a decline in their quality and their value to the Courts". Half a probation service is about as much use as half a balloon so it is indeed to be hoped "that the new pay scale . . . will assist in rebuilding the service". It will at least be some consolation for any short-

fall in job satisfaction during the rebuilding period.

On the subject of law reform one gains the distinct impression that this department is less than luke-warm about proposals for a full-time Law Reform Commission. It points out that there is no evidence that during the last eight years the scoring record of a full-time commission would have been any better than that of the part-time committees or of the Department of Justice. The issue is not quite so simple as a choice between a full-time or a part-time commission and indeed with the Law Reform Division of the Department of Justice and its associated committees what we have in effect is a hybrid that has done much excellent work.

However, the present system has its shortcomings and the report acknowledges that there has been a falling off in the amount of law reform since the 1960s. A number of reasons suggest why this is so and these reasons relate generally to shortcomings in the legislative process and the growing insistence by the public in participating more fully in the formulation of legislation on contentious topics. More legislation is being passed, more Bills are being referred to select committees, more time of Members of Parliament is being taken up and there is more and more pressure on Parliamentary Counsel.

Considering the inter-relation between the machinery of law reform and the legislative process it is senseless to deal with each separately. Yet the two could be made to mesh better. Could, for example, a law reform body relieve pressure on Parliament (especially on the select committees) by centring public participation on itself in the formative stages of legislation?

As part of an inquiry into whether there could be a more harmonious relationship consideration would need to be given to whether the machinery of law reform should be independent or remain centred on Government departments as at present. Again this issue cannot be considered in the abstract but depends on the role law reform machinery will play in relation to the legislature.

There is a feeling afoot that Members of Parliament should be concerning themselves more with general policy, and exercise a more inquisitorial function concerning executive action. At present there is no time – whether through inefficiency or diversion. There seems a strong prima facie case that a better integrated law reform structure could help.

The section of the report on the family and law demonstrates a second aspect of law reform. With innovative legislation it is not simply a matter of preparing legislation and leaving it at that. Small steps are needed. Once the first step has been accepted and absorbed the second is taken. This as the pattern with divorce legislation, matrimonial property legislation, and now, one suspects, with maintenance. The monitoring of legislation in times of change is an important, if overlooked, aspect of law reform.

Justice is not one of the more dramatic departments of State. However, this report quietly demonstrates the value of the Department. It is perhaps a reflection of the times that it manages to demonstrate that its services (including probation and marriage counselling) have not only social value, but save money as well.

Family protection, morals and inflation

The decision of Mahon J in *Re Dominikovich* (see Practice Note on p 347) attracted attention by the manner in which his Honour countered inflation by tying an annuity to the National Consumers' Index (All Groups). However, the implications of the case extend beyond the novelty of the solution.

The testator had made provision for his wife by way of annuity which she contended was inadequate. Proceedings were initiated under the Family Protection Act 1955. The case for her was argued on the basis that it did not matter whether or not the provision was adequate at the date of the will or the date of death. The breach of moral duty alleged lay in the testator "not recognising the probability of future depreciation in the value of money".

His Honour agreed. When considering the question of foreseeability it was a matter of "looking at the economic situation of the country as at the date of death in the light of those aspects of the situation which ought reasonably to have been within the objective knowledge of the testator". For that purpose "the testator is not to be objectively endowed with the attributes of an accurate fiscal prophet".

Against the background of the steady increase in living costs, of which evidence had been given, and of which the testator had had practical experience the testator ought to have foreseen the consequence that the income provision would be eroded beyond the point of insufficiency and in failing to make adequate provision was in breach of his moral duty.

Because of the nature of the estate assets it was not felt appropriate to substitute the annuity by a defined share in income, but instead the annuity was increased and indexed.

This decision brings to the fore the need to take inflation into account when making provision for a spouse by way of an income settlement.

In effect even "life interest to wife and remainder to children" has become a formula to be invoked with caution, and no longer from habit.

Tony Black

TO DESERVE TO BE WANTED

Opportunities and Challenges for Commonwealth Lawyers

Closing Address by His Excellency, SHRIDATH S RAMPHAL, Kt, CMG, QC *Commonwealth Secretary-General, to the 5th Commonwealth Law Conference, Edinburgh, Scotland, 29 July 1977.*

To open a Conference whose course is uncertain is problem enough; but it at least offers a chance to apply speculation to hypothesis. To close a Conference whose course is run without having personally shared in the journey or been fully acquainted with its outcome is nothing short of adventurous. To minimise the dangers of such an enterprise while responding to the invitation of the Organising Committee to address your closing session, I shall steer clear of the specifics of your Agenda and speak to you instead of some of the opportunities and challenges that seem to me to lie ahead of Commonwealth lawyers as you prepare to leave Edinburgh for home.

To many of these opportunities and challenges your deliberations may already have sensitised you. I am acutely conscious, however, from many years of Conference attendance, of the counterveiling numbness that a week of speeches induces. I promise you brevity and directness.

Let me admit, however, to the special quality of this occasion for me. It is special because I am of the law and have been a devotee of Commonwealth Law Conferences. I recall, as would many of you, that most splendid Conference in Sydney in 1965 when so much good work was done that has enured to the benefit of the Commonwealth and of its member States ever since.

I remember wondering at the time whether anyone would be brave enough to follow upon the excellence of the Sydney arrangements. It was wholly appropriate that the sub-continent should have been: and from Delhi, too, in 1971 Commonwealth legal co-operation and law development drew renewed strength and inspiration. Edinburgh is heir to this tradition and will have been a worthy successor if you leave this Meeting as we did after earlier Law Conferences, with a deepened and altogether more realistic perception of the potential for Commonwealth co-operation in the law – and of the strength which this potential and even more so its fulfilment can bring to the Commonwealth connection.

Your consultation – essentially at a non-governmental level – is powerful testimony to the validity of that connection; for it emerges out of a special blend of practicality and fraternity without nudging or contrivance by officialdom. That it does so, is at once vindication of the Commonwealth relationship and reinforcement of it.

So let my first words to you be of the Commonwealth itself. We have just – a little over a month ago – ended a Meeting of Commonwealth Heads of Government in London: an event (despite appearances) not entirely programmed as a curtain-raiser to the Law Conference in Edinburgh. I hope you will agree that the Commonwealth emerged from that Meeting with self-respect and with accomplishment. Certainly, I can testify to the immense confidence of the Commonwealth's collective leadership in its potential and its performance both on behalf of its member States directly and in the service of the wider world community. I hope you share that confidence and are ready to work within your respective communities for its dispersal.

Relatively few of the people of the Commonwealth have an opportunity, such as you have had here, to glimpse the reality of Commonwealth co-operation; yet the Commonwealth needs the support – and the enlightened (not merely worshipful) support – of its many publics. We need your help in broadening that enlightenment – quite apart from your several contributions to the cause of legal development and co-operation in particular Commonwealth member countries.

One element of that enlightenment is that the Commonwealth is the reality of variety commingled. That reality is a measure of the Commonwealth's strength and of its contemporary relevance and validity. We need not suppress it in the mistaken belief that diversity implies discord and disharmony; it can as often imply richness and a basis for exciting growth. In rightly highlighting those things we have in common, we must be careful not to perpetuate myths or even to believe them necessary.

Language in the Commonwealth often attracts this danger of distortion. The Commonwealth is not in a true sense an 'anglophone' community – yet how pervasive is its image as an association of English speaking peoples. For many Common-

wealth countries English is not the official language of government – in some cases not even one of the official languages of government. Hindi, numerically is our largest language; add to that the Tamil tongue, Bengali, Chinese in several forms, Swahili, Sinhala, French, Greek – some of the many languages within the Commonwealth. For us, and for most of us lawyers, English is a most valuable tool that history has left with us and we use it to facilitate our business together. It is not a means of asserting any form of community. More anglophone than many Commonwealth countries are – for example – the United States, the Philippines, Ireland, the Sudan; yet their absence does not constitute a gap within the Commonwealth. Speaking English is a Commonwealth fact; it is not part of any Commonwealth ideology; it is our channel for easy communication, a precious one in functional terms; it is not a badge of identity.

And it is the same in the law. The common law of England does, like the proverbial golden thread, run through much of the jurisprudence of the Commonwealth's member States. But the tapestry of Commonwealth law is enriched by other threads and that process of continuous enrichment is bound to be sustained, indeed intensified, as societies develop endogenous processes of social organisation, as they enlarge their choices through steadily widening circles of regional integration and, looking beyond region, as they acknowledge and respond to the reality of an interdependent world community.

The point I am trying to make is that particularly because for most of us our inheritance from the common law of England and from the English legal system is so substantial we need to watch our for myths of legal homogeneity, to be on guard against a psychology of legal dependency, to be mindful and proud of our other inheritances, including those from within our own societies, and to be certain of the intrinsic worth of an outward-looking philosophy of legal development.

I recall, for example, the degree to which the Civil or Romanistic legal tradition of Scotland is shared by such Commonwealth jurisdictions as Malta, Mauritius, Quebec in Canada, Seychelles, Sri Lanka, St Lucia and some parts of Southern Africa, even though it has given way – in some cases entirely – to English legal influence in jurisdictions like Jamaica, Gibraltar, Guyana and Trinidad and Tobago.

Scotland, of course, had to be resolute in maintaining its independent legal heritage; it was not so long ago, after all, that Lord Normand wrote of the "grave risk" of Scots law "becoming a debased institution of the law of England". Yet, in a Commonwealth context, the Scots should be confident of being among friends who welcome the rich variety of their legal traditions. Lord Maugham did not speak with a Commonwealth tongue when he inveighed against "those interesting relics of barbarism tempered by a few importations from Rome, known to the world as Scots law". An altogether more balanced view, which I expect many of you can embrace within the context of your own legal systems, is perhaps that of Professor T B Smith on the influence of English Law on the Scottish system when he said: "part has been highly beneficial, part is on probation and part has been definitely detrimental".

The lawyers of this small country have traditionally ploughed their own furrow, adapting and modifying the technicalities entrenched in the south – technicalities often more faithfully copied in jurisdictions much further afield. But this rugged insistence on practicality and relevance – though I hope not on self-sufficiency merely – is now becoming more characteristic of Commonwealth jurisdictions elsewhere. I suggest to you that this new self-assurance is entirely consonant with – indeed indispensable to – the real growth of Commonwealth co-operation in legal development.

And Scotland's contribution to Commonwealth law has been made not only by Scots law but by Scottish lawyers who like the engineers and other distinguished sons of this land have worked in, and in some cases peopled, its further-most corners. It is no coincidence that Dunedin, the Commonwealth city furthest from us today, bears the ancient name for Edinburgh – and no coincidence either that the Lions' hopes in tomorrow's rugby international there should be pinned on a Scottish fullback.

But these personal contributions have not been limited to peripatetic Scots. It may have been a hypothetical English snail in the bottle of ginger beer that put *Donoghue v Stevenson* into the Law Reports, but it was two Scottish lawyers in the House of Lords saving the hapless customer's claim from foundering, as Lord Walker commented, "on the common law rock of privity of contract" that guaranteed it an honoured place in the annals of judicial law development. Legal systems throughout the Commonwealth, bearing on the lives of one-quarter of the world's people, were the ultimate beneficiaries of their enlightenment and courage.

Of course not even two Scottish Law Lords might have saved the lady's claim had it been confronted with *Clements* case whose head-note simply (but simplistically) reads: "Possession in Scotland evidence of stealing in England" – a proposition which I believe Scottish nationalists (with a small 'n') now adopt in terms (with only minor prepositional changes), to wit: "possession

of Scotland evidence of stealing *by* England". But perhaps that too is simplistic!

I mention these matters not to dwell on the past, nor to add to the volume of praise our Scottish brothers-in-law have had heaped upon them (and occasionally, I suspect, have heaped upon themselves) during the past few days, but rather to highlight the way in which the law of Commonwealth countries can benefit from the freshening breezes that need to blow within and across jurisdictions.

Commonwealth Law Conferences provide unique opportunities for us as lawyers to strengthen these perceptions – to remind ourselves of the legal heritage we share, and to enlarge both our capacity and our resolve to be activist in ensuring its continuous qualitative growth. I am certain that you shall leave Edinburgh enriched in these and other respects by your exchanges – whether of ideas, of experiences or of aspirations – and by the friendship and camaraderie of the consultation.

If I may be permitted to intrude a note of regret into what has otherwise been a memorable occasion, I would express my sorrow, indeed my concern, that financial problems in developing countries have created what can only be described as a grave imbalance in terms of representation. That these problems are very real is unquestionable. Indeed, much of our work at the Secretariat is directed towards ways of tackling them. But it is my sincere hope that by the time of your next gathering, ways will have been found to ensure adequate representation from the developing Commonwealth. This is a forum in which the lawyers of our newer member countries can make, and should make a specially significant impact; a forum where enlightened mutual understanding can be advanced in a spirit of fraternity perhaps unequalled by any other grouping. It is an opportunity too precious to be missed and one fully deserving of a wider participation. Of course, both the quality of these proceedings and, no less important, the image of the Commonwealth lawyer in his domestic environment, have a bearing on that justification.

For us in the Commonwealth Secretariat, and more especially for the work of our Legal Division, this occasion is also specially important for it immeasurably broadens that awareness of the value of Commonwealth co-operation in legal affairs without which we would labour in vain. The creation of a legal division in the Secretariat was actually first proposed at the Commonwealth Law Conference in Sydney in 1965 at a session, I am glad to recall, which I had the honour of chairing. The proposal came from Tom Kellock (now Judge Kellock) and from D G Downs and I like to think that its reception at Sydney reflected the importance which the practising profession attached to a comparative approach to problems and its recognition of the capacity of Commonwealth lawyers for helping each other.

The calls that have been made on the Legal Division by the Commonwealth demonstrates the great potential that exists for co-operation in legal matters. While there is no such creature as a Commonwealth common law, there can be no doubt about the value attached by lawyers throughout the Commonwealth to an awareness of legal developments in other jurisdictions. The quarterly Commonwealth Law Bulletin issued by the Secretariat now offers information on new legislation, judicial decisions, law reform proposals and other developments in a large part of the Commonwealth. It is now received by judicial officers, practitioners, Government agencies and many others in some sixty countries – itself a commentary on the enlarging interest being shown by non-Commonwealth countries in Commonwealth legal developments. And with the Division deliberately (and I believe rightly) established as a small professional unit we look to Commonwealth lawyers to assist in the processes of our work. We see our work in this area as being primarily of a collaborative nature with the legal profession throughout the Commonwealth.

I have noted with keen interest the prominence given in your deliberations this week to law reform. Our Commonwealth gatherings tend by their very nature to interact and to inter-relate. This Conference is no exception; in just four days' time I look forward to welcoming to Marlborough House a number of you who are actively involved in law reform, where we are to discuss the mechanics of your craft. And in just four weeks' time others of you will have crossed the Atlantic to engage in the Meeting of Commonwealth Law Ministers, at Winnipeg. The Agenda in Canada embraces a wide range of topics, but the overall theme is of ways in which through Commonwealth consultation – and in some cases, co-operation – the law and legal institutions can be made more effective: which is, after all, what law reform is all about. You will appreciate that the impetus of your discussions this week runs no risk of being lost.

But the legal work of the Secretariat goes even beyond these particular activities. Through the Commonwealth Fund for Technical Co-operation, we have by now given basic training to nearly 100 legislative draftsmen from some 30 jurisdictions who otherwise would have received none. We provide developing Commonwealth countries with legal experts in such disparate fields as constitutional law, treaty succession, taxation, company law, land titles and inevitably – as they are in such short supply but great demand –

legislative draftsmen. We have too, our own permanent Technical Assistance Group where a team of economists, accountants and lawyers provide multidisciplinary assistance principally to Governments of developing countries in their dealings with transnational corporations. We are, then, very much involved in the legal field as in others with the acceleration of development.

By the very nature of the Secretariat's work we cannot but promote the use of law as an instrument for the attainment of the chosen social and economic goals of Commonwealth countries. Nor should it be imagined that the search for a truly improved quality of life and the relevance of law to that search is confined to poorer countries. Their needs may be specially urgent, but affluence increasingly yields diminishing returns and poses for materially rich societies social problems of frightening proportions. The lawyers of the developed world can no more shrink from their duty to contribute to finding solutions than can their colleagues in the less developed countries.

In the search for solutions to these basic social problems, whether they derive from debilitating poverty or from excessive affluence, whether from a crisis of unemployment or a crisis of leisure, the lawyer represents a human resource of the most immense value. I cannot say to you that in our multi-faceted Commonwealth there is a widespread recognition of his having everywhere enlisted his talents in the pursuit of social justice and social change.

The truth is that the lawyer has traditionally been caught between the tensions generated by the fundamental need of society for stability and the demand of society for change.

In more leisurely times, with a less demanding public, lawyers could perhaps afford to move sedately – to be used to implement the law and as a tool of the law. The pace of change was slow – not yet quickened by the explosion of rising expectations. The lawyer rested comfortably content with the status quo. It served him well; it provided him with a handsome living; and, as only the well-to-do could afford him, market forces ensured that his education was directed to their service. I generalise, of course; but I do so consciously. The few mavericks who kicked against the pricks made little headway, and inspired few imitators.

The tempo of change has now quickened. This is an age of rapid and often bewildering transition. The social scene has altered everywhere beyond recognition; but as lawyers we are still moving slowly and often without conviction in response to the demands being made on us. The calls from a better educated public are as clament as they were predictable – legal services are a right, not a privilege; legal jargon is an unnecessary and intolerable mystique; the lawyer has no more right to exploit a need for his services than a doctor to exploit the misfortunes of the sick.

All this calls into question a wide range of tacit assumptions of long standing, and it is not surprising that the legal profession in the Commonwealth should be under such intensive systematic scrutiny. The way courts are conducted; the accountability of the judiciary; the complaints procedures against the profession; the education and training of lawyers; and the way in which legal services are finally delivered to the public: all are the subject of critical examination. It is becoming more widely recognised, too, that the have-nots suffer more wrongs and more injustices than do the moneyed elite; that they encounter a whole range of problems that is beyond the experience of the middle class lawyer and ignored in his education – rooted as it so often is in the milieu of tax avoidance, family trusts and corporations. A real response is demanded; tokenism is now recognised for what it is, and is rightly and fortthrightly rejected.

The law has been called "the government of the living by the dead". In the nature of the law such epithets are to some extent inevitable. But it is equally true as Justice Holmes once said, that: "the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity". May I suggest, in the spirit of Holmes, that as lawyers we all too often make a virtue of that necessity – ignoring our duty to be creative social engineers of the present and enlightened architects of the future our works must inspire but cannot determine.

The legal profession is in danger of running out of time. No longer can it comfortably echo of its own habitat the words of the poet in praise of England – "a place where freedom broadens slowly down from precedent to precedent". Change is needed, and quickly; a degree of change uncomfortable for a profession which tends to profit from the status quo. All these problems are greatly accentuated in the newer societies and most especially in the poorer ones – but they have their counterparts everywhere. I acknowledge that there will be many here to whom such an image of a profession redolent with reaction does not fairly apply. But, the evidence of my own experience is that it is all too generally apt.

As community leaders, as opinion formers, as advisers, and as members of a profession with a belief in justice, your societies – which together are a sample of the world – look to you

not only for advice but also for practical leadership; not for mere preservation of the status quo but for making it worthy of survival; not for observance of rituals but for constructive innovation. And can we doubt that everywhere they look with enlarging impatience?

The challenge which faces lawyers is an age-old one. It is the challenge to vindicate before an unbelieving public our own conviction that in our calling we are not only necessary but desirable elements of human society. It is a challenge that should make every lawyer pause and question the complacency which marks our traditional response. If we are content to rest our fate on a smug belief that our societies cannot do without us, we may face a rude awakening to the reality of redundancy. For Commonwealth lawyers, as for lawyers everywhere, the reappraisal of values, of institutions, of methodologies, that seems more specially characteristic of our age than of others, presents an inescapable challenge to justify our worth to our societies.

Finally, may I suggest a wider dimension of challenge to Commonwealth lawyers today. Social and economic change is not a need confined to national societies. It is a need increasingly felt within the much broader community of States. If we seek that our own societies be just societies, as I believe we all do, it is immoral and in the end impractical to deny the reach of these values to the wider community of States and peoples. It is simply no longer possible and never was justifiable for an ethos of social and economic justice to stop at national frontiers. Nationalism and sovereignty, for too long a masquerade of national bigotry self-aggrandisement must now give way to internationalism and interdependence – and not just for moral reasons related to our spiritual health, but for practical reasons related to our planetary survival.

International law, chained as it is to the conceptual ironwork of a passing order, is proving as incapable of making the quantum, leap into modernity as was the common law when feudal structures crumbled. Bold spirits point the way and there have been some marginal advances, but there is today a pressing need for a new 'equity' to redress the many wrongs that man now perceives in his global order. Its installation requires the same boldness, wisdom and inventiveness as that which flourished under the great Chancellors –and demands as much of the world's contemporary lawyers.

Commonwealth lawyers – heirs to this great tradition of fashioning a new jurisprudence out of the rigidities of the old – should be in the forefront of a movement that will fashion a new world legal order for the twenty-first century. Great challenges are already at hand in such frontier areas as the international commons – and it was symbolic of this that in your discussions this week you spent time on the law of the sea. But, as the 'law of the sea' dialogue confirms, these challenges will only be met by new systems and structures when we make the essential conceptual breakthrough about the nature of the human condition: when we acknowledge that the vision of one world has become the reality of one human community. It is worth remembering that Lord Atkin's catalytic formulation of the duty to take care could only have entered a jurisprudence already sensitised to the concept of 'neighbour'.

All this is a part of the new global 'equity' of which I speak – a consciousness that each man – not just each fellow citizen – is our neighbour, and an acknowledgement that to all men and by all men are rights and duties owed. These are the ultimate challenges to all lawyers. Where better for Commonwealth lawyers to commit ourselves to their fulfilment than in this City that has nurtured the noblest traditions of an activist jurisprudence.

Filling the gap – One of the less onerous tasks in compiling the New Zealand Law Journal is selecting "fillers" for that occasional gap at the end of an article. The material is gathered from many sources – New Zealand Law Reports, English reports, the Hong Kong Magistrates' Newsletter, Wellington public bars, to name but a few. Unfortunately, our prize collection of bons mots was one of the victims of the Hannahs Building fire. We have scoured the student publications, local newspapers and magazines published in 40 different languages – only to find that they are using our old fillers, which we filched from someone else in the first place. . . . If you have a funny story or a quotable quote (preferably with a legal flavour) that you would like to share, please send it to us. How about an occasional series on "The Law in Literature"? Think of all those nasty passages in Dickens about lawyers. We may even offer a prize to he who finds a complimentary quote about lawyers.

PRE-TRIAL DIVERSION: CONNECTICUT'S ACCELERATED REHABILITATION ACT

The following address by His Honour Mr Justice DAVID H JACOBS, *Chief Judge of the Circuit Court of the State of Connecticut was first delivered to the Benchers Society the membership of which is made up of Yale Law School Professors, Judges and distinguished lawyers.*

In the context of criminal law, diversion means the suspension of formal criminal proceedings before conviction on the condition that the accused will do something in return *(a)*. Diversion programs use the threat of possible conviction to encourage an accused to participate in a rehabilitation program, undergo psychiatric treatment (if necessary), modify his behaviour or hold down certain employment.

The concept of diversion arose from a belief that too many people are swept within the scope of the criminal law. Nondangerous individuals clog the police stations, courts, and jails, rendering the criminal justice system inefficient, costly and arbitrary. Diversion has received acclaim as a reform that will make American criminal justice more efficient and humane *(b)*. The proponents of diversion argue that by diverting individuals who should be treated rather than punished, diversion spares them the indignity and stigma of indictment, trial, conviction, and imprisonment; and, at the same time, it preserves the resources of the criminal justice system more effectively to apprehend and detain dangerous offenders *(c)*.

In 1967, the President's Commission on Law Enforcement and Administration of Justice, observed that "[p]rosecutors deal with many offenders who clearly need some kind of treatment or supervision, but for whom the full force of criminal sanctions is excessive; yet they usually lack alternatives other than charging or dismissing the case" *(d)*. It recommended "[e]arly identification and diversion to other community resources of those offenders in need of rehabilitation and treatment, and for whom full criminal disposition does not appear required" (p 134).

Such a system has been endorsed by professional organisations, the ABA, public officials, and national commissions. It has been predicted that if diversion programs continue to expand, they will handle 150,000 persons per year by 1987 *(e)*.

Emerging data on diversion programs, however, raise serious questions as to the efficacy of diversion in decreasing the scope of the criminal law. In fact, it has been suggested that diversion may serve to cast a wider net of governmental intervention over American society. Commentators have suggested that this apparent expansion is due to the absence of proper standards and guidelines in diversion programs. But there is another explanation – that the seemingly anomalous results of current diversion programs reflect the essential theory of diversion and expose its contradictions *(f)*.

In his thorough analysis of traditional diversion methods, Professor Brakel characterises such practices as lacking in formality, low in observability, and devoid of such institutional elements as specialisation of personnel and thorough data gathering and reporting *(g)*.

Prosecutors have long held the power to halt criminal prosecution by dropping charges *(h)* or by informally diverting individuals to social service agencies *(i)*. Such discretion has been practiced because the system allows and, in part, requires it *(j)*.

(a) National Advisory Committee on Criminal Justice Standards and Goals on Courts 27 (1973).

(b) See N Klapmuts, Diversion from the Justice System 1-3 (National Council on Crime and Delinquency 1974).

(c) Vera Institute of Justice, Programs in Criminal Justice Reform 78-80 (1972).

(d) President's Commission on Law Enforcement and the Administration of Justice: The Challenge of Crime in a Free Society.

(e) Crime Commission Report: Report on Courts; see Report on Corrections.

(f) See 1 eg Pretrial Diversion from the Criminal Law, 83 Yale LJ 827, 853-854.

(g) See Brakel, Diversion from the Criminal Process: Informal Discretion, Motivation and Formalisation, 48 Denver LJ 211, 227 (1971).

(h) Goldstein, Police Discretion Not to Invoke the Criminal Process, 69 Yale LJ 543 (1960).

(i) See Vorenberg & Vorenberg, Early Diversion from the Criminal Justice System: Practice in Search of a Theory.

(j) See National Institute of Mental Health, Diversion From Criminal Justice System 1 (1971).

In the past, however, the unlimited use of such discretion has proceeded largely without standards or articulated goals. Experience has demonstrated that traditional diversion has been so informal, unstructured, and lacking in principle that it has tended to depend on the personal inclination of the individual. Unlike its antecedents, diversion programs do not divert individuals *out* of the criminal justice system; rather, they *delay* the operation of criminal processing. If the conditions of a diversion program are met, charges are usually dismissed; if they are not, the case can be returned to the system for further criminal processing. During diversion, an accused remains under the authority of an enlarged criminal justice system.

The ideal of rehabilitation has assumed a central role in American criminal justice. In the last 50 years, this ideal has been a major force in the development of the juvenile court system, indeterminate sentencing, probation and parole. Its essential elements are the assumption that human behaviour has identifiable causes which make possible the scientific control of deviant behaviour and the conviction that measures employed to deal with criminals should serve a therapeutic function. The rehabilitative school has its roots in the thinking of Cesare Lombroso who believed that criminals differ from non-criminals in traits of personality which promote tendencies to commit crimes. Lombroso's thinking influenced the development of both the psychiatric school which looks to the criminal's psychiatric problems as the source of their criminal behaviour, and the sociological school, which focuses on the social environment for the causes of criminal behaviour. Both schools recommend that the degree and nature of social intervention in a criminal's life should depend not on his crime but on the cause of his criminality and the prognosis for reformation. The rehabilitative approach also reflects a prevention concern, that dangerous individuals should not be free to commit crimes but should be controlled and treated until they are no longer dangerous *(k)*.

Supporters of diversion claim that such programs reduce the expense of the criminal justice system because they cost significantly less per person than normal criminal processing. I do not support that theory because diversion programs require a substantial expenditure of prosecutorial and probationary resources. The Adult Probation Department must maintain jurisdiction over the case for an extended period – sometimes up to two years; and additionally, must determine the participant's termination from the program. Finally, the Court must process those individuals who are unsuccessful in diversion programs.

The question we face is: Can the laudable goals of diversion, ie, to reduce unnecessary incarceration and to distribute rehabilitative services to them who need them most be accomplished within the classical limits of the criminal law? In other words, is diversion in the right direction.

Diversion was, in part, a response to overcriminalisation, the notion that the criminal sanction extends too far into the regulation of moral conduct and various minor forms of deviance.

It could be argued that, while such proposals are desirable, they should not be adopted in a crime-wary age.

Chief Justice Burger, while still a judge on the Court of Appeals, said: "Few subjects are less adapted to judicial review than the exercise of the Executive of his discretionary power to divert criminal cases from the traditional channels of the criminal justice system" *(l)*.

Connecticut's Accelerated Rehabilitation Act (§54-76p) was originally enacted by the 1973 General Assembly, but was subsequently modified by the 1974 General Assesembly by removing the discretion from the hands of the state's attorney or prosecutor and placing that discretion with the Court *(m)*. The Act shall not be applicable to persons accused of class A, (maximum life [unless death sentence]) class B (maximum 20 years and/or

(k) See Dershowitz, Preventive Confinement: A suggested Framework for Constitutional Analysis, 51 Texas LR 1277, 1286-87 (1973).

(l) *Newman v United States,* 382 F 2d 479, 480 (DC Cir 1967).

(m) The relevant provision, as modified, is: § 54-67p. Pre-trial rehabilitation program

There shall be a pre-trial program for accelerated rehabilitation of persons accused of a crime, not of a serious nature. The court may, in its discretion, invoke such program on motion of the defendant or on motion of a state's attorney or prosecuting attorney with respect to an accused who, the court believes, will probably not offend again and who has no previous record of conviction of crime, provided the defendant shall agree thereto and provided notice and an opportunity to be heard thereon shall be given to the victim or victims of such crime, if any. Unless good cause is shown, this section shall not be applicable to persons accused of a class A, class B, or class C felony. Any defendant who enters such program shall agree to the tolling of any statute of limitations with respect to such crime and to a waiver of his right to a speedy trial. Any such defendant shall appear in court and shall be released to the custody of the commission on adult probation for such period, not exceeding two years, and under such conditions as the court shall order. If the defendant refuses to accept, or having accepted, violates such conditions, his case shall be brought to trial. If such defendant satisfactorily completes his period of probation, he may apply for dismissal of the charges against him and the court, on finding such satisfactory completion, shall dismiss such charges.

(1973, PA 73-641, § 1, eff June 12, 1973; 1974, PA 74-38).

$10,000) or class C (maximum 10 years and/or $5,000) felonies unless good cause is shown.

The Act provides that upon motion by either the prosecuting attorney or the defence attorney, the Court, in its discretion, but subject to certain specified conditions and restrictions, may offer ar accused an alternative to entering a plea to the crime or crimes charged. Under the alternative plan, the accused must voluntarily submit to the custody of the Commission on Adult Probation and to submit to probation not to exceed two years. If at the end of his probationary period, the accused complies with all the conditions and restrictions and satisfactorily completes his probation, the Act provides that the Court shall dismiss the charges.

One of the conditions which must be satisfied before the Court may entertain the motion, is that the crime in issue not be of a serious nature. The term "serious nature" is not defined by the Act. The fact that Class A, B and C felonies shall be excluded under the Act (unless good cause is shown) indicates that these felonies are of a "serious nature".

Nor is the term "good cause" defined by the Act; thus, the resolution of the terms "serious nature" and "good cause" are left to the discretion of the Court.

Other conditions must be satisfied prior to proceeding under the Accelerated Rehabilitation Act. They are: (1) the Court must be satisfied that the accused will probably not offend again; and (b) the accused must have no previous record of conviction of crime.

It is a difficult, if not an impossible task, for the Court to understand how one can reasonably predict future criminal behaviour based upon the most superficial contacts with the accused. The Court does not have access to the complete socio-economic profile of the accused; consequently, predication about future criminal behaviour is based more or less on guess-work.

An additional requirement of the Act involves notice to the alleged victim of the crime. The alleged victim does not possess any veto authority; nevertheless, it does give the victim the right to be heard.

Finally, the accused who is offered the opportunity of entering a program of accelerated rehabilitation must agree to the tolling of the statute of limitations and must waive his right to a speedy trial during his probationary period as conditions precedent to being placed in the program. Should the accused refuse to accept the statutory conditions, or if it is determined that the individual has violated the conditions, the Act provides that the case shall be brought to trial.

The idea of pretrial diversion of appealling. But unresolved doubts remain about other aspects of the concept, its practice, and program organisation, etc. At the present time, discourse on the benefits of pretrial diversion is politicised and value-laden with empirically unsubstantiated assertions. The claim of recidivism reduction needs to be tested out by proper evaluation research. The claim of resource conservation is unconvincing. Other claimed benefits – stigma avoidance, decriminalisation of certain offences, reduction of pretrail detention – are all plausible, but unconfirmed.

Pretrial diversion has become today a reform movement well on its way to institutionalisation. Continued proliferation of pretrial diversion programs at this time is hard to justify. Existing programs must first meet the burden of showing that their promises have been or could be delivered. Otherwise, the practice of pretrial diversion, like almost anything we do in the criminal law field, is on the basis of faith.

Cloaked in substantially more enthusiasm than the data warrant, pretrial diversion in the criminal justice system must be critically reassessed and re-evaluated. The research and analysis to date are greatly deficient and do not answer the question whether diversion is desirable.

The dominant opinion that diversion is successful can be dissected into a number of subpremises. A brief review suggests that none of these subpremises are supported by currently available data.

Recidivism: The theory that diversion counselling more effectively reduces recidivism – the fact remains that current research offers no support for this.

Diversion counselling more effectively reduces recidivism than do normal modes of cases processing and correctional services. This issue has been addressed and discussed, but not answered.

Diversion produces employment gains in comparison to similar correctional programs or in comparison to traditional case processing modes. Again, there are no data on the first comparison and unreliable data on the second. The effect is, therefore, unknown.

Diversion reduces Court congestion: This statement may be somewhat accurate for diversion programs that handle sizeable proportions of a court's caseload.

Diversion produces no harmful effects on clients: Although a firm answer is not available, diversion may result in control of some defendants who would otherwise not have been convicted. Futhermore, current modes of acceptance and termination create a potential of abuse.

Diversion ameliorates the severity of treatment imposed on defendants charged with crime. This statement is accurate from the standpoint of formal labels only as applied to successful clients who receive dismissals and would otherwise have

been convicted. Its accuracy in terms of the severity of supervision imposed is unknown.

Diversion is a cost-beneficial return: No reliable data exists.

Diversion reduces current system expenditures: This conclusion is not supported as no documented cost savings have been identified. Arguably, the impact is the reverse.

As this summary discloses, empirical support for diversion is unimpressive. Most premises have not been reliably confirmed and several are even questionable. Nevetheless, enthusiasm for diversion remains high.

At the core of the diversion movement is a basic perceptual bias of immense importance to understanding current interest in criminal justice reform. The perception is that the current criminal justice system is an abject failure from virtually any major policy perspective that might be applied to its evaluation. Whether one emphasises crime control, rehabilitation, civil liberties, or other themes, the practice of criminal justice appears almost totally ineffective or perhaps even counterproductive. This perception has represented contemporary views for many years. It has created an intensive drive for change which, in turn, has been fueled by the availability of federal and other funds to effectuate reforms. Yet the direction that such change should take is a subject of intense political and philosophical debate.

Advocates of rehabilitative perspectives press for changes apposed to those that adhere to punishment perspective. Crime control viewpoints collide with libertarian ideals. These controversies frequently prevent a policy consensus and, hence, a full commitment to any single course of reform activity.

The point is not only that hasty reform movements may cause harm, but that failure to collect, examine and integrate the lessons of critical or objective data reduces the probability that the reform movement will successfully achieve its own purposes or that the resulting change will in fact represent improvement.

A call for further research is not only inevitable, evaluation in the context of pretrial diversion is urgently needed.

PRACTICE NOTE

Indexing annuities

"In *Re Dominikovich* (1977 Butterworths Current Law 512) Mahon J used indexing techniques to ensure that an annuity remained adequate despite inflation. The annuity was tied to the National Consumers' (All Groups) index as being the most appropriate. There was one small complication in the selection of that index – it includes the housing group which were not applicable to the plaintiff as she owned her own house. Should the annuity therefore be related to the index less that group? There were two reasons for ignoring it. Firstly the additional benefit to the plaintiff would not be significant and secondly there was an obligation to consider the administrative responsibilities of the trustee and here the relative simplicity of adjustment by reference to a single comprehensive index had advantages.

The relevant portions of the form of the order follow For further precedents and guidance reference may be had to a useful Australian text, 'Inflation as it Affects Legal and Commercial Transactions" by Andrew G Lang (West Publishing Corpn Pty Ltd, Syndey).

With reference to clause 2 (d) some other allowance will need to be made for the possibility of a change in the base index. Leaving the matter to the trustee's discretion and/or arbitration are two suggestions.

Order

(1) That the annuity referred to in clause 5 of the last will of the deceased be varied by altering the amount thereof to $100.00 per week, payable as from the 1st day of January 1977 and subject thereafter to a quarterly adjustment as hereinafter prescribed.

(2) That the amount of such annuity be amended each quarter by reference to the National Consumers' Index (All Groups) as published quarterly by the New Zealand Government Department of Statistics in the following manner:

(a) The annuity payable for the quarter year commencing on the said first day of January

1977 is to be amended, after the expiration of that quarter, to the amount arrived at by multiplying the amount payable for that quarter by the index number published in respect of that quarter and then dividing the product by the index number published in respect of the immediately preceding quarter ended 31 December 1976.

(b) That the annuity payable in respect of each and every succeeding quarter after the first shall be adjusted in like manner.

(c) That if the annuity payable for any quarter shall be less than the amount calculated by the said adjustment, then the balance shall be paid forthwith to the plaintiff. If the annuity payable for any quarter shall be greater than the adjusted figure for such quarter, then the over-payment shall be deducted in such manner as the trustees shall think fit from the annuity payable for the succeeding quarter.

(d) In the event of the base index being altered from the number operative as at the date of this order, or in the event of other variation in the computation of the said index, leave is reserved to the parties to apply in the event of disagreement as to the manner of subsequent adjustment to the said annuity.

Tony Black

INDUSTRIAL LAW

UNJUSTIFIED DISMISSAL: GRIEVANCE AND VICTIMISATION

By ALEXANDER SZAKATS, *Professor of Law, University of Otago.*

Only those workers whose employment is covered by an award or collective agreement may allege unjustifiable dismissal, and resort to the grievance procedure set out in s117(4) of the Industrial Relations Act 1973 ("The Act"). This was the unanimous view of the Court of Appeal, in *Auckland Freezing Works and Abattoir Employees Industrial Union of Workers v Te Kuiti Borough* [1977] 1 NZLR 211 on a case stated by the Industrial Court. Consequently, the only remedy open to an employee whose service contract does not incorporate a collective instrument, even though he belongs to a trade union, would be a common law action for wrongful dismissal. As a termination of employment may be unjustifiable under the statute but fall short of being wrongful at common law, in such cases frequently no redress can be found. Nothing prevents, however, an employee outside an award or collective agreement, if he is a trade union member, from claiming victimisation as the reason for his dismissal, and relying on the procedure provided by s 150 of the Act. So held the Industrial Court in *New Zealand Insurance Guild Union of Workers v The Insurance Council of New Zealand* (1976) BA Ind Ct 173, a decision dated just four days before that of the Court of Appeal *(a)*. The question is whether or not the opinion expressed in the *Insurance Guild* case can be reconciled with the later judgment of a superior court. The purpose of this brief note is to argue that as the two cases concern different, though related issues, the appeal judgment does not affect the validity of the Industrial Court's decision, and that the broad interpretation given to s150 of the Act accentuates the ungenerosity of the common law compared with statutory remedies.

In the *Freezing Workers'* case the defendant Borough Council terminated the employment of two abattoir slaughtermen who were voluntary members of the plaintiff union, but their service contract was not governed by any award or collective agreement. The union alleged unjustifiable dismissal on behalf of the men, and set in motion the grievance settlement procedure specified in s117(4) of the Act. The grievance committee failed to settle the disputes. When the matter was referred to the Industrial Court the defendant denied the applicability of subs (4) and applied pursuant to s51 to state a case for the Court of Appeal.

Richmond P in delivering the judgment of the Court accepted the defendant's submissions. Examining the language of s117, in his view subs (2) goes no further than ensuring that "every award or collective agreement shall contain

(a) November 19, 1976; the decision of the Court of Appeal was given on 2 November 23, 1976.

provision for setting up of effective machinery to deal with personal grievances"; subs (3) merely requires the inclusion of the standard machinery in subs (4) or an alternative procedure approved by the Industrial Commission, in every collective instrument; and it further provides that if no such clause is included the standard procedure in subs (4) "shall be deemed to be included". In reference to the first statutory appearance of "personal grievances" in s 179 of the now repealed Industrial Conciliation and Arbitration Act 1954 (the "IC & A Act") (as inserted by s4 of the 1970 Amendment Act) his Honour dismissed the submissions that under that section it was not necessary for the worker's conditions of employment to be governed by an award or collective agreement and that it was unlikely that the legislature when replacing the previous section with the present s117 would have intended to restrict the grievance procedure to cases where a collective instrument existed. His Honour arrived at a contrary conclusion and said:

> "[I]t is clear that the disputes procedure introduced [by s179] was intended to apply only in cases where the worker's conditions of employment were governed by an "instrument" and that word was defined by s176 of the Industrial Conciliation and Arbitration Act (a section which was also introduced by the abovementioned amendment Act of 1970) in such a way as to exclude private contracts of service" (p213).

The definition referred to enumerates "any award or industrial agreement" (which term is now replaced by "collective agreement"), "any agreement under s8 of the Labour Disputes Investigation Act 1913" (repealed and substituted by agreements between an unregistered society of workers and an employer or employers under s141 of the Act) and "any other collective agreement in the nature of an industrial agreement between a workers' union and an employer or a body of employers". The operative word is "collective" used in a more general sense than in the present Act. An "instrument" may include further types of collective arrangements which where possible under the old legislation and before the appearance of regulations restricting wages, but without doubt excludes individual employment contracts.

The standard grievance procedure, as contained in subs (4) of s117 is thus, merely a model clause. It has no direct enforceability as a legislative command independently from a collective instrument. It is mandatory to the extent only that by virtue of subs (2) and (3) it must be or deemed to be included, or substituted by another approved clause, in every award or collective agreement, but its intrinsic enforcement is restricted to being a statutorily superimposed term of the instrument. In turn the relevant terms of the instrument become by incorporation terms of the individual service contract enabling the worker through his union to set the machinery in motion. Without the intermediary of the employer-union collective instrument the model clause will not be deemed to have been imported in a contract of employment, and the employee may not avail himself of the benefit of the statutory grievance procedure.

Voluntary insertion of a grievance settlement provision either by way of a full descriptive text or simply by reference to s117(4), nevertheless, remains open for the parties to the individual employment contract. Employees with personal bargaining power who could demand such a clause, however, by virtue of their superior position do not require it. Also they do not belong to a trade union. On the other hand, an employee who might need a grievance machinery has no power to secure its inclusion in his service contract. Employees who rise above a salary bar lose the coverage of the collective instrument but they usually retain their union membership, and believe that the protective umbrella still extends to them. As a result they fail to stipulate the grievance clause as an express term of the employment contract. In any case should they try to do so they are powerless to insist on it.

This was the situation in the *Insurance Guild* case. The remuneration of the employee upon his appointment as local Technical Officer exceeded the salary bar provided by the New Zealand Insurance Workers' Collective Agreement ((1975) BA 5493) but he was under the mistaken belief that in all other respects he still remained covered by the instrument. According to his statement to the Industrial Court he was expressly assured to this effect by the General Secretary of the Insurance Council. He continued to be a member of the Guild. Subsequently serious differences developed between him and officials of the Council culminating in his transfer as "Assistant to the Chief Technical Officer". This was described by a member of the Council as a "lateral move". It involved no loss of salary, but it did involve loss of the use of a car which was provided to the local Technical Officer. The employee considered the transfer a loss of status and that it affected his employment to his disadvantage. He turned to his Guild to settle his grievance under cl22 of the Collective Agreement, but the Council declined to agree to the setting up of a grievance committee, and dismissed him as from 8 December 1975. On account of a special leave of absence to go overseas a manager of a New Zealand sports team already granted and

accumulated holiday leave due to him the actual date of termination was 11 May 1976. During that period he was to receive his normal salary but was not required to perform any duties.

The guild abandoned the grievance procedure and brought action under s150 of the Act, and anti-victimisation clause. The section purports to give a general protection to workers against dismissal in bad faith for reason of involvement in trade union or related activities. It provides that "where an employer dismisses any worker or alters any worker's position in the employment to this prejudice, and at any time within 12 months before his dismissal or alteration of his position" the worker acted in the manner or did any of the things set out in paras (a) to (g) in subs (1) "the employer shall be liable to a penalty". In addition the Industrial Court is given the discretion to make orders for reinstatement of the worker in his former, or a not less advantageous position, or payment of compensation to him, or both. The employer's only defence lies in proving that the dismissal or alteration of position was for any other reason.

Only part of para (d) and para (f) were relied on by the plaintiff as grounds for alleging victimisation. These paragraphs specify the criteria that the worker:

"(d) Was entitled to some benefit for an award order or collective agreement, or had made or caused to be made a claim for any such benefit for himself or any other worker, or had supported any such claim, whether by giving evidence or otherwise:

"(f) Had submitted a personal grievance to his employer."

Para (d) in itself contains three alternatives, but the plaintiff placed reliance only on the middle one, "had made or caused to be made a claim" for some benefit of the instrument.

It was common ground at the hearing that the collective agreement did not cover the employee. The Court refused to find as having been satisfactorily established that the service contract expressly or impliedly incorporated parts of the instrument including the grievance procedure, and held that the Guild "quite properly [did] not invoke the first option." The Court continued:

> "[This] leads . . . to the question whether it was possible for [the employee] . . . to claim a benefit under the collective agreement, even although he did so mistakenly, so as to cause para (d) or apply. The very existence of the second option in (d) suggests to us that it has in mind the worker who makes a claim which in the result is not upheld. [Counsel for the defendant] argues that this option cannot apply unless the worker is covered by the instrument, but if that were so there would appear to be little . . . reason for the second option as the first would apply whenever coverage by the instrument was clear" (1976) BA Ind Ct 173, 181.

Reference was made to the decision of the Court of Arbitration in *Inspector Of Awards v Armoured Transport Mayne Nickles Ltd* (1967) 67 BA 763 where the worker made a claim under para (d) of s 167 (1) of the I C & A Act (corresponding with para (d) of s 150 (1), which turned out to be unjustified. Examining the provision the Arbitration Court expressed the view that it should not be narrowly construed as "the purpose of paragraph (d) is to throw a broad cloak of protection over ordinary workers subject to the award". The Court added:

> "Bearing in mind s5(j) of the Acts Interpretation Act . . . our view is that the purpose and meaning of paragraph (d) is to protect the worker who makes reasonable representations about his award whether or not his law or the interpretation of the award turns out to be correct . . . [A] man should be entitled to negotiate about his working conditions under his award without being in fear of dismissal because his law might not be right" (p 766).

Applying this broad interpretation to the Insurance Guild case the Industrial Court had no difficulty in arriving at the conclusion that the dismissed technical officer when claiming the benefit of cl22 of the collective agreement did not do it frivolously, but he believed that he was entitled to that benefit, and though mistakenly he claimed in that belief. "Paragraph (d) does not require that he should be entitled to the benefit . . . and have claimed the benefit" (p 182). The word "or" joining the two parts of the paragraph cannot be read as "and", therefore the case under the second alternative was made out.

Concerning para (f) the Court pointed out that even though the employee was not entitled to rely on the grievance procedure, he suffered under a sense of grievance and made it clear that he wanted it to be considered with a view to redress. That amounted to "submitting a personal grievance". The requirement under the paragraph is merely that the grievance be submitted, not that it also be established. An informal complain should be sufficient without the necessity of going through the whole process as set out in s117(4). Had Parliament intended to the contrary, "it could have quite easily added a few words which would have made the matter clear" (p 182). Emphasising that the purpose of s150 is to throw over workers a very broad cloak of protection, the Court gave para (f) a broad construction without any qualification.

In conclusion the Court held that the employee was dismissed, because, though mistakenly, he claimed a benefit under the collective agreement, and he submitted a personal grievance. "This is exactly the situation at which s150 is aimed" (p 184), stated the Court, and found the claim of victimisation under both headings well established. Reinstatement of the dismissed employee and payment of a sum as reimbursement of wages were ordered in addition to the penalty imposed.

After having analysed both the *Freezing Workers* and the *Insurance Guild* cases it becomes obvious that the judgment of the Court of Appeal can be meshed in with the decision of the Industrial Court. The distinction between the effect and enforceability of ss 117 and 150 has now been authoritatively made. The former can operate solely as a clause of a collective instrument incorporated either by expressly repeating the words of subs(4) or by the command of "shall be deemed to be included". Its benefit may be claimed only by a worker covered by the award or collective agreement through his union. It has no direct force by itself.

On the contrary s150 is intended to have a more general application as a statutory protective measure without the intermediary of an instrument. Although its main target is to safeguard trade union freedom and to protect "ordinary workers subject to the award" (p 184), participation in union activities does not appear to be the exclusive prerequisite when claiming victimisation. Thus, while paras (a), (b), (c) and (e) definitely refer to involvement in affairs connected with the union, para (d) does not necessarily do so, while (f) and (g) do not refer to involvement at all. Even coverage by an instrument is not a strict requirement. Union membership can also be classified without some hesitation, as not being a condition to invoke the penalty action. It is conceivable that a non-unionist employee may be victimised not only under paras (d) or (f), but under para (g) for the reason that "he had given evidence in any proceedings under [the] Act". Action in such a case pursuant to s151(l) (b) may be brought by an Inspector of Awards and Agreements. The difficulty arises from uncertainty as to whether or not the Inspector taking action under s 151, has the same power as under s 158, when he recovers wages for a worker "whose position or employment is subject to an award or collective agreement". The dominant provision governing the matter, however, clearly is s150 (4) which empowers the Court to order reinstatement of, or reimbursement or compensation payable to the worker, either in addition to or instead of a penalty. As the Court in the Insurance Guild case had the power of making, and actually did make, such orders in respect of a worker not covered by the instrument, even though he was a member of and represented by the trade union, surely this power can be exercised to order payment of the same character to a non-union employee on whose behalf the Inspector brings the penalty action. The prerequisite in s158 is coverage by an instrument, not membership of a union. A worker while he remains subject to the award or collective agreement may be exempt from union membership. Thus, it is submitted, an Inspector could bring a penalty action under ss150(4) and 151 and also recover reimbursement or compensation, or both, in respect of a non-unionist employee not covered by any instrument. Whether such a situation would occur is another question but its possibility cannot be ruled out.

The following conclusions are apparent from the two decisions discussed. Under s 117 (4) (d) in most cases the unjustifiable dismissal itself constitutes the grievance that triggers off the machinery through other lesser grievances can also give rise to the procedure. Conversely, under s150 submission of a grievance may be the very cause for the dismissal, "grievance" being construed in a broad sense. Further, the grievance prodecure is available only to a worker covered bv an instrument, as a term of it, while any employee may claim a remedy pursuant to s 150, regardless of such coverage. Union membership in itself is immaterial in the first case, and it does not appear to be an absolutely essential factor in the second one either, though preferable. When a worker is unable to allege unjustifiable dismissal through the grievance process for the reasons discussed, his only remedy normally would be at common law. By common law standards the employer in the Insurance Guild case was extremely generous, as in fact the worker received six months' notice with full pay. He would have had a hard, almost impossible, task to establish a cause of action. The anti-victimisation provisions of the Act gave him a vastly superior protection.

The intention of the legislation may have been to restrict the protection of s150 to workers subject to an award, but if the section is given a broad construction, and neither coverage by an instrument nor union membership are essential prerequisites to invoking it, then all employees, including persons in relatively high positions, provided they can show a grievance, may elect to bypass a common law action, and take advantage of the statutory antivictimisation remedies. The procedural difficulty facing them, however, would be a deterrent: they have no locus standi and only an Inspector may bring

an action. It is most questionable whether an Inspector would do so in such circumstances. Unless the entire law of protection of employment is given a new legal framework based on the principles of the famous ILO Convention *(b)* recommendation *(c)* the effect of s 150 in practice will remain restricted to workers who are members of a trade union, and in most cases subject to an instrument.

(b) See UK Contracts of Employment Act 1972, Employment Protection Act 1975, Trade Union and Labour Relations Act 1974; Germany (Fed Rep), Protection Against Dismissal Act 1951, and other overseas legislation.

(c) Recommendation Concerning Termination of Employment at the Initiative of the Employer No 119 26 June 1963.

WHY LAWS LIKE THIS?

By NOEL S WOODS, *Visiting Fellow in Industrial Relations at Victoria University of Wellington.*

I have examined in detail elsewhere *(a)* the provisions of the New Zealand industrial relations legislation of 1976 and it is not my purpose to re-traverse that material here. In the course of that examination, however, I pointed to some of those provisions as giving cause for concern in various ways – some for departing from the essential foundations of fairness; some for being impractical or woolly and unsatisfactory in phraseology; and one (which declares that an agreement is an award) as a piece of illiterate nonsense. On the other hand, some of the 1976 provisions are good, necessary and clear.

In an earlier publication I had pointed to the need for industrial law to be particularly clear because of the frequency of its impact on very large numbers of ordinary people, and had referred to the incomprehensibility of some of the legislation in recent years in this area. I asked the question: "Why must we suffer such inflictions?" *(b)* In the light of some of the provisions in the 1976 legislation, that question has to be asked again.

To give point to this question I propose to re-examine two Sections of the 1976 legislation relating to ballots of union membership on the unqualified preference issue. I take up ss 101A and 101B of the Industrial Relations Act 1973, both of which were added to that Act by the Industrial Relations Amendment Act (No 2) 1976.

As background, it should be explained that s 99 of the 1973 Act provides that the parties negotiating for a collective agreement or award, or its renewal (ie industrial unions or associations of workers on the one side and employers or industrial unions or associations of employers on the other side) may through their assessors acting for them in the Conciliation Council agree to include in the instrument a clause making membership of the industrial union of workers (the trade union) a condition of employment. This is called an "unqualified preference" clause, but is better known in other countries as a "union shop" clause. The request for such a clause to be included in the instrument will normally be made by the trade union in line with union policy as determined by the membership in accordance with the rules of the union. These rules are scrutinised by the Registrar of Industrial Unions who may not record them unless he is satisfied that they provide a sufficiently democratic constitution and do not contain any unreasonable or oppressive rules *(c)*.

The assessors for the employers at all times have the right to refuse the request, in which case the trade union can only obtain the clause if a ballot conducted by the Registrar shows a majority of union members in favour of it.

What the law will permit may not always be apparent on the face of it and this is a point of some difficulty which we shall come back to later. First, however, we have to consider to what limits are Minister and Registrar entitled to go in the conduct of ballots under ss 101A and 101B if we take those sections at face value and read them in the way in which considerable numbers of laymen have in fact read them.

Section 101A provides that the Minister of Labour may, from time to time by notice to the Registrar of Industrial Unions, require a ballot to be conducted of the adult members of a union

(a) "The Industrial Relations Amending Legislation of 1976", Occasional Paper No 21 published by the Industrial Relations Centre, Victoria University of Wellington.

(b) "Industrial Relations : A Search for Understanding" published by Hicks, Smith & Sons, 1975. See pages 99 to 102.

(c) These are the requirements of ss 175 and 179 of the Industrial Relations Act 1973.

who will become bound or will continue to be bound by an unqualified preference clause in their award or collective agreement. The ballot will determine whether they are to continue to have such a clause in the award or collective agreement. The Minister does not need to have received any complaint, nor to have reason to believe there might be cause for complaint. The Minister's decision to require a ballot is entirely at his whim and fancy. He may require the ballot at any time (except within three years of any similar previous ballot) – eg he may require it just before or during the negotiations; or when he learns that the parties have agreed to an unqualified preference clause; or after reading in his morning newspaper that some official of the union has criticised the government; or at any other time.

Moreover, the provision is selective. It does not provide that the Minister shall require a ballot in every union; only that he may, from time to time, select some particular union. If it is assumed that the Minister exercises this selection on legitimate grounds – namely, that he has reason to believe that this union has secured an unqualified preference clause by some insufficiently democratic means, and this is why he has selected it in preference to all the others he might have selected – then it also has to be assumed that the union concerned is under a cloud. By selecting it the Minister casts an aspersion on it.

(There is a practical difficulty present in the fact that, while it is a trade union that is inevitably pointed at, the actual ballot has to be limited to the adult workers bound by a specified agreement or award which that union has negotiated. These may be only a fragment of the total membership of the union. In many cases a union has negotiated a number of such instruments and, while the union will have a roll of all its members, it may be the employer and not the union who has decided and who knows which instrument applies to a particular employee.)

The Minister's reason for deciding to require a ballot may be the legitimate one that there are grounds for believing that the union requested an unqualified preference clause without properly ascertaining the wishes of its membership. The Minister, however, is not restricted by the law to this legitimate reason. He may arrive at his decision on any reason whatsoever. Even such improbable reasons as that the union executive had refused to contribute to his electioneering fund; or that an official of the union had publicly criticised him; are not debarred by the words of s 101A.

Virtually all trade unions registered under the Industrial Relations Act 1973 and its forerunner, the Industrial Conciliation and Arbitration Act 1954, have requested and obtained the agreement of employers to the inclusion of an unqualified preference clause in their collective agreements or awards. Membership of the union then becomes compulsory on those whose work is covered by the agreement or award. This is self-inflicted compulsion capable of being removed by the membership through its normal procedures for determining and changing policy – always assuming that the normal procedures are allowed to operate and members are able to exercise their membership rights to whatever extent they desire to do so.

In this situation any government has a legitimate concern to ensure that the normal procedures continue to operate and members are able to exercise their rights. As regards unqualified preference, either or both of two simple measures could provide any additional safeguards necessary to this end. The first is a measure already available to union members in some other countries but not so far available in New Zealand. It would enable any member of a union who believed his union was not adhering to its rules or was otherwise thwarting the wishes or infringing on the rights of the members, to make a complaint to an appropriate government agency (the Registrar of Industrial Unions in Australia; the Department of Labour in the United States). The complaint is thus lodged with an official or agency which is particularly knowledgeable regarding the rules and procedures of unions, has normal close contacts with them, and is in a position to take the complaint up immediately, and informally in the first instance. Failing redress in this way the complaint can be referred to an Industrial Court or similar body with power to hear and determine it.

The second measure *(d)* is one that is already in the legislation in a different context (Part XIII of the Act). It would provide that if a sufficient number of members of a union had reason to believe that the union's assessors in conciliation council had requested the inclusion of an unqualified preference clause without due process to determine the wishes of the membership, or contrary to the wishes of the membership, then those members could apply for an inquiry by the Industrial Court into the circumstances of the request. The Court would determine the matter in such way as it thought fit and this might include an order by the Court for a ballot of members under the Court's supervision.

(d) I mentioned both possibilities in my written submissions to the Labour Committee of Parliament on 19 October 1976 in referring to s 101A.

Let us now see what the Industrial Relations Amendment Act (No 2) 1976 has given us in place of either or both of the above solutions.

In the comments that follow I shall first set forward what the layman – the trade union member or officer, the ordinary person – is reasonably entitled to take out of ss 101A and 101B by reading them. On the face of these sections what is an ordinary person entitled to see as within the permissible limits of the law? This is not a question of what a Minister or Registrar of some given standard of integrity would do. It is the law that we have to rely upon, not the variable integrity of individuals. Quite rightly, what people concern themselves with is, therefore, what the law permits and not what some particular individual might or might not do.

The Registrar or designated person is an employee in the Minister's Department, a servant of the Minister and open to instruction by the Minister. The Minister might, without any apparent breaching of the provisions of s 101B, instruct the Registrar to delete certain names and addresses, in any number, from the roll as supplied by the union and to add to the roll a list of names and addresses of persons supplied by the Minister. This can be kept secret since s 101B does not require the Registrar to disclose the amendments or to open the roll to scrutiny.

The Registrar or other person now proceeds to conduct the ballot "in such manner as the Registrar or designated person thinks fit" *(e)*. There are no provisions as to how the ballot papers are to be handled and it would appear that the Registrar may put them in his satchel and take them home with him to be counted secretly there, or take them to the Minister's office to be counted there. Section 101B does not provide for anyone to check the count. The Registrar issues a certificate stating the result of the ballot. The section does not provide that the roll and ballot papers are to be kept and it therefore appears that, having counted them, the Registrar could forthwith burn them.

After the Registrar has issued the certificate any number of members of the union bound by the award protest that they did not receive ballot papers. The section gives them no rights whatsoever to query or protest the conduct or result of the ballot. None of the Registrar's actions can be called in question and the certificate he issues "shall be conclusive evidence of the result of the ballot".

On reading ss 101A and 101B the layman can thus reasonably conclude that they offer Minister and Registrar a blank cheque for corrupt practice, and that his or her protection against this lies in someone's personal integrity and not in the law. Many who had suspicions see their suspicions as confirmed; many who had no suspicions find doubts arising. The actions apparently possible on the face of ss 101A and 101B become profoundly disturbing to many people, and they include people whose confidence or mistrust makes or mars industrial relations.

At this point we should consider something that is not apparent in ss 101A and 101B (and therefore of no help to the layman when he reads those sections) but which may, nevertheless, raise a barrier between Minister and Registrar on the one hand and any corrupt practice on the other hand. If corrupt practice came before the Courts of law we could rely upon those Courts to take as severe a view of it as might be possible. A Court would no doubt hold that Parliament in passing the legislation could not be construed as intending to open the way to corruption; that no matter what the legislation said or failed to say it could not be interpreted in such a way; and consequently that any attempt at corrupt practice under cover of the legislation would nevertheless be unlawful. In the absence of definition there could still be difficulties in determining the point at which corrupt practice began (eg could it begin under s 101A with the manner in which the Minister exercised the almost unlimited discretion vested in him?); but if it came before them the Courts would undoubtedly so something about it.

Having decided that a ballot be taken the Minister has to advise the Federation of Labour of his decision with his reasons for it, and give the Federation opportunity to consult with him about it. While this may be some protection, the step does not guarantee that the Minister will in fact be confined to the legitimate reason. The views of the Federation could in some circumstances, moreover, be influenced by other considerations. The union concerned may not be an affiliate of the Federation of Labour. Even if it is, its current position in favour or disfavour within the Federation may depend upon the ebb and flow of power politics always present in such an organisation. Points such as these may not matter, however, because the Minister does not have to take any notice of what the Federation of Labour may say to him. If he is determined to require the ballot nothing can stop him.

He gives notice to the Registrar of Industrial Unions requiring him to proceed with the ballot. The Registrar must comply either in person or by designating some other employee of the Department of Labour to act for him. The Registrar is himself an employee of the

(e) Regulations made under the Act can supplement its provisions but there are no such regulations relevant to s 101B. The procedures are detailed in the section itself.

Department, a servant of the Minister, and open to instruction by the Minister.

Section 101B details the actions of the Registrar or his designated substitute in conducting the ballot. He has to compile a roll and as a first step he obtains from the union a list of the names and addresses of those of its members who are bound by the award or collective agreement specified. Subsection (5) of s 101B states: "The Registrar or designated person shall compile a provisional roll and for that purpose may adopt the list supplied by the union with such amendments (if any) as he thinks fit". The section does not provide that such amendments as he makes – and there are no strictures on the nature or the extent of them – have to be disclosed to anyone. Nor does it provide that the provisional roll or the roll when finalised by the Registrar are to be subject to scrutiny by any person. He may advertise that he is compiling the roll, but he does not have to do so. According to s 101B, unless the Registrar chooses to divulge the information, no other person may know how he has amended the roll or what names and addresses are finally on it.

The Courts can do something about it only if it can be brought before them. Here the situation becomes even more unclear and completely beyond the layman. There appears to be nothing within ss 101A and 101B which would enable any of the actions of Minister or Registrar mentioned above to be brought before a Court. Nor is there anything apparent in the Act as a whole to enable any of these actions to be brought before a Court. There may be some other means but if there is, it is well beyond the view of a layman. (A professional word of certainty on the point would be very welcome.)

To the several hundred thousand ordinary persons affected by these two sections of the Industrial Relations Act, corrupt actions, however improbable they may appear to be in the light of the integrity of the person holding office for the time being – and even this light varies according to the beholder – do not appear to be debarred by the law. Should any of this happen, this ordinary person can see no way of redress. There is no point at which he can lay his finger on some words in the Act and say: "There is where the law is being broken". Those laymen who are more closely concerned – the officials and members of trade unions – are particularly sensitive to the absence of specific safeguards because in regard to their own rules of procedure relating to ballots the Registrar and the Industrial Court are strongly insistent on precise safeguards against corrupt practice.

The fact of the matter is that in ss 101A and 101B (and at other points in the Act not commented on here) we have law that is bad by every criterion that can be applied to it. How do we manage to get such bad law?

The question obliges us to consider the main steps in the formulation and passage of this law. Initially some person or persons would set down the proposals in broad outline. There would be ensuing discussions, probably between the initiators and the Minister, possibly in a wider group, and certainly in Cabinet and Caucus. It might be unfair to expect finer points of detail to be picked up during such preliminary discussions, but alternatives and practicalities should certainly have been brought into consideration.

One way or another the proposals reached the point at which their proponents considered them sufficiently clear, detailed and acceptable to be referred to the Law Drafting Office for drafting. Here they came into the hands of professional people with professional standards; people trained to perceive the full implications and omissions in the words in front of them; and people fully aware of the basic tenets of good law.

I recall, during World War II (when I was in charge of the Industrial Manpower Division of the National Service Department) having various discussions with the then law draughtsmen – Mr Adams and Mr Christie, but mainly Mr Christie – on proposals for manpower regulations or amendments. We would sometimes reach a point where the law draughtsman would put his pen down and state quite firmly that we could not have it; or we would have to write in the specific safeguards. These people were not just law draughtsmen. They were guardians of good law.

When the union ballot proposals reached the Law Drafting Office in 1976 where were the people of the Christie calibre? It seems quite incredible that a law drafting office could think in terms of returning officers without scrutineers; of electoral rolls without rights of inspection. However, it is clear that they did.

At some stage, and possibly after drafting, the Minister would refer the proposals to the Department of Labour for examination and comment. The Department, of course, is particularly sensitive regarding union rules governing ballots and the safeguards against corruption necessary in such rules. Something would be very much amiss in the Department if it failed to identify the deficiencies in the law draughtsman's draft of ss 101A and 101B. Did it fail or was it ignored? I recall one occasion when, as Permanent Head, I had to advise my Minister that a particular proposal for legislation was so bad that I would have to dissociate myself from it if it proceeded. I was invited to discuss my views with the Cabinet Committee concerned and they were accepted. The Department has a guardianship role. The Law Drafting Office should be safeguard number one

and the Department safeguard number two against the evolution of bad law. Both safeguards apparently failed and the Bill with its defective provisions was introduced into Parliament and referred to a Select Committee for close examination – safeguard number three.

If the defects had been missed up to this point they were now brought to the notice of the Committee in written submissions. In my own submissions to the Committee I referred specifically to ss 101A and 101B. The Select Committee nevertheless reported the Bill back to Parliament with the defects still present in ss 101A and 101B. Others might have missed them, but the Committee chose to ignore them. Safeguard number three had failed, but one more still remained.

In Parliament the Bill proceeded to the Committee stage where it was taken clause by clause. Every Member present in the House now had his or her attention focussed specifically and in detail on each successive clause. A majority of the members voted "Aye" for s 101A and similarly for s 101B. Again, it seems quite incredible that all of these people (and they include lawyers) were incapable of perceiving the short-fall of these two sections as they stood – and still stand. Safeguard number four failed.

In the result we have this bad law, and it has come through legislating procedures which are failing at all key points to protect us from the passage of bad law. Other examples of this are available and it is not a new phenomenon. In ss 101A and 101B, however, we seem to have reached about the worst of the worst and this makes them the appropriate text for a plea for something better. This is especially urgent in the industrial relations area where bad law can have particularly unsettling, damaging, and widespread consequences.

Postscript

By the time this article appears the Minister and Registrar may have carried through the first ballot. If so, I would expect these two particular people to have taken it with all the missing safeguards inserted. The point remains that those safeguards will have been inserted by the personal choice of the individuals concerned and not by law. Personal choice is shifting sand and is no substitute for good law.

FAMILY LAW

THE CONTESTED CUSTODY OF CHILDREN

By C C JACKSON.*

In 1976, the latest year for which statistical figures are available, 6.153 petitions for divorce were filed. The number of children living at the date of the decree absolute was 5,401. In only a very small percentage of cases is the custody of children of a broken marriage contested by the husband and very rarely, particularly in disputes heard in the Magistrate's Court, is a father successful in his application, unless the mother is clearly shown to be unfit and often grossly so. This is in fact contrary to the statutory intent of equality between the parties in such disputes, and, as will be argued, may run contrary also to the overriding principle that in such cases, the best interests of the child be held paramount.

Of all the decisions attendant on the breakdown of a marriage none is more important than a custody judgment which ensures that the emotional as well as the material well-being of children of divorce is preserved as far as possible. The "psychological" environment is by current standards held to be as important, if not more so, than the physical environment thus necessitating an evaluation on the part of the Court of the character, stability and parenting capacities of the respective spouses. It would not be doubted that the emotional interests of children subject to inter-parental custody disputes would be best served by granting custody to the parent adjudged to be the most stable and loving party to whom the children show the strongest emotional bonds and loyalties. Whether these issues are more competently decided by professionals trained in the behavioural and social sciences, and whether many of these considerations are in fact outside the sphere of expertise of the judiciary and legal profession, is of course open to dispute. An equally important and related consideration is whether the current legal guidelines and principles upon which custody decision making is based, do in fact have any "validity" viewed from a psychological and psychiatric perspective, and from what is currently known about child development and disturbances in the mother to child, as well as father to child relationship. Unfortunately legitimate criticisms can be made of all such legal constructs including in particular "the mother principle", "schooling" and the age

at which greater weight is attached by the Court to the child's nominated choice of parent.

Although both in New Zealand as well as in the judicial systems of countries other than our own there is a growing trend away from a virtually automatic adherence to the "mother principle", Courts still rely on a very subjective evaluation of the worth of both parties as mother and father and of the strength of the emotional bonds and attachments of each child to his respective parents. Instead of a careful evaluation of the individual circumstances of each case, preconceived assumptions, generalisations and "rule of thumb" approaches may be used, which in practice still tend to favour the mother, often to the emotional cost of the children concerned who may then be deprived of the society and affection of the more loving and accepting parent. In domestic proceedings as in criminal and civil cases the "sympathy" of the Court is often extended to the woman whether justified by the circumstances presenting or not, thus clouding a proper objective evaluation of an often complicated family situation. In spite of superficial appearances to the contrary, many wives initiating actions for separation and divorce who themselves may come from disturbed or broken homes of origin, could have acted in subtle ways, damaging to the marriage and disruptive of the security of the children. It is essential therefore that practitioners in law and the judiciary should develop a relatively more sophisticated understanding of the processes of marital breakdown; its relationship to disturbances in the natal background of the spouses ;and, specifically, of destructive maternal, as well as paternal attitudes and behaviour.

It is within the general understanding of both the judiciary and the public at large that most women bring to their roles as mother, personal qualities, of love, affection, care and nurturance, and this conception of motherhood it is suggested, permeates decision making in custody adjudication cases. The assumption is thus made, often unrelated to individual personalities, that the woman is better suited by her biology and cultural role to provide the care every child needs. This "common-sense" but rather superficial and misleading outlook on motherhood stands in contrast to research into disturbances in the mother-child relationship *(a, k, o, aa, ad, ae)* which indicate that even very young children can show symptoms and behaviour indicative of maternal rejection or hostility and lack of real love and affection. Where real qualities of maternal warmth are lacking the child may seek security elsewhere, from the father, or from other siblings. Children subject to maternal deprivation exhibit characteristic symptoms often from the first few weeks of life, including digestive and feeding disturbances, failure to thrive, a variety of psychosomatic complaints, including in particular, allergic illnesses such as asthma and eczema, and, in particularly severe cases of rejection, risk of physical assault. A New Zealand study *(q)* of this syndrome "the infant development distress" syndrome, carefully excluded any physical or medical basis to the symptoms which were directly attributed to psychological disturbances in the mother-child relationship. Furthermore, these disturbances often compounded, and took a different form as the child grew older, rather than ameliorating with time. The syndrome is said to affect approximately one child in ten.

It has been held by responsible authorities in the literature on maternal hostility and destructiveness, that the assumptions made by the judiciary concerning the presence of so-called "natural bonds" said to exist between mother and child, have no generalised validity. It is accepted that there are women whose life experience has not fitted them to be mothers except in a biological sense, and this literature is now extensive. The following passage is representative *(ae)*:

> "It can happen that a woman's inability to be a mother in the deepest sense is the result of factors over which she herself had no control. It may be that she never recovered from the emotional deprivation she suffered at the hands of her own mother, for in large part a woman's capacity for motherhood is influenced by her experiences with her own mother. Whatever the explanation for a woman's limited capacity to function as a mother, and regardless of the question of her responsibility in the situation, the impact of this lack in her will have serious consequences for her children. More than any other one factor the lack of warmth and affection in the mother is the cause of emotional disturbance in children. Children should not be awarded to the custody of a mother who cannot love them . . ." (Thomson, 1967: 214).

The capacity to relate warmly to children is not a quality determined by sex, or inherent in the mothering process. Thus a father may show his children more parental warmth and affection than the mother depending on the personality and stability of family background of the individual concerned. These findings are based on recent research into the nature of the father-child bond, a relationship hitherto left unstudied in psychiatric and psychological investigations until comparatively recently *(s, t, u)*.

One such study *(t)* critically examining the concept of maternal deprivation even in children as young as 18 months of age, found the strongest emotional attachment in nearly one-third of the

children studied, to be to the father. The amount of time spent by the child with the respective parents does not by itself as an isolated factor, affect the strength of the attachment, rather it is the quality, attentiveness and nurturance that is the crucial factor in the formation of close emotional bonds between parent and child.

Thus the emphasis placed by many legal authorities on the fact that one parent can give a child full time care, while the other (usually the husband because of job commitments) cannot, is perhaps misplaced. If the relationship between a parent and child is basically disturbed, the time factor per se is not likely to positively affect the relationship.

Further, while a child needs for its security a person to whom he is attached it is irrelevant whether or not this person is his mother. According to Rutter *(ab)*, an authority in the field, the father-child relationship is as important and sometimes it may be the most influential. Both parents influence their children's development and which parent is more important varies with the child's age, sex, temperament and environmental circumstances. Goldstein, Freud and Solnit's *(m)* concept of the "psychological" parent is useful here. Essentially "the psychological" parent is the person (not necessarily the biological parent or mother) to whom the child has formed the strongest emotional bonds and attachments. The formation of these bonds depends on the personal qualities of the individual and on the quality of attention given the child. The "psychological" parent may be of either sex since an individual's capacity to love and care for others including his own children depends ultimately on how well he or she was loved as a child, within their own family of origin. Thus any parent, product of a broken home, may not have experienced the emotional security to offer the children sufficient stability in a solo-parent situation in turn. It is a troubling fact, and one known to practitioners in family law, that many spouses petitioning for divorce (and most often the wife) have come from a broken or disturbed family.

The psychological "fitness" of a parent from this kind of background to assume custody of children, where this is disputed, should of course be carefully questioned.

Without regard to these considerations and due to the little challenged sanctity accorded to motherhood, the wife usually has an over-riding, iniquitous, and often prejudicial advantage over the husband in custody disputes irrespective of the individual worth of the parents, and without proper assessment of the real nature of the emotional attachments of the child to each spouse.

Legal objections to a proper consideration of psychological and psychiatric findings in custody matters, may rest on an incomplete understanding of the techniques and processes of these examinations which are not, contrary to popular assumption, in any way threatening or harmful to the child. The youngster may in fact benefit from the opportunity to talk over his fears and problems attendant upon the breakup of his family and loss of one parent.

A number of legal authorities have recommended that the judiciary be assisted to a just custody decision by professional personnel attached to, or acting on, the recommendation of the Court.

As stated by the Committee on Parental Rights and Duties and Custody Disputes *(l)* ". . . if the welfare of the child, and not the myth of 'parents' rights' is really to be paramount then we think the law should be prepared to accept the guidance of experts in the field of child welfare . . . particularly if the expert evidence all points in the same direction . . ." (p 27).

Under para 62 of this report the Committee rejects any general rule which favours mother over father or a biological over a substitute parent. It is recommended instead that the welfare of any child subject of a custody suit or care proceedings is best served by whatever decision will minimise the risk of his suffering whether this be emotional, psychological or physical. Where this decision may not allow an ideal or absolute alternative a decision made on the basis of the "least detrimental available alternative", for safeguarding the child's growth and development is recommended. The Family Law Section of the American Bar Association also suggested in a proposed uniform statute that custody should be awarded to either parent according to the best interests of the child, and that to assist a custody decision the Court require an investigation and report from professional personnel *(h)*.

A study of interparental custody disputes in New Zealand by Mallon *(v)* was awarded the Joshua Williams memorial prize essay in 1973. Published in the 1974 Otago Law Review it provides a closely reasoned argument in support of psychiatric and psychological findings to assist the judiciary in the determination of just custody outcomes. It is Mallon's thesis that Judges are not suitably equipped to make this kind of judgment, which at best may be made at the level of an intuitive guess, or on "common-sense" principles; often based on a superficial evaluation of the witnesses gained from their appearance in Court. Because of the complexities involved in custody disputes, Mallon questions the qualifications of the Courts to deal with these issues unaided by expert opinion.

Under existing law, while the Court may call

for a custody report from the Social Welfare Division there are no provisions under the Guardianship Act for it to call evidence on its own initiative from psychologists or psychiatrists. Some Magistrates may be highly critical of any Social Welfare or other specialist report that does not confine itself to factual detail, and any views expressed concerning the capabilities of the respective parents may be held in some instances to have trammelled the view of the Court and to have usurped its proper function.

In Mallon's view, as long as the present attitude of the Courts continues, the Court may not reach in every custody dispute before it decisions which are in fact medically and socially in the child's best interests. It is concluded that,

> "In view of recent developments in child psychology, medical and psychiatric evidence may be of vital importance in helping the court to assess the likely effect of any particular custody order on any particular child. It is submitted that it is only with the aid of trained professional investigators that the judge can fairly comprehend the nature and extent of the role that psychological factors play in attempting to define the best interests of the child" (p 23).

If more enlightened and informed custody decisions are to be made based on expert opinion available to the Court it follows that the Court itself should direct that this information be secured, and that proper weight should be attached to it by the judiciary.

While either partner to a custody dispute may seek a psychiatric or psychological opinion an erroneous assumption is often made that the findings of those reports may be biased in favour of the party securing the report and therefore one-sided in their conclusions. At present the Court is not required to take into account the findings of psychological and psychiatric examinations in determining a custody outcome. There have been relatively few cases in which the Courts have been prepared to accord decisive significance to medical or psychological evidence, and according to Mallon, Judges have rejected the contention that such evidence can be a sufficient foundation for the judgment of the Court. In view of the doubtful validity of the legal constructs and principles on which custody decisions are based these attitudes could be held to be outdated, and detrimental to the real interests of many children directed into the custody of the least loving and nurturent parent. It is not sufficient for the Courts to be satisfied as stressed that the child remains in a familiar home and school evironment, or is adequately cared for in a material and nutritional sense, if that environment does not offer the child psychological and emotional stability. It will be noted that s 27 of the Childrens and Young Persons Act places proper emphasis on the mental as well as the physical welfare of the child although the provisions of this Act are not directly applicable to custody matters.

If data secured from psychiatric or psychological investigation is to be regarded as admissible evidence it is submitted that the Courts' discretion should be narrowed to preclude the total disregard of such evidence. It is not generally appreciated that clinical techniques are available which allow an objective assessment of the strength of the emotional bonds felt by a child to its parents. A child's basic emotional loyalties are not easily swayed by competing parents at point of marital breakdown and it is further submitted that the Court should re-examine critically the concept of "schooling" often used to the disadvantage of the father if he is nominated by his children as the preferred parent, but rarely used to the disadvantage of the mother, a factor that can act to preserve sacrosanct the mother principle. It is also suggested that the Court attach greater weight than at present, to the nominated choice made by the child concerning the preferred parent. Research suggests that even children of "tender years" (as young as three or four) can report with accuracy on the nature of their emotional relationships within the family, and there is no real justification to assume that it is only when a youngster reaches 11 or 12 years of age that more reliance can be placed on the expression of his feeling to his parents. Often the child's basic loyalities to one or both parents are formed during the first three years of life, and are then both potent and lasting. Most children of latency age (six to ten years) become aware of a whole range of conflicting emotions towards their parents, emotions which tend to polarise on separation. These feelings can be reliably and objectively assessed by clinical instruments representative of which is the Bene-Anthony Test of Family Relationships, often used by child psychologists in the presentation of custody reports *(r)*. Thus research into children's self-report of their family relationships supports the observation that they are capable of perceiving and reporting on the respective strengths of their parents' emotional attachment to them, with a high degree of objectivity and validity.

Sufficient research material has been cited to add weight to the assertion that no custody decision so vitally affecting the future emotional and mental well-being of children following a marriage breakdown should ever be made on point of principle even though well established, or on the basis of social policy, or on any other advantage said intrinsically to accrue from the biological status of motherhood. What is needed

instead is a full, comprehensive evaluation of the individual circumstances of each family, through psychological and or psychiatric investigations to assist the Court, where a parent out of genuine concern for the welfare of the children has opted to contest their custody.

The question should be asked: If the legal criteria on which custody decisions are based are of doubtful validity and value, and rest on the false support of precedent and traditional values and beliefs not upheld by current research findings, how many custody decisions may have in fact run contrary to the real emotional interests of the child concerned? There should be little room for complacency on the part of the judiciary, or the legal profession generally.

In this important area there is no place for outdated, sectional or partisan attitudes. If the welfare of the child is to be held paramount, the Courts should use whatever specialist resources are available to it, to ensure that just, impartial, and above all valid decisions are made in accord with the best interests of the child.

To preserve the future mental health of our population, the welfare of the child, not the welfare or interests of either parent, should be the determining consideration.

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BIBLIOGRAPHY AND REFERENCES

(a) Anthony, E. 'The Mutative Impact of Serious Mental and Physical Illness in a Parent on Family Life', in Anthony, J and Koupernik, C. *The Child in his Family.* New York, Wiley-Interscience 1970, 87-120.

(b) Bradbrook, A. "The relevance of psychological and psychiatric studies to the future development of the law governing the settlement of inter-parental child custody disputes." Journal of Family Law (1971): 557-587.

(c) Brown, A, Morrison, J and Couch, G. "Influence of affectional family relationships on character development." J of Abnormal Soc Psychol 42 (1947) 422-428.

(d) Despert, L. *Children of Divorce.* New York, Dolphin Books, 1962.

(e) Dicks, H. *Marital Tensions.* London, Routledge & Kegan Paul, 1967.

(f) Dominian, J. *Marital Breakdown.* London, Penguin Books Ltd, 1968.

(g) Eisenstein, V (ed) *Neurotic Interaction in Marriage.* London, Tavistock Publications, 1956.

(h) Ellsworth, P and Levy, K. 'Legislative Reform of Child Custody Adjudication: An effort to rely on Social Science data in formulating Legal Policies. Law and Society Review, 2, 1969, 167-233.

(i) Family Law Reform Association (NZ) Inc. *The Case for Family Law Reform in New Zealand* Sec Ed Feb 1975.

(j) Foster, H and Freed, D. "Child Custody", Parts I and II, New York University Law Review, 39, 1964, 423-443; 615-630.

(k) Freud, A. The Concept of the Rejecting Mother, In Anthony, E and Benedek, T. *Parenthood: Its Psychology and Psychopathology.* Boston, Little, Brown & Co, 1970, 376-386.

(l) Godfrey, G, QC. *Parental Rights and Duties and Custody Suits.* London, Stevens and Sons, 1976.

(m) Goldstein, J, Freud, A, Solnit, A. *Beyond the Best Interests of the Child.* New York, The Free Press, 1973.

(n) Goode, W. *After Divorce.* Illinois, The Free Press, 1956.

(o) Greenburg, N. A typical behaviour during infancy: Infant development in relation to the behaviour and personality of the mother. In Anthony J and Koupernik, C *The Child in His Family.* New York, Wiley – Interscience, 1970, 87-120.

(p) Handel, G. *The Psychological Interior of the Family.* Chicago Publishing Co 1967.

(q) Ironside, W. "The infant development distress syndrome: A predictor of impaired development?" Australian and New Zealand Journal of Psychiatry, 9, 1975, 153-158.

(r) Kauffman, J. "Validity of the family relations test: A review of research." J of Projective Techniques and Person. Assessment, 34, 3, 1970.

(s) Lamb, M. *The Role of the Father in Child Development.* New York, John Wiley and Sons, 1976.

(t) Lewis, M, Weinnaub, M, Ban P. "Mothers and fathers, girls and boys, attachment behaviour in the first two years of life." Research Bulletin No RB 72-60. Princeton NJ Educational Testing Service, 1972.

(u) Lynn, D. *The Father: His Role in Child Development.* California, Broker Cole Publishing, 1974.

(v) Mallon, C. "Joshua Williams Memorial Essay 1973 – A critical examination of judicial interpretations of a child's best interests in inter-parental custody disputes in New Zealand." Otago Law Review 1974, 191-204.

(w) McGeorge, P. Paternal Influences on Attachment Behaviour. A thesis submitted for the Diploma in Psychological Medicine at the University of Otago, Dunedin, New Zealand, 1975.

(x) Oster, A. "Custody proceedings: A study of vague and indefinite standards." Journal of Family Law 1965, 5, 21-38.

(y) Philips, I. "Mental hygiene, divorce and the law." Journal of Family Law 1963, 3, 63-70.

(z) Pincus, L. *Marriage: Studies in Emotional Conflict and Growth.* London, Methuen and Co, 1960.

(aa) Rheingold, J. *The Fear of being a Woman: A theory of Maternal Destructiveness.* New York, Grune and Stratton, 1964.

(ab) Rutter, M. *Maternal Deprivation Re-Assessed.* England, Penguin Books Ltd, 1972.

(ac) Skolnick, M. "Psychiatric evidence in child custody proceedings." Intramural Law Review 22, 1966-67, 154-177.

(ad) Spitz, R. The effect of personality disturbances in the mother on the well-being of her infant. In Anthony, E and Benedek, T. *Parenthood, its Psychology and Psychopathology.* Boston, Little, Brown & Co 1970, 501-524.

(ae) Thomson, H. *The Successful Step Parent.* London, W H Allen, 1967.

(af) Wakari/Dunedin Community Liaison Group. The Rights and Needs of Children. Submission to the Royal Commission on the Courts. May, 1977, Mimeo.

(ag) Webb, P. "Forensic psychiatry and psychology." [1977] NZLJ 94-96.