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CREDIBLE AND INCREDIBLE

Summer is here. So, unfortunately, are the first products of the digestive complaint that hit Parliament in early October. To complete the cycle we have the various party manifestos.

Party manifestos are supposed to have the advantage of letting voters know where the proponents stand. Such is the level of generality of the Labour and National manifestos in particular that members of those parties will be able to stand like centipedes. However, despite the lack of specifics and their generally uninformative contents, one or other of those manifestos will provide the straight-jacket within which Parliament will be constrained for the next three years. If manifestos provide the jacket, the catch cry of credibility will tie the knots. Any party that does not, in the short span of three years, implement its manifesto promises, or at least make some gesture towards the various generalisations, or that departs from them will be branded as not credible.

Many of the most criticised features of the past three years may be traced back to this alliance between manifesto and credibility. The Superannuation debacle is a direct instance. The implementation of an election promise assumed an over-dominant importance. The volume and speed of passage of legislation, culminating in over 100 Acts of Parliament being passed in the closing stages of the last session may also be traced back to this desire to be able to say that what was promised has been done. A case of building the credible on the incredible.

The importance of keeping promises should not be downgraded, but nor should other values. Unfortunately, when many promises are made, the sacrifices involved in keeping all of them tend to be forgotten and this is particularly so of the scattergun approach to promises adopted at election time.

The greatest loss is that of comprehension. Statutes that are frequently changed, inadequately considered, that pass in a night, or that arrive as part of a pile four inches thick round about Christmas are not read, comprehended or understood. Those who do plough through the pile will find such diverse information as that the law relating to company securities has been completed changed, the value of debentures that may be transferred without probate has been increased to $2,000, the blood-alcohol laws have been altered, listening devices in drug offences permitted, drug laws changed, shops and offices and shop trading hours legislation amended, new provisions for industrial relations, a reformed Fencing Act, extended powers of search for customs officers, extensive amendments to the Accident Compensation, new zoning for schools, and so on.

All important, but it is not enough that statutes be passed. We are entitled to expect that they will be passed in a manner and at a pace that enables them to be considered, understood and absorbed. Without that our laws will continue to be something imposed and not something that grows with the community.

If manifestos are to be continued, and if credibility is to be the vogue in political circles, could we ask that promises be limited to those that may be implemented without the disruption of the type experienced during the past three years. More importantly, pursuit of the credible need not result in the desirable.

Tony Black

LAW REFORM

REVISED LAW REFORM MACHINERY — A PRACTICAL PROPOSAL

By DL MATHIESON, *barrister, Professor of Law, Victoria University of Wellington. This paper has been circulated to District Law Societies for comment and general consideration.*

In this short article I am not concerned to survey once again the history of the machinery for law reform in New Zealand. The story is briefly told in the article by David Collins in [1976] NZLJ 441.

My purpose is to propose a new structure in outline form. Before doing so it is necessary to list the major disadvantages of the present system, as I see them:

(1) The five Law Reform Committees work too slowly. Many reports, although of high quality, take too long to produce. This is the direct consequence of their meeting for a day or a half-day at monthly, and often more infrequent, intervals.

(2) It is often impossible, within a day meeting, to reach any definite view as to the lines upon which the reform of a specific area of law should proceed. Often one or two members unavoidably miss a meeting. At the next meeting the problem has to be taken up again, almost ab initio. Some members will have forgotten the fruitful lines of approach tentatively advanced at the earlier meeting. Those who were then absent may have different ideas. In this respect the system is inefficient.

(3) Members of a standing law reform committee have expertise in some of the topics allotted to that committee, but not in others. Thus, members of the Torts and General Law Reform Committee will hardly be expert in everything which might be subsumed under "general" (to date this has mainly covered questions in the law of evidence). This factor has of course been recognised, as for example by the appointment of a special committee with representatives of affected interests, to study the law of defamation.

(4) On occasions but not always, consideration of the existing law and its possible reform would benefit from the appointment of laymen to the committee, but this is not envisaged by the present system. In general, the membership of a committee needs to be constituted on more of an ad hoc basis, ie tailored to the topic under consideration.

(5) To cope with the work of drafting working papers and reports many committee members, including very busy practitioners, must undertake a considerable amount of writing. Often they simply do not have the time for this: it would be better if their input consisted of ideas and practical experience, leaving the writing of the reports to able full time law reform staff. Further, to the best of my knowledge the final text of every report is at present placed before the full committee, and much valuable time is wasted on format and style — the usual disadvantages of "drafting by committee", mitigated often by strong chairmanship.

(6) The Law Reform Council, which has met since 1975, has few and comparatively undefined functions, and is unable to keep the entire law reform enterprise under effective review. It is not able to achieve a liaison between those engaged in reform and the Minister of Justice as effectively as could a full time Law Reform Commissioner. Similarly, it is not able to exert the pressure which is often necessary to ensure that proposals for reform find their way into the Government's legislative programme. It is wrong that law reform Bills should have to compete with other Justice Department measures for a place in that department's programme (which includes substantive family law and penal reform measures). A law reform Bill should proceed to the Cabinet Committee on Legislation via the Minister of Justice, if he finds the proposal acceptable, and any argument to be made in favour of its early implementation should be advanced by a Law Reform Commissioner, rather than by the Secretary for Justice.

(7) Some committees have commissioned very useful research papers from LL B (Hons) or LL M students. The writer of such a paper will probably have advanced suggestions of his own for reform of the law but, not being a member of the committee, is precluded from any effective dialogue with it, and has no chance to participate in the formulation of the final proposals.

Discussion of a suitable law reform structure for New Zealand has been bedevilled by suggestions that there should be a Law Reform Commission along the lines of the English Law Reform Commission (five Commissioners) or the NSW Law Reform Commission (four Commissioners) or on the Canadian model. These Commissioners serve in jurisdictions with a much larger population than

New Zealand. Furthermore, our own committee system has the merit that it brings together practitioners, academic lawyers, departmental officers and Parliamentary Counsel. The strengths of our present system should be maintained, and its weaknesses eliminated. A full time Commission of four or five members is unnecessary if special committees continue. In any event it is probable that few politicians would accept that the cost of a large Commission, even of the NSW type, was justifiable. Arguable as this may be, let us proceed on that assumption. The following is tailored to the special needs of New Zealand and, by contrast, is inexpensive. It would admittedly cost much more than the present system which, it is trite to say, operates on a shoestring.

A Law Reform Commission should be constituted by statute. Its status would be similar to other such commissions, eg the Fire Services Commission. Employees would be appointed to the Office of the Commission. It should comprise:

one Commissioner
one Deputy Commissioner
five or six research officers
adequate secretarial staff.

The Commissioner should be appointed for four years (or possibly three or five). A limited term reconciles the widely accepted need to secure continuity, on the one hand, and to prevent staleness and allow the infusion of new ideas, on the other.

The Commissioner must be given very high status. In this the English and New South Wales experience is compelling. The Commissioner should simultaneously be a Judge of the Supreme Court, and he should be appointed as a Commissioner by the Governor-General on the recommendation of the Minister. On the termination of his appointment he should move to either the Supreme Court Bench or to the Court of Appeal. The qualities to be sought in the Commissioner are breadth of legal experience; a sense of vocation to law reform; the ability to delegate and to act as the leader of numerous reform teams; tact, persuasiveness, an aptitude for public relations, and the ability to establish a close working relationship with the Minister.

The Deputy Commissioner should have many of the same qualities. Obviously he would be a lawyer of considerable experience, preferably not all of it in the Public Service. He would be a state servant seconded to the position and able at the end of his appointment (which need not necessarily be for a fixed term) to resume departmental duties.

The research officers should be appointed from the younger members of the Bar, the best law graduates and those completing junior lectureships. They would be state servants, responsible to the Commissioner as to a departmental head, and otherwise subject to the jurisdiction of the State Services Commission. They should be appointed for no more than two years. The question of possible reappointment would need consideration as a matter of principle.

The basic procedure of the Commission and his staff would no doubt evolve with time, but from the start the underlying principle should be that what is best in the present system should be preserved. Each topic under consideration would be submitted to the following process:

A The Minister first refers a topic to the Commission. Alternatively, the Commissioner would have express statutory power himself to designate (without ministerial veto) a topic for research with a view to reform, should reform be judged desirable.

B The Commissioner allocates the preparatory work among his own staff. The method would vary with the topic. Thus he might decide to appoint one (or two) research officers to write a research paper; or he and his deputy might simply discuss it. Whatever procedure were followed, a paper sufficient to launch fruitful discussion at stage D would be prepared.

C The Commissioner appoints an ad hoc Committee or team drawn *as he sees fit in the particular circumstances of each case* from the ranks of practising and academic lawyers. The number of members might be small or large, the Commissioner deciding this in the exercise of his discretion. In each case Parliamentary Counsel would be included and at least one of the Research Officers. The chairman of this committee would invariably be either the Commissioner or the Deputy Commissioner. The Commissioner in his discretion could invite a layman or laymen to join the committee. Any Research Officer who had written a research paper should in principle automatically be a member.

D Having first received the paper that emerged from stage B, the committee would meet for either two or three or four consecutive days, to discuss and decide the contents of a Working Paper. Thus the ad hoc committee would work at a problem in a concentrated way, and without pressure of other business. This is well within the bounds of practicability. Thus the committee might meet on a Friday, Saturday and Monday; or on a Tuesday and Wednesday.

E The Working Paper would be written in the Commission, not referred back to committee members, and entirely under the supervision of the Commissioner or his Deputy. It would then be circulated to such interested persons or bodies as the Commissioner in his discretion thought proper, being those who could offer valuable comment, eg the New Zealand Law Society, the Judges,

selected pressure groups, and professional organisations likely to be specially affected by the tentative proposals in the Working Paper.

F The Commissioner would receive comments on the Working Paper.

G The Commissioner would next reconvene the committee for a further 2–3 days' meeting; or, if the problem were one of considerable complexity, for two such extended meetings. At these the committee could determine its final views and recommendations, and settle a draft Bill.

H The Commissioner's staff would translate the committee's proposals into a Report: final decisions as to format, style and wording would lie with the Commissioner, but he would no doubt circulate the draft Report to committee members, who could suggest variant wordings. The essential point is that the ad hoc committee should be happy with the final report, formally signed by the Commissioner alone, but that the committee would not waste time in drafting. A draft Bill should accompany the Report in all cases except when this would be obviously inappropriate, eg a report recommending no change to the present law.

I The Commissioner would present the Report to the Minister, arrange for appropriate publicity to be given to it, discuss with the Minister what priority should be accorded it in relation to other law reform measures the implementation of which is pending, and take whatever other steps to secure implementation that he considers are justifiable.

The Law Reform Commissioner should report to Parliament annually on the work of his Office. He would publicise the work of law reform and commend its importance to the public. He would also be responsible for relations with the law reform agencies existing in other jurisdictions.

It is not suggested that the procedure set out above should all be incorporated into a statute. My purpose in going into this kind of detail has been merely to demonstrate that the best features of our present arrangements can be combined with the Law Reform Commission concept, and the worst features avoided.

It is implicit in the above that the present Law Reform Committees should be disbanded, and that the Law Reform Council would disappear.

The scheme proposed in this article is probably susceptible to improvement in matters of detail. But in the absence of a better, but still comparatively inexpensive and practical, proposal, I venture to submit that this is the way to reform the machinery of law reform in this country.

COMMERCIAL LAW

REGISTRATION OF CHATTEL SECURITIES — MORE MISCONCEPTIONS

By D W McLAUCHLAN, *Senior Lecturer in Law, Victoria University of Wellington.*

In a previous issue of this journal *(a)*, the writer attempted to explain some aspects of the law applicable to personal property secured transactions where the debtor is an incorporated company. Particular attention was devoted to the interrelationship between the Chattels Transfer Act 1924 and the registration provisions of the Companies Act 1955. Readers of that paper may perhaps be interested in the recent decision of Jeffries J in *Re Graham's Service Stores Ltd (In Liquidation) (b)* which, in a number of respects, is inconsistent with the views expressed in the paper.

The facts of the case were as follows. On 4 October 1974, a Mr Graham entered into a contract with Lett's Service Stores Ltd (hereafter referred to as the vendor) to purchase a grocery business in Featherston. Graham signed the contract "as trustee for and on behalf of a company to be formed under the name of Graham's Service Stores Ltd". The purchase price was $3000 for plant and fittings plus stock at valuation. On settlement Graham was to pay the $3000 and grant an instrument by way of security over the chattels sold to secure the value of the stock. On 10 October, Graham, still acting in his capacity as trustee for the company to be formed, executed an instrument by way of security in favour of the vendor securing the sum of $7,434.84 (the value of the stock). As Jeffries J explained, "the schedule of chattels was quite specific as to plant and fittings, but also included simply "stock-in-trade" which was not particularised further". On 16 October, the "instrument" was registered at the Masterton Supreme Court.

The company, Graham's Service Stores Ltd, was finally incorporated on 23 October 1974. On 13 November the vendor, Mr Graham and Graham's Service Stores Ltd executed a written contract whereby it was agreed that the

> "principal agreement and instrument are hereby adopted by the Company and shall be binding on the Vendor and the Company as if the Company had been in existence at the date of the said principal agreement and had executed the same and been a party thereto".

This contract, accompanied by a copy of the

(a) "Corporate Personal Property Secured Transactions – Companies Act, Chattels Transfer Act Or Neither?" [1978] NZLJ 137.

(b) Unreported. Judgment was delivered on 27

ton Companies Registry on 28 November. A year later, Graham's Service Stores Ltd went into voluntary liquidation and the liquidator brought proceedings to determine whether the vendor had a valid security.

In a reserved judgment, Jeffries J held that the security was invalid. This decision must alarm some practitioners since the writer understands that the above sequence of events prior to liquidation would not be uncommon. His Honour's reasoning was as follows:

> "It seems to me that the drawer of these documents completely misconceived the dichotomy between the Chattels Transfer Act, which basically concerns security given by individual traders over personal property, and the Companies Act 1955, by which a company can grant security over its personal property. For some reason, which is unexplained, an attempt was made to convert an instrument by way of security over chattels into a document which could also be adopted and used by a limited liability company to secure its personal property. There is no question but that the original document which calls itself a mortgage to secure payment of the sum of $7,434.84 was meant to be an instrument by way of security under the Chattels Transfer Act 1924. It is also clear from that original document that it was not in fact given by an individual acting in his own capacity, but by a person as trustee of a company to be formed, and when that company was formed it formally adopted that said instrument. Under s 2 of the Chattels Transfer Act 1924 the term 'instrument' is defined in one part of the section, and in another part there is an extensive list setting out what an 'instrument' does not include, and under (j) there appears,
>
> " 'Mortgages or charges granted or created by a company incorporated or registered under the Companies Act 1955'.
>
> Therefore, at the very commencement of the life, so to speak, of this document it was purported to be given by or on behalf of a company to be incorporated under the Companies Act and yet it was said to be a mortgage under the Chattels Transfer Act 1924, which specifically prohibits such documents as coming within the definition of an instrument. Therefore, in my opinion, the document was a nullity from the very start, and has no validity. Adopting the same reasoning I do not think it has any validity as a charge under s 102 of the Companies Act 1955. It could only come under s 102 (2) (c) which states:
>
> " 'A charge created or evidenced by an instrument which, if executed by an individual, would be void as a bill of sale, and it is excluded because by definition it is not an instrument.
>
> There is a further objection at least to part of the property which the instrument purports to secure, and I have already alluded to it. Section 23 of the Chattels Transfer Act, requires that the instrument shall have endorsed thereon a schedule of the chattels comprised therein and the general description of 'stock-in-trade' would not satisfy that requirement. Therefore it could not cover the then existing stock-in-trade. At the date it was executed it could not cover future stock-in-trade because the Chattels Transfer Act Amendment of 1974 was not in force".

In essence, his Honour is saying:

> The original document was meant to be an instrument by way of security under the Chattels Transfer Act. In fact, since (a) it purported to be given by or on behalf of a company to be formed and (b) the Chattels Transfer Act excludes company mortgages from the definition of instrument, the document was a nullity. Nor was it valid as a charge under s 102 of the Companies Act because it did not fall within any of the categories of charge mentioned. With regard to the stock-in-trade, the security was also void under s 23 of the Chattels Transfer Act.

In the writer's view, the drawer of the documents did not misconceive the operation of the Chattels Transfer and Companies Acts. Indeed, it is difficult to see what more, in the circumstances, he could have done. It is submitted, with respect, that his Honour's conclusion and reasoning are wrong on several counts. First, the original document *was* an "instrument". It was quite properly registered under the Chattels Transfer Act. Secondly, even if it was not an "instrument", it does not follow that it was a nullity. Thirdly, the contract of 13 November constituted a valid and binding company mortgage which was properly registered under the Companies Act. This mortgage *was* within s 102 (2) (c). Fourthly, even if s 102 (2) (c) did not apply, again it does not follow that the document was a nullity. Finally, s 23 of the Chattels Transfer Act does not apply to company mortgages. In the remainder of this note each of these points will be explained in more detail.

Was there an "instrument"?

It is submitted that original document was an "instrument" and was properly registered under the Chattels Transfer Act. Jeffries J stated that the document

> "was not in fact given by an individual acting in his own capacity, but by a person as trus-

that said instrument".

In his Honour's view, it followed that there was a company mortgage within exclusion (j) from the definition of "instrument". With respect, this over-simplifies what happened and skirts over the two distinct stages to the transaction, viz,

(a) the granting of the security by the trustee on 10 October, at which stage, although it did not bind the company (and therefore could not be a company mortgage), the document did bind the trustee personally *(c)*, and

(b) its adoption by the company in the new contract of 13 November.

It is generally accepted that agreements entered into by a trustee for a company to be formed do not bind the company after incorporation. The current state of the law is summed up by Northey, *Introduction to Company Law in New Zealand* (8th ed 1976 at p 37) as follows:

> "Although the effectiveness of an agreement made by a trustee is still somewhat uncertain, it would seem that the company is able to take the benefit of the agreement, but it is not bound by it; only if, after incorporation, the agreement is adopted or in some other way a new contract arises, is it enforceable against the company".

It must follow that on 10 October the security did not constitute a company mortgage. However, this does *not* mean that there was no security at all for the vendor until the new contract with the company. There was a security given by and binding on the trustee *personally*. Although Graham acted as trustee, it is clear that he was bound by the principal contract of purchase and, upon settlement, he became the legal owner of the business. Accordingly, when he executed the instrument by way of security over the plant and stock-in-trade, *he was mortgaging his own chattels,* chattels to which he had legal title. Such a chattels mortgage, being given by an individual, was clearly within the definition of "instrument" in the Chattels Transfer Act and was, in fact, properly registered.

The effect of "securities" that are not "instruments"

Even on the assumption that the case did simply concern a company mortgage not subject to the Chattels Transfer Act, it does not follow that, because it was meant to be and was described as "under the Chattels Transfer Act 1924", the security was a nullity. The Chattels Transfer Act is not a codifying or empowering statute which prescribes the kinds of security that can be given over chattels. The latter is principally governed by the common law and equity rules relating to the transfer and acquisition of interests in personal property. For the most part, the Chattels Transfer Act merely says that certain instruments should be registered otherwise they run the risk, for example, of being avoided against the persons mentioned in ss 18 and 19. If a particular security is excluded from the definition of "instrument", then this simply means that it does not have to be registered under the Act. It is quite valid according to its terms without registration. The exclusion does *not* mean that the security cannot be given at all, which seems to be the view of Jeffries J.

The contract of 13 November

It is submitted that the contract of 13 November constituted a valid and binding company mortgage which was quite properly registered under the Companies Act. It has already been observed that, until that contract, there was no security by which the company was bound. However, once having entered into the new contract with the vendor and the trustee, the company effectively mortgaged its plant and stock-in-trade in terms of the instrument by way of security annexed to the contract.

There appears to be some suggestion in the judgment of Jeffries J that a company cannot in fact grant an "instrument by way of security" over its personal property. His Honour stated:

> "For some reason, which is unexplained, an attempt was made to convert an instrument by way of security over chattels into a document which could also be adopted and used by a limited liability company to secure its personal property".

It is difficult to see how such an action requires explanation. It is permissible and, indeed, very common for companies to grant instruments by way of security/chattel mortgages. The mere fact that the instrument adopted by the company in this case was described as being "Under the Chattels Transfer Act 1924" cannot in any way affect the validity of the security. That Act is simply not the source of the power to create a chattels mortgage. Furthermore, the reference to the Chattels Transfer Act is readily explained by the fact that, as originally executed, the security *was* registrable under that Act.

> Jeffries J held that the instrument did not have "any validity as a charge under s 102 of the Companies Act 1955. It could only come under s 102 (2) (c) which states: 'A charge created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act 1924' and it is excluded because by definition it is not an instrument".

With respect, this misconceives the object of s 102 of the Companies Act. His Honour is suggesting

can be validly created by a company. A similar suggestion is also implicit in his Honour's earlier reference to the Companies Act as the Act "by which a company can grant security over its personal property". In fact, s 102 merely specifies the types of charge that must be registered in order to avoid the adverse consequences mentioned in that section and s 103. If a particular security does not fall within one of the nine categories in s 102, the result is that it need not be registered under the Companies Act, *not* that it cannot be created at all. The validity and effect of the security will depend on the general law of property.

Furthermore, the latter point aside, the security in this case *was* within s 102 (2) (c). Jeffries J held that it was not caught "because by definition [a company mortgage] is not an instrument". His Honour seems to overlook that s 102 (2) (c) refers to "a charge . . . which, *if executed by an individual,* would require registration under the Chattels Transfer Act 1924". In determining whether para (c) applies, one must first assume that the grantor is an individual. Exclusion (j) from the definition of instrument in s 2 of the Chattels Transfer Act must be ignored at this point. Accordingly, s 102 (2) (c) clearly applied, the consequence being, as noted above, that the security was required to be registered. Since it *was* registered, that should have been an end to the matter.

Section 23 of the Chattels Transfer Act

Finally, Jeffries J's conclusion that the security over "stock-in-trade" was void under s 23 of the Chattels Transfer Act must also be wrong. Neither s 23 nor s 24 (avoiding securities over future goods) applies to company mortgages. Both sections apply only to "instruments". Company mortgages, of course, are not "instruments" and ss 23 and 24 are not included amongst the sections which do apply to company mortgages by virtue of s 59 of the Chattels Transfer Act. Furthermore, even if these sections did apply to company mortgages, is not at all certain that s 3 of the Chattels Transfer Amendment Act 1974 (which exempts stock-in-trade from the operation of ss 23 and 24) could not have been invoked to validate the security over the stock-in-trade. This raises an interesting question as to the application of s 3 to instruments executed prior to the coming into force of the amendment on 1 January 1975. This question does not warrant an extended treatment here. It is, perhaps, sufficient to note that the Amendment Act does not contain a provision limiting its application to instruments executed after the commencement of the Act. Accordingly, it can be argued, in relation to instruments over stock-in-trade executed prior to 1 January 1975, that the effect of the Amendment was to remove the risk of their being avoided under either s 23 or s 24. Let us assume that in the present case Mr Graham had in fact decided not to form a company and that he executed the instrument by way of security solely in his personal capacity as legal owner of the business. From the time of its execution on 10 October 1974 until 31 December 1974 the instrument, in so far as it purported to cover stock-in-trade, would have been valid inter partes but liable to be avoided in the event of Mr Graham becoming bankrupt. However, on 1 January 1975 the law was changed. The legal basis for avoiding the instrument was removed. Sections 23 and 24 could no longer be invoked to avoid a security over stock-in-trade *(d).*

(d) I have assumed that a reference simply to "stock-in-trade" is sufficient to comply with s 3 of the Amendment Act. Probably it is, but the matter is not free from doubt; see (1976) 7 NZULR 83, 86.

RECENT ADMISSIONS

Barristers and solicitors

Abraham, BRB	Auckland	1 Sept 1978
Ball, GAN	Auckland	1 Sept 1978
Bamford, JGF	Auckland	1 Sept 1978
Carr, JA	Auckland	1 Sept 1978
Coupe, RAB	Auckland	1 Sept 1978
Daroux, CH	Auckland	1 Sept 1978
French, JO	Auckland	1 Sept 1978
Green, AMB	Auckland	1 Sept 1978
Grierson, CA	Auckland	1 Sept 1978
Heath, PR	Auckland	1 Sept 1978
Ironmonger, RA	Auckland	1 Sept 1978
Lyons, GF	Auckland	1 Sept 1978
Patel, MD	Auckland	1 Sept 1978
Penberthy, DF	Auckland	1 Sept 1978
Raine, JW	Auckland	1 Sept 1978
Ring, MG	Auckland	1 Sept 1978
Robson, JT	Auckland	1 Sept 1978
Sage, SR	Auckland	1 Sept 1978
Thwaite, GJ	Auckland	1 Sept 1978
Williams, GL	Auckland	1 Sept 1978

ACCIDENT COMPENSATION

ACCIDENT COMPENSATION AMENDMENT ACTS 1977 AND 1978

By DAVID COCHRANE, *solicitor.*

This year the Act has undergone its fifth series of amendments since being enacted in 1972. The amendments contained in this year's Act make minor changes of policy or attempt to clarify or correct apparent deficiencies in the original act. In a few cases minor alterations are made to facilitate administration or remove anomalies.

Since the Act is one of the more complex on the statute book it is perhaps worth noting those amendments which have been passed since the Act was last reprinted as on 1 January 1976. Amendments are described in terms of the sections of the principal act which they affect.

1977 Amendment Act – Agents' responsibilities

This was one of many Acts passed late in the 1977 session, receiving the necessary assent two days before Christmas. The principal amendment which it effected did not come into force until 7 August 1978.

Section 2 of the Act repeals and substitutes s 82 of the principal Act which affects the relationship between the Commission and its agent, the Inland Revenue Department. From 7 August 1978 the Department must pay over to the Commission the levies it collects from employers and the self-employed by the end of the month after the month during which the levy was payable whether or not it has in fact been paid to the Department. The Department is not authorised to indulge in the printing of money to pay over to the Commission if the levy has not been paid to it but can do the next best thing by making the payments from the Consolidated Revenue Account. Agency fees may be deducted and amounts written off or Assessments reduced may be deducted from future payments. No doubt there are many organisations in these times of financial strictures which would like to have their agents pay over full payments of all amounts payable whether or not in fact received by them and agents would be delighted to oblige if they could make up any shortfall from the Consolidated Revenue Account. However, since this provision is unlikely to be extended beyond the area of quasi-governmental organisations and their departmental agencies it can be disregarded by all but the parties directly involved.

Section 3 of the Act amends s 181 which gives a long list of matters in respect of which regulations may be made. The particular amendment enacted lays down in greater detail the matters in respect of which regulations may be made affecting the delivery of levy relating to employers and self-employed persons.

1978 Amendment Act

Section 2 – Definition of New Zealand – The principal Act is amended by the addition of a definition of New Zealand. This is a consequence of a broader definition of New Zealand now found in the Territorial Sea Exclusive Economic Zone Act 1977. For accident compensation purposes "New Zealand" has been more narrowly defined. So far as the Act is concerned New Zealand means only the main islands, including the Chathams and Kermadecs, various minor islands and the territorial sea which in terms of the 1977 legislation on that topic means roughly a 12 mile skirt around each land mass.

One effect of the amendment is to entirely exclude the Ross Dependency from the definition of New Zealand for the purposes of the Act. The precise status of the Ross Dependency and the territorial sea surrounding it is unclear since the Territorial Sea and Exclusive Economic Zone Act 1977. The relationship of that Act to the Acts Interpretation Act 1924 and other legislation has not yet been tested. The position may be complicated further by the Antarctica Act 1961 but under accident compensation the position is now clear; the Dependency is not part of New Zealand and persons there or travelling to and from only have cover to the same extent as if they were in or travelling to or from a point outside New Zealand *(a)*.

Section 59 – Extended cover for earners – Section 59 provides for the extension of earners' scheme cover (which for practical purposes broadly means the right to earnings-related compensation) to persons who are not earners at the time of their accident but have had that status in the recent past. The maximum period during which cover is automatically extended is 13 weeks after the person had earners' scheme cover. A formula is used to determine the extension in each case

(a) Ie, under ss 60, 61 and 63 – see s 4 (3) of the Act.

according to the length of time the person was an earner before he ceased employment. The amendment corrects a technical defect and ensures that the maximum extension can in fact be reached in appropriate cases.

The further extension of cover at the discretion of the Commission as permitted by the proviso to s 59 (2) is not affected by the amendment.

Section 73 – Penal and merit levies – This section deals with penal and merit levies in the earners' scheme, affecting employers and the self-employed. The section is repealed and replaced by one in broader terms. It moves away from accident rates and accident records to accident experience of the employer or self-employed person and enables the Commission to impose a penalty or require levy at a penalty rate and in appropriate cases to grant a safety incentive bonus or allow levy to be paid at a rebated rate.

No penalty or rebate scheme had been introduced under the original provision perhaps partly because of deficiencies in its wording but the new provision appears to give plenty of scope for the introduction of whatever scheme the Commission may consider appropriate.

Section 78 – Levy payments by the self-employed – This section deals with the making of levy statements and payment of levy by self-employed persons. It is amended by the enactment in statutory form of the Accident Compensation Self-Employed Levy Payments Regulations 1978, the substantive part of which is consequentially revoked.

The effect of this rather lengthy amendment is to make the date for the making of levy statements coincide with the date for furnishing returns of income under the Income Tax Act 1976. The date for payment of levy becomes 7 February next following the date for filing the return. This facilitates the task of calculating and declaring levy and paves the way for combined income tax and levy statements and processes, which ought to be more efficient for all concerned.

Section 81A – Collection of overdue levy – This is a new provision which mirrors s 400 of the Income Tax Act 1976. Prior to this amendment the Commissioner of Inland Revenue could not recover outstanding levy by the same means as he was able to recover outstanding tax, using the simple method of giving notice requiring the defaulter's debtor to make payment direct to the Inland Revenue Department.

Section 102C – Cover for non-residents – This section affects the cover of persons not ordinarily resident in New Zealand. The previous section provided that they did not have cover under the supplementary scheme until they completed disembarkation from the ship or aircraft in which they arrived and lost that cover on commencing to embark on a ship or aircraft by which they were to leave New Zealand.

This probably meant that crews and passengers of visiting ships had cover while on their vessels travelling between points in New Zealand and left the question of cover for non-residents accommodated on board fishing vessels which operated out of New Zealand ports unclear.

The new provision makes it clear that a non-resident has no cover under the supplementary scheme whenever on board a ship or aircraft used by him to enter and visit or leave New Zealand. Acts of embarkation and disembarkation from such a ship or aircraft are treated in the same manner. While a non-resident is on board any ship in New Zealand other than one by which he entered or will leave New Zealand he apparently retains cover as though he were on shore.

It should be noted that a person who is not ordinarily resident in New Zealand but has cover under the earners' scheme is unaffected by this provision and the geographical limits of his cover are found in s 55.

Sections 104, 113, and 114 – Compensation for high earners – The amendments to these sections provide a major change in the legislation of interest to all those with earnings above $15,600 *(b)* per annum. Under the Act prior to the 1978 amendment earnings-related compensation was only payable in cases where earnings below that figure were affected. Thus the person who suffered a $10,000 loss of earnings from $30,000 to $20,000 was not entitled to any earnings-related compensation. However, he was still liable to pay levy (if self-employed) or levy had to be paid on his behalf (if an employee) in respect of his first $15,600 of earnings.

In other words, levy was payable on the first $15,600 of earnings received but earnings-related compensation was only payable in respect of the last $15,600 of income lost. The 1978 Act has changed this and earnings-related compensation is now payable in respect of the first $15,600 of earnings lost. Thus the person whose earnings drop from $30,000 pa to $20,000 pa will be entitled to earnings-related compensation calculated on the $10,000 lost. If the loss of earnings is greater than the prescribed maximum then the maximum will still apply. Thus no person can receive compensation calculated on an amount

(b) In respect of accidents occurring on or after 1 April 1979 this figure will increase to $18,720.

greater than $15,600 pa even if his loss of earnings is much greater. On the other hand, of course, he is not liable for levy (or liable to have levy paid on his earnings) on amounts greater than that prescribed maximum. This provision applies to periods of incapacity occurring on or after 1 December 1978. It therefore applies to any person injured before that date if the incapacity extends beyond it as well as those injured after that date.

Section 105A – Persons travelling between places in New Zealand – This section has been repealed and re-enacted but the only change is to a consequential one following the definition of New Zealand for the purposes of the Act. The general effect, namely that persons leaving New Zealand and not going more than 300 nautical miles away before returning are deemed to have remained in New Zealand, is unaltered.

Section 109A – Ambulance charges – This provision is a seemingly innocuous one yet it may have important ramifications for the viability of the accident compensation scheme.

Its effect is to make the Commission liable for the costs of transporting accident victims to hospitals or places of treatment and subsequent transportation for treatment including transport between hospitals in situations where no charge is made on the patient. This represents an important change of emphasis for it involves the Commission in the costs of operating health services rather than the compensation of accident victims. Previously the commission was only liable for transport costs to the extent of "reasonable expenses incurred" and in the case of many ambulance services this meant no liability since it is not customary to charge the patient for these services.

The significance of the change is that the Commission is now involved as a primary source of funds for the operation of health care services. It may be but a short step from this to the Commission's funds being called upon to provide finance for the construction and operation of accident and emergency departments of public hospitals. Its present responsibilities are on an individual claimant basis and generally are subject to existing social security benefits *(c)*.

The provision is expressed to take effect from 1 April 1977. While perhaps not ranking in significance with the abolition of a superannuation scheme or the merger of state airlines without validating legislation the Auditor-General nevertheless noted in the public accounts for 31 March 1978 that $170,000 had been paid in anticipation of the amendment and validating legislation was therefore essential.

(c) See eg s 111 (1) (a).

Section 126 – Payment to Trustees – This provision, under which the Commission may make payments of compensation to persons other than the claimant has been repealed and replaced by a provision giving a wider discretion to the Commission.

The Commission's discretion is broadened in two respects; firstly as to the categories of cases in which it may divert payments from the claimant and, secondly, there is wider discretion given in determining to whom the payments shall be made.

The Commission now has power, on application and of its own volition, to decline to make payments to a claimant if it is satisfied that this would be in his interests "whether by reason of his mental or physical infirmity or otherwise howsoever". Instead, payments may be made to the person's guardian or person caring for him or to a trustee corporation.

The variations from the original section are too numerous to mention in full but the principal ones may be highlighted. The power applies equally to all compensation including weekly earnings related compensation and lump sums.

The Commission has wide powers to make payments to any person who has made application or to a guardian or trustee corporation. This is quite a significant change as far as lump sums are concerned because previously the only options open to the Commission were to make the payments to the claimant himself or to the public trustee on his behalf.

Section 131 – The commission's interest in the claimant's right to sue – The principal Act provided that the Commission could

(1) Deduct from the compensation payable under the Act any damages or compensation obtained under the laws of any other country or pursuant to any international agreement.
(b) Require as a condition precedent to the granting of compensation that the claimant pursue any claim he might have or assign his rights to the Commission.
(c) Meet some or all of the expenses involved in pursuing the claim.

However, this involvement could only take place if the personal injury by accident occurred outside New Zealand. The 1978 amendment has changed this and now the involvement can also take place if the accident occurs in New Zealand. It will be interesting to see the extent to which this provision is invoked and the type of cases involved. While confined to accidents occurring outside New Zealand there has been little scope for its use and those cases that might have arisen would pro-

bably have been in the fields of employment or motor vehicle accidents. With the extension of the section's application to New Zealand opportunities may arise for Commission involvement in overseas litigation in other fields, notably products liability.

It is tempting to consider the position had the recently widely published case involving the Ford Motor Co arisen over a vehicle imported into New Zealand. Armed with an assignment of rights the Commission might have received $128,000,000 in punitive damages which is more than its total income for any one year. Although the award was subsequently reduced to a "mere" $3,500,000 (plus $2,800,000 general and special damages) the $6.3 million total would have paid half the total medical bills met by the Commission in 1978.

Section 181 – Regulations – There are two amendments to the power to make regulations. The first is consequential following the amendment concerning penal and merit levies and the second is a consequence of the 1977 amendment concerning levy statements and payments of levies, neither is of any particular significance though regulations under the former will be awaited with interest by many employers.

TRUSTS AND TRUSTEES

FAMILY PROTECTION: COACH AND FOUR THROUGH AN ACT OF PARLIAMENT

MFL FLANNERY, *a Wellington practitioner, examines methods by which the family protection legislation may be circumvented*

The lament of RJ Sutton (Ousting the Family Protection Jurisdiction [1977] NZLJ 57–64) on the practical consequences of *Schaefer v Schuhmann* [1972] AC 572; [1972] 1 All ER 621 as decided by the Privy Council and followed by Wild CJ in *Re Webster* [1976] 2 NZLR 304 may well be a scholar's modern response upon discovering that a coach and six horses have been driven through an Act of Parliament.

A near-similar comment was made 80 years ago by a Member of the House of Representatives of New Zealand during debate on the Testator's Family Maintenance Bill. That Bill became the Testator's Family Maintenance Act 1900 (the penultimate predecessor to the Family Protection Act 1955 as Amended) and the pioneer legislation in the world on family maintenance and protection.

Admittedly the number of metaphorical horses has changed (the claim of Sir Stephen Rice before he became a Judge was that he would drive a coach and *six* horses through the Act of Settlement of Ireland) but the coach in the New Zealand setting is the same and its target is still the attempt to render nugatory family protection legislation through inter vivos transfers of the testator (and now testamentary provisions that make his contracts operative). That last device is the innovative one because dispositions during lifetime are obvious, commonplace but not necessarily characterised with the intent of defeating or diminishing claims under the Family Protection Act 1955 as amended. The same may not always be said of the testamentary contract.

On 12 July 1900 a Member of the House of Representatives when speaking during the Second Reading of the Testator's Family Maintenance Bill challenged

> "... whether the Honourable Member, as a lawyer, could not see his way to drive a coach and four horses through the Bill if it became law .... It was quite possible for him, before he died, to transfer the whole of his property to certain sons or daughters, or to trustees for certain persons and then leave no provision for his wife:" *New Zealand Parliamentary Debates* (1900), vol CXI, 507.

The eventual reply to that question was to the effect that no doubt a number of men would try to get behind the Act when the time came; and that the speaker could not provide for all those things when introducing the measure (NZPD at 509).

(The New Zealand Legislature continues that failure to provide whereas England and Canada have been legislatively active with a United States academic producing a notable legislative thesis that apparently has not been considered in New Zealand).

That 1900 Bill in New Zealand became the pioneer Testator's Family Maintenance Act 1900, later Part II of the Family Protection Act 1908

and eventually the current Family Protection Act 1955 as amended; but in none of these statutes was provision made to exempt or include property transferred inter vivos by the testator by gift or contractual testamentary promise from the extent of the testator's estate when a judicial variation of trust is made by order of the Court for the benefit of the dependants of the deceased.

The Schaefer principle (and implications)

The Judicial Committee of the Privy Council in 1972 replaced its own sentinel that stood guard over dependant's claims against deceased estates under family protection and testator's maintenance legislation with a contradictory decision.

Formerly, in *Dillon v Public Trustee* [1941] AC 294; [1941] 2 All ER 284; [1941] NZLR 557; [1941] GLR 227 it had extended the scope of the then Family Protection Act 1908 (now 1955) to include property that should be subject to the judicial variation of testamentary trust and therefore remain subject to the order of the Court. The Board held that property devised or bequeathed pursuant to a contract entered into inter vivos for valuable consideration did not prevent the Court from making an award that includes that property.

Now, in *Schaefer v Schuhmann* [1972] AC 572; [1972] 1 All ER 621; (1971) 46 ALJR 82 it has held that a contractual testamentary promise is inviolate and its property protected against claims under the New South Wales' Testators' Family Maintenance and Guardianship of Infants Act 1916–1954.

Inter vivos transfers constitute an obvious means for the testator to diminish his estate and to defeat claims against it whereas contracts to leave specific property by will are both an innovative and sophisticated method (and iron-clad since *Schaefer)* for they not only diminish or abolish the estate and likewise the result of any claims but they ensure that the promisee is endowed with contractual rights and remedies because he is now elevated to the status of a creditor of the estate.

The *Schaefer* principle broadly means that the Court has no jurisdiction to order new or further provision out of property that the testator in his lifetime has contracted to leave by will and the will has performed that contract. That principle results in there being a quintet of types of property that are removed from the Supreme Court's jurisdiction: firstly, property subject to a special power of appointment: *Nosworthy v Nosworthy* (1906) 26 NZLR 285; 9 GLR 303; secondly, an appointed fund subject to a general power of appointment validly and completely disposed of by an exercise of the power (unless the testator has made it part of his personal estate): *In re Kensington* [1949] NZLR 382; [1949] GLR 185; thirdly, gifts and settlements inter vivos even though brought into the estate for duty purposes and including property the subject of a donatio mortis causa under s 2 (5) of the Family Protection Act 1955; fourthly, property situate abroad; and fifthly contractual testamentary property.

The Family Protection Act 1955 contains no definition of the testator's estate against which the judicial variation of the trusts may be effected. Section 4 simply says that the Court may make such provision as it thinks fit and that the order of the Court "shall be made out of the estate of the deceased . . .".

The Law Reform (Testamentary Promises) Act 1949 likewise contains no definition of the estate. Instead s 3 allows the promisee and claimant to proceed so that the liability is "enforceable against the personal representatives of the deceased . . .". Where the promise relates to realty or personalty other than money, the Court may in its discretion vest the property in the claimant or vest part and award money. An award of money may be an award of a lump sum or a periodical or other payment: ss 3 (3) and 4. The statutory variation of trusts is effected judicially with the incidence of payments ordered falling rateably on the whole estate unless the Court exonerates any part of the estate.

Not all of that "estate" is necessarily available for nor capable of satisfying all claims and liabilities, and yet the lack of definition in statute means that no indication is given of that lack of availability and capacity.

It is axiomatic that special powers are limited powers vested in the testator so that as donee he can exercise them only in favour of certain specified persons or classes; and therefore his actual (or net) estate must include only property over which he had power (other than by special power of appointment) to dispose by will after deducting his debts, liabilities and the estate duties payable out of his estate on his death. The subject matter of judicial variation of trust now extends only to that part of the estate that is *disposable* by the testator (exclusive of property *disposed* by inter vivos transfer and testamentary contractual disposition).

Promises to leave property by will can arise contractually and exist independently of the will: *Re Richardson* (1934) 29 Tas LR 149; and specific performance may be ordered in appropriate circumstances. A contract not to revoke a will is similarly enforceable even though it does not prevent the making of a subsequent will: *Aimers v Taylor* (1897) 15 NZLR 530. Lord Cross in *Schaefer* (at 586) treated it as established that where

there is a contract to leave specific property by will the plaintiff is entitled to a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of that property in breach of contract: *Synge v Synge* [1894] 1 QB 466. Conceivably a caveatable interest is registrable against the title if that property is land.

Clearly the subject-matter of such contracts falls outside the arena of judicial variation of trusts necessitated by a family protection or testamentary promises claim.

Dillon held that such contracts could only take effect subject to the provisions of the Family Protection Act of New Zealand and *Schaefer* reached a different conclusion concerning New South Wales testator's family maintenance legislation.

The will may operate to perfect an inchoate gift and later the Supreme Court may be asked whether that subject-matter forms part of "the estate of the deceased" when a claim is made under the Family Protection Act 1955 that seeks a judicial variation of trusts of the will to allow new or improved provision for the claimants. Cases where the unregistered disposition has been held to have failed are generally explicable by the failure of the testator-donor to hand over unequivocally the relative memorandum of transfer: *Cope v Keene* (1968) 118 CLR 1; *Brunker v Perpetual Trustee Co* (1937) 57 CLR 555; and *Travica v Travica* [1955] VLR 261. If the gift is land then the central question is whether the intended donees have an equitable interest in the land at the date of death, because an award for the judicial variation of trusts under a Family Protection Act order over land would be futile owing to the outstanding statutory right to be registered as proprietor.

If the value of property that the testator has contracted to devise in a particular direction constitutes a legitimate liability so that the promisee is a creditor of the estate then the *Schaefer* principle means that no such property can be made subject to an order for the judicial variation of the testamentary trust. Law may not have advanced far since the time of Justinian because as far back as the late classical period there had existed two supplementary querela the main purpose of which had been to prevent a testator thwarting the main querela by open-handed largesse in his lifetime.

With the exception of donationes mortis causa in New Zealand (as provided for by s 2 (5) of the Family Protection Act 1955), there is no jurisdiction in New Zealand for the Supreme Court to make an award out of any property of the testator disposed of by him in his lifetime even though such disposition was made with the express purpose of defeating the operation of testator's maintenance and family protection legislation: see *Parish v Parish* [1923] GLR 712; *In re Richardson* [1920] SALR 24; *Thompson v Thompson* [1933] GLR 274. The testator may feel himself free therefore to settle a substantial part of his property inter vivos upon trust for himself for life and simultaneously reserve to himself a testamentary special power of appointment or enter into contracts to come into effect on his death and the enforcement of which will deplete the whole of his estate.

Schaefer is not an example of a donatio mortis causa. The deceased's unpaid housekeeper was devised the house in the codicil if she "still be employed by me as a housekeeper at the date of my death". The deceased paid her sufficient money for household expenses but nothing for her wages. The housekeeper acquiesced in this arrangement and was still employed as housekeeper when the testator died. The Privy Council found an enforceable contractual arrangement that elevated the housekeeper to a creditor, with rights that existed independently of the will. However that finding does *not* mean that "... there is no jurisdiction under the testator's family maintenance legislation of the Australian states for the Court to make any award out of property comprised in donationes mortis causa: *Schaefer v Schuhmann* [1972] AC 572; [1972] 1 All ER 621; Wright, *Testator's Family Maintenance in Australia and New Zealand*, 3, 8" as contended in *Equity: Doctrine and Remedies* by Meagher, Gummow and Lehane (Butterworths 1975), (at page 3011). Nor indeed does Wright in either edition (3rd 1974 and 2nd 1966) proffer *Schaefer* as an authority for or example of donationes mortis causa.

Both the Family Protection Act 1955 as Amended and the Law Reform (Testamentary Promises) Act 1949 as Amended represent no diminution of the concept of freedom of testamentary disposition because people still remain free to leave property to whom they like. The last will of the testator must necessarily be his *will*. Each statute is the recognition of another competing social interest that the law allows to be made where there is proved a breach of a moral duty owed to dependants and a breach of a testamentary promise. Neither statute prevents or inhibits the testator from making his will in the manner he wishes but each provides a sanction where dependants are left without adequate maintenance and or testamentary promisees remain unrewarded.

The Family Protection Act provides a remedy where a testator fails to exercise his will-making power justly in the interests of his dependants: *Bosch v Perpetual Trustees Co Ltd* [1938] AC

463. The Act has become more than one simply for the protection of destitute persons because implicit in the Act and explicit in the Court's decisions is the recognition of society that dependants have adequate maintenance and also that the surviving spouse receives a fair share of the deceased's estate. Adult children of independant means have claims for proper maintenance provided they can prove the breach of a moral duty neither fulfilled in the testator's will nor during his lifetime.

Judicial variation of trusts

Four important statutes allow the making of orders by the Supreme Court that permit a significant judicial variation of the trusts on which property is held. Those statutes are:

(i) the Family Protection Act 1955 as amended;
(ii) the Law Reform (Testamentary Promises) Act 1949 as amended;
(iii) the Domestic Proceedings Act 1968;
(iv) the Matrimonial Proceedings Act 1963.

For the primary right of support of dependants and of those who can prove the breach of a moral duty owed them and not fulfilled by the testator either in his lifetime or in his will, the Family Protection Act represents the most important of that quartet of statutes that significantly provide for the judicial variation of trusts and the award of capital and or property thereby.

The Family Protection Act is the most commonly invoked statute – and yet after nearly 80 years of judicial activity the extent of jurisdiction against the deceased estate has remained uncertain in all legislation until it was limited by the Privy Council in a case emanating from New South Wales and one binding on New Zealand: *Schaefer v Schuhmann* [1972] AC 572; [1972] 1 All ER 621 (PC) until this country takes belated legislative action that must be both corrective and remedial.

No matter how tightly drawn any new definition of "net estate" is given to any new enabling section on variation of trusts (ideally in the Trustee Act 1956), the contractual testamentary arrangement does oust the Family Protection Act 1955 and the ambit for the exercise of other judicial variation of trusts – unless and until New Zealand chooses to abrogate the effect of the Privy Council advice in *Schaefer*.

Instead, New Zealand legislation should recognise now the potential of contractual supremacy over other claims allowed by statute and instead of trying to annihilate that supremacy, the law should try to balance the equities between (on the one hand) the surviving spouse and or dependent and or disappointed children, and (on the other hand) the inter vivos transferee and testamentary promisee for value.

The matter is not devoid of practicable remedy nor does it cause as many anomalies and injustices as are cured. Indeed more inequity and inequality remain if nothing is done.

Legislative solution

Nevertheless it may well be less difficult to conceive of a method to drive a coach and six horses through the Family Protection Act than to engineer a just and practical way of preventing such a gap. Freedom of testamentary disposition must be balanced against the sanctity of contract; but equal to (or perhaps paramount over) is the need to ensure that judicial variation of testamentary trusts is available to allow maintenance for the surviving spouse and (at least) for children dependent upon her. The competing equities of bona fide transferees for value and contractual promisees with those of dependants warrant statutory recognition and the recital of criteria in statute upon which all their claims and demands may be judicially enforced. New Zealand has not emulated any of the legislative schemes found in England, Canada and Ireland (some of which may owe origin to a United States legislative thesis).

That legislative failure may have unwittingly allowed *Dillon* and (again indirectly) facilitated *Schaefer;* but in New Zealand the prevailing attitude is that inter vivos evasions of family protection legislation are infrequent and so with that complacent attitude, no thought had been given to preventing testamentary performance of contracts that disposed of testators' property and at the same time diminished the bounty on which families may claim. The result can be the delay or defeat of claims and diminished provision for dependants on the testator's death.

> "The only reason why nothing has been done to amend the legislation is that we have not succeeded in devising a practicable method of avoiding dispositions made to defeat claims without causing as many anomalies and injustices as are cured. The question was last considered a year or so ago by our Law Revision Committee which decided that no practicable remedy was possible": letter of Minister of Justice (Clifton Webb) bearing date April 14 1953 to Professor W D Macdonald and quoted in the latter's *Fraud on the Widow's Share*, Ann Arbor: University of Michigan Law School (1960) (in footnote 19, page 297).

That comparative study of family maintenance and family protection legislation and judicial decisions has never received attention in New Zealand – and yet it offers the base for a socially and judicially acceptable solution.

United States thesis

Contracts to make wills concerning promises to give effect to the devise or bequest of specific property to a designated party are given separate analysis by Professor Macdonald. His plethora of case and comment is nearly all American: most of the cases concerning spouses' rights involve all the deceased estate particularly when designated property is contracted and amounts less than the whole estate may be regarded as unreasonably large as far as the surviving spouse is concerned. No English or Australian cases are mentioned and nothing on *In re Richardson* (1934) 29 Tas LR 149.

Professor Macdonald is clear that such an arrangement is a contract, not a will and contends (at 372) that jurisdictions that adopt the family maintenance-type legislation should not permit the claimant to attack the contract to make a will "unless she can show that she is entitled to maintenance and is not otherwise adequately provided for".

The next step in such jurisdictions (he adds) should be to balance the equities between the surviving spouse and the contract beneficiary. Professor Macdonald explains (at 372):

> "By 'equities' I mean circumstances or factors that militate in favour of one party or the other under the maintenance and contribution formula [that is, alleviation of the demonstrated need during widowhood and during the minority or period of dependence of children; and the exercise of discretion by the Courts in requiring contribution from any inter vivos transferee and in obtaining apportionment of the amounts payable by several transferees]. The two most important equities, of course, would be the spouse's need and the nature and amount of consideration 'paid' by the promisee. Also relevant would be such factors as the widow's treatment of the decedent, her knowledge or otherwise of the contract at the time of the marriage, and hardship to the beneficiary. It should be immaterial, of course, that the promisor made the promised will or died intestate".

Professor Macdonald submits his own Model Decedent's Family Maintenance Act that largely is an adoption of family provision and family protection legislations but also includes extensive provisions to safeguard against evasion. The attempt is a reconciliation of that conflicting triangle of social interests: the protection of the widow against disinheritance, the security of the title of the transferee and the wish of the husband to dispose of his estate with certainty.

The Courts are given wide discretion. They must decide whether the applicant needs maintenance. Then, whether an inter vivos transferee must contribute towards maintenance if the estate is insufficient and finally what should be the amount of the transferee's contribution. At this point the Courts must balance the competing equities and consider the injurious effect upon the transferee of interference with his transfer. The Act catches all inter vivos transfers made within 10 years preceding death that are "unreasonably large" according to the Act's criteria.

Canadian examples

New Zealand may have been too complacent or too confident after *Dillon* notwithstanding the criticism that that decision attracted overseas and the fact that in other jurisdictions (Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia and Saskatchewan principally) exempting sections were enacted. Where New Zealand anticipated "causing as many anomalies and injustices as are cured", those Canadian provinces simply provided that where a testator bona fide and for valuable consideration contracts to leave property by will, such property shall be exempt except to the extent that the property exceeds the consideration received by the testator. The reason is that the testator's estate is not therefore diminished.

Republic of Ireland

Under s 121 of the Succession Act 1965, Courts in the Republic of Ireland are empowered to deal with a disposition which it is satisfied was made to defeat or diminish substantially the share of the testator's spouse (whether as a legal right or on intestacy) or the intestate share of any of his children or the sufficiency of the provision of any of his children. The Courts can order that the whole or part of the disposition be deemed to be a devise or bequest made by will and to form part of his estate and to have no other effect. To the extent of such a Court order, the disposition is deemed never to have had effect and the donee (or any successor in title) is deemed to be a debtor of the estate for such amount as the Courts may direct. Furthermore the Courts are given a general discretion to make such further order concerning the matter as may appear to be "just and equitable having regard to the provisions and spirit of this Act and to all circumstances". However, "disposition" applies only to a non-testamentary, voluntary disposition by which the beneficial ownership of the property vests in possession within three years before the death of the testator or on his death or later.

Example of England

Much certainty in the definition of the estate and objectivity in the determination of claims

upon it characterise the Inheritance (Provision for Family and Dependants) Act 1975 because in its application to England and Wales there is a clear indication of the property of the deceased upon which the judicial variation of trust may be made to operate. Before ordering any provision to be made, the Court must be satisfied that the disposition of the deceased's estate effected by his will (or the law relating to intestacy or the combination of his will and that law) is not such as to make reasonable financial provision for the applicant. That test is objective. The statutory language is wholly impersonal: *Re Goodwin* [1969]. 1 Ch 283, per Megarry J at 287).

The judicial variation of trusts of the deceased's property is that constituted by his net estate that is exhaustively defined to include the following:

(i) All property that the deceased had power to dispose by will (except by virtue of a special power of appointment) *less* the funeral, testamentary and administration expenses, debts and liabilities;

(ii) Any property over which the deceased had a general power of appointment (not exercisable by will) that has not been exercised; but if the power was exercisable by will then the property falls within the abovenamed category (i) and whether or not the deceased exercised that power;

(iii) Any property nominated to any person by the deceased under a statutory nomination or received by any person from the deceased pursuant to a donatio mortis causa.

Additionally the deceased's net estate may be made to include any property that the Court orders to be provided by any person under the powers to prevent evasion that has been held to have been made through inter vivos dispositions and/or testamentary contracts.

A disposition means any inter vivos disposition of property made by the deceased (except an appointment made under a special power of appointment) and may be constituted by a payment of money.

A contract is one by which the deceased agreed either to leave by his will a sum of money or other property to any person, or that money or other property would be paid or transferred to any person out of his estate.

A disposition must have been made less than six years before the deceased's death but no such time limit is applicable to a contract.

Under s 11, the Court can exercise its powers when it is satisfied that the contract was made by the deceased with the intention to defeat an application for financial provision under the Act, and that when the contract was made full valuable consideration was not given or promised by the person ("the donee") with whom or for the benefit of whom the contract was made or by any other person.

The Court's powers are discretionary as to exercise and the extent of that exercise. It must consider the circumstances under which the contract was made, the relationship of the promisee to the deceased, the conduct and financial resources of the promisee and all other factors relevant to the case.

Conclusion and recommendations

Novel means of minimising or abolishing the estate and thereby virtually annihilating the availability of the statutory variation of trusts for claimants for new or improved provision, demand the creation of a new Equity that can allow the administration of a broad legislative policy and the exercise of judicial controls and discretions. Statute must enumerate all the judicial criteria.

New Zealand slept after *Dillon*. The Canadian provinces did not but instead enacted exempting legislation while New Zealand (reportedly) could find no practicable remedy.

New Zealand should not be allowed to sleep after *Schaefer*. It should now seize the chance again to enact legislation as bold and innovative as the penultimate predecessor to the Family Protection Act 1955 (the Testator's Family Maintenance Act 1900 that swept the world with its novelty of idea and equity of purpose).

New Zealand legislators owe a duty to protect and preserve the idea of those men who strove to provide legislatively for surviving spouses and dependent children and to maintain at the same time freedom of testamentary disposition.

Moreover what is now capable of practicable remedy is the balancing the equities between bona fide transferees and contractual testamentary promisees and dependants and claimants.

The Law Revision Commission should look again at this problem (and this time more confidently) and ask its Property Law and Equity Reform Committee to present a working paper that is grounded upon the legislative and judicial experience of other countries where the practical implications of *Schaefer* have been at least realised and acceptably solved.

Legislative evasion by the coach and six horses simply costs too much and causes too much uncertainty. That lesson should be learnt now.

THE GAPS IN THE EXISTING LEGAL SERVICES IN NEW ZEALAND

By Piers Davies and Robert Ludbrook

Introduction

No master planner exists in New Zealand at present to look at the legal needs of the community, consider what resources are available and deploy those resources in the most effective way to meet the needs of the community. Legal services are provided almost exclusively by private law firms. The assumption being that anyone who needs the services of a lawyer will find his way to the appropriate lawyer's office. Evidence is accumulating overseas and in New Zealand that this assumption is false, that there is an "unmet need" for legal services and that there are gaps between the legal resources and the community needs.

We have therefore defined the term "unmet need" as "the absence of appropriate legal services, whatever the cause – legal, social or economic". In this paper we consider:

(1) what factors determine how legal resources are distributed?
(2) what are the gaps in the legal services?
(3) what recent trends have accentuated these gaps?
(4) what attempts have been made to bridge these gaps?
(5) what more can be done?

(1) What factors determine how legal resources are distributed

A number of interacting factors determine how available legal resources are allocated. Some of these can be identified as follows:

(a) *Profit motive* – Lawyers are businessmen selling their skills and their time. Their aim in economic terms is to maximise their profit. They will therefore be attracted to those clients and categories of work that are most profitable.

(b) *Status and prestige* – Status, prestige and appointment to high office within the profession is accorded to the lawyer who handles important matters, acts for large corporations, appears in the higher Courts, and who is solid and uncontroversial. Any lawyer who is ambitious is unlikely to further his career by attending to the legal needs of the small man.

(c) *Supply of lawyers* – In theory an oversupply of lawyers should have two consequences – it should force down the cost of legal services and should encourage lawyers to enter less profitable areas of practice. At the present time there are more qualified lawyers than can be absorbed in practice. Yet there is no evidence of a reduction of legal fees – even if allowance is made for inflation. Many law graduates are travelling to greener pastures overseas or are finding employment outside the legal profession. Some lawyers have recently opened offices in previously neglected suburban areas.

(d) *Distribution of legal services* – Our current dilemma is that we have an apparent oversupply of lawyers and yet a large unmet need for legal services. This can be explained by failures in the system of the distribution of legal services. The major obstacle is that the newly qualified lawyer cannot immediately provide a service in an area of greatest need. He cannot practise on his own account until he has had at least three years experience with a firm; but he cannot get a job with a firm and is therefore unable to acquire the requisite experience. If he is lucky enough to get a job with a firm, then after three years he will have found a niche and is unlikely to be motivated to set out into the uncharted waters of sole practice in a depressed suburb.

(e) *Demand for legal services* – There is no exact way of gauging the demand for legal services in a community. Research in England suggests that only a small proportion of those in need find their way into the system. Other factors affect demand. The consumer movement, public education and public confidence in the effectiveness of the legal system are all likely to increase demand. Unlike businessmen, lawyers cannot identify demand by market research nor create demand by advertising. Undoubtedly legal aid, legal advice and duty solicitor schemes tend to increase the demand for legal services.

(f) *State intervention* – By providing free legal services or subsidising legal services the state makes legal services more readily available to people of low or moderate means. Our three legal aid schemes exemplify three different social philosophies.

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Mr Robert Ludbrook is a consultant partner in the firm of Cairns, Slane, Fitzgerald and Phillips. He works in a voluntary capacity with the Neighbourhood Law Office in Grey Lyn and lectures in law and sociology at Auckland University.

(i) The oldest – the Offenders Legal Aid scheme enshrines the Victorian concept of "charity for the worthy poor" and the ridiculously meagre rates of payment make it clear that lawyers are expected to purify their souls by providing a service for negligible remuneration.

(ii) The Civil Legal Aid scheme is a means-tested scheme and demonstrates the philosophy of legal aid as a juridical right – there can only be equality before the law if there is equal access to competent legal services.

(iii) The Duty Solicitor scheme is a universal scheme available to the millionnaire company director as well as the unemployed welfare beneficiary.

State spending on legal aid services last year amounted to over $1,000,000.

The important question is to what extent are the public getting value for money from the Government's legal aid spending. The short answer is that they are not. A significant proportion of legal aid expenditure is outlaid in prosecuting maintenance proceedings at the behest of the Department of Social Welfare. The profession is providing an expensive collection agency for a government department. Such expenditure does nothing to fill the gaps in legal services. The real litigant is the Department of Social Welfare. The applicant is seldom any better off financially as a result of the Court action because any money recovered goes straight back to the government. The Duty Solicitor scheme is wasteful too. It would be cheaper to employ a full time solicitor on a salary and to provide him with unqualified assistance or to ask lawyers to tender for the position, than to pay lawyers on the present piece-work rates.

(g) *Internal policies of the legal profession* – In the last eight years the legal profession has accepted greater responsibility for ensuring that the needs of the community are adequately met. They have set up an impressive network of voluntary legal services throughout the country and have sponsored and financed the Neighbourhood Law Office in Grey Lynn.

(h) *Personal characteristics of lawyers* – Class and social differences are less pronounced in New Zealand than in many other westernised countries, but they still exist. Lawyers are predominantly male, middle class and Caucasian. They have restricted contact with, and are therefore likely to feel uncomfortable with, people of another culture or class. Some lawyers are public spirited and have a strong social conscience. Others are hard nosed businessmen. Most fall somewhere between.

(2) What are the gaps in the legal services?

(a) *Failure to recognise that a lawyer can help* – Many problems are not immediately apparent to the public as being instances where legal skills can be of value. Examples of this will include disputes over superannuation funds, interpretation of union or club rules, and questions as to eligibility for a Social Welfare benefit.

(b) *Inability to pay for legal services* – Item (a) above is often linked with the fear that people have that they will be unable to pay for lawyers' services if they enlist them in their problems. A typical problem of this kind is a dispute over the return of a bond to a departing tenant. Sometimes landlords refuse to pay back bonds that are properly due, in the hope that the tenant will give in and not press for the money. This is a very real problem affecting lower income groups. Often the sum concerned may be equal to a week's or a fortnight's wages to the person concerned. However, the tenant is worried that it will cost him most of the bond to have a solicitor press the landlord and issue proceedings.

The same type of problem can also occur for middle income people as well, despite the fact that their income and capital assets are much more substantial. A typical example of this problem is a middle income person who becomes involved in a complicated town planning matter where substantial business resources are on the other side. He can be faced with lengthy hearings before town planning committees and appeal tribunals. It soon becomes apparent that he just cannot hope to pay for the fees necessary to get adequate representation, unless he is able to band together with other citizens and/or planning groups and/or preservation societies with a common interest. His failure to obtain legal services may mean that the citizen loses his case by default through lack of skills in obtaining and presenting the essential evidence for such planning procedures. Many lawyers contribute their time free to environmental and preservation socieites but this does not solve the problem of the middle income citizen embroiled in a town planning dispute.

(c) *Failure to make contact with a lawyer* – This is not so much a problem with middle income groups who are in the habit of referring to "my lawyer, my stockbroker, my accountant". However, it is very much a problem with lower income groups who can be deterred by the atmosphere of many legal offices. This is often expressed by apologies about coming into the office "in working clothes". This problem is even more accentuated with Polynesians. On many occasions Advice Bureaux have referred Maori or Pacific Islanders to solicitors to deal with urgent legal problems, only to find out that the person concerned

has become completely overcome and confused by the referral system and never made the further appointment. We do not know at present what eventually happens to these "lost" referrals but can only assume that the majority of them never do get adequate legal assistance.

(d) *Inaccessibility of lawyers* – Legal offices are usually situated in the central city area or in the more affluent suburbs. The manual worker will usually have to travel some distance from his home or work to get to the lawyer's office. Also, most legal offices are open during the same working hours as their potential clients. This in itself can be inconvenient and expensive in lost wages.

(e) *Non-availability of legal aid* – Although civil legal aid works effectively, there are gaps in its availability which cause problems. Such gaps are in relation to legal advice, divorce, some types of administrative tribunal work, etc. As far as criminal legal aid is concerned, the problem is one of getting competent legal representation because of the present low scale of legal aid payments.

(f) *Uneconomic litigation of small claims* – All too often, disputes which are of great importance to the people concerned do not involve sufficient money to justify the outlay necessary to procure the legal skills required. This is particularly true of disputes between home owners and tradesmen, disputes over the purchase of furniture and home appliances and disputes between private individuals over the purchase of second hand motor vehicles. There is always the danger that such a dispute will just eat its head off in costs, with the suspicion on the part of the clients concerned that the only people who made out of the proceedings were the lawyers.

(g) *Lack of knowledge of specialisation among lawyers* – On some occasions, clients fail to obtain a solicitor who has the requisite expertise for the particular problem concerned. A major cause of this is that solicitors cannot advertise their areas of specialisation.

(h) *Limited knowledge or expertise of lawyers* – Most lawyers have neglected those areas of the law which greatly affect the poor and disadvantaged – social welfare law, landlord and tenant, consumer law, civil rights cases, immigration, Maori land law. Largely because these areas cannot sustain the normal office fee structure.

(3) Factors which have accentuated these gaps

Recent trends in our society and the legal profession have caused these gaps to widen:

(a) During the 1950s and most of the 1960s, New Zealanders maintained a strong sense of egalitarianism, but over the last 10 years the trend has been for the differences within our society in income and assets to grow wider, so that there are much clearer gaps between the rich, the poor and the middle income citizens. All too often the legal profession has been clearly identified with the large income earners and as owners of substantial capital assets.

(b) The property boom of the early 1970s in Auckland and many other cities and towns of New Zealand raised the expectation level of many lawyers as to their appropriate standard of living. Profit became an increasingly important feature of legal practice and references in the newspapers to the average earnings of solicitors from all sources and Interfirm comparisons have acted as a spur to all those who were earning below the median.

(c) Costs of employing staff and replacing accounting, dictaphone and typewriter machines have greatly increased in the 1970s, spurred along by the very high rates of inflation since 1973. Many other items, such as practising fees, professional negligence indemnity and fidelity fund contributions have continued to climb during the same period. The high rates of inflation have also caused many practitioners to worry about providing an adequate future income for their eventual retirement.

(d) There has been a significant increase in the standard and size of the offices and their furnishings. Prior to the 1960s, carpeting would have been common in Auckland only in the partners' offices, and the overall atmosphere was Dickensian. During the 1960s, carpet might be found in most of the offices, with linoleum in the passageways and typists' areas. Over the last 10 years, more and more offices have become carpeted throughout with ever increasing standards of quality in the carpeting. A similar increase in the size of the office in which the legal practitioner works has been noticeable. The standard of furnishings and office desks, chairs and other equipment has also kept pace with the improvements in the quality of the offices. This has obviously meant much more congenial working conditions for the legal practitioner, but, at the same time, it has added very substantially to the overheads of many legal offices, particularly as the rents in the more modern and expensive buildings have also inflated with monotonous regularity. A few offices have now become so opulent that they could pass for oriental pleasure domes.

(e) The changes in the legal education system during the 1960s and 1970s have included a change from part time study to full time study. Instead of legal offices having the services of young clerks in their second or third year at University to do the menial legal work, most students complete their full time legal course of three – four years before joining an office staff. By this stage they already have an LLB and are often more orientated towards complex legal problems than

the run of the mill dispute which the average citizen is most likely to be involved in. The draining of the pool of the cheap labour provided by the part time law students of the 1960s has been an added cost to the legal services offered by most law offices.

(f) All this has resulted in the tendency for more and more firms to become centre city practices who cannot afford lower income people as clients. These fringe clientele are unable to pay the price of the services being offered and may feel uncomfortable in the tasteful reception areas. Sometimes they are able to find substitute lawyers in the suburbs. All this has added up to the passing away of the family lawyer. Those firms that still do act as family lawyers are finding it increasingly difficult to be economic in comparison with other centre city legal firms, especially with the current low turnover in conveyancing work.

(4) How are these gaps being dealt with at present in New Zealand

(a) *Legal referral services* – In New Zealand a number of steps were taken in the 1970s to assist and deal with the problems outlined above. So far as the problems of recognising that a lawyer can help and making contact with lawyers the initial steps in this regard were made with the establishment of Advice Bureaux and legal referral systems attached to them.

Although some preliminary steps were taken in Christchurch prior to 1970, the first fully fledged and operating Citizens Advice Bureau was started at Ponsonby during 1970 and opened its doors in October 1970. This Advice Bureau was the first of those operated under the control of the Auckland City Council with supporting voluntary workers and local community support.

Since 1970 the number of Advice Bureaux type of legal referral services has grown to approximately 40. These are spread throughout New Zealand.

The existence of the legal referral panels at Advice Bureaux has helped to identify the problem of people who fail to recognise that a lawyer can help them and also the continuing problem of getting people to actually go to a lawyer from an Advice Bureau once it is realised that they do have a definite legal problem.

(b) *Small Claims Tribunals* – One attempt to deal with the problem of small uneconomic claims has been the Small Claims Tribunals created in New Zealand under the Small Claims Tribunals Act 1976. At present small claims tribunals operate at Rotorua, New Plymouth and Christchurch. They have been in operation for less than a year and it is too early to measure their success.

The fact that such tribunals are needed, points out the dilemma that the mere fact that legal services take place. Alternative legal systems tend to spring up, either officially such as in a Small Claims Tribunal or alternatively in unofficial methods of resolving disputes. For example, in India a traffic accident is likely to be dealt with on the spot by an unofficial jury comprised of the onlookers who will argue over the question of fault and arbitrate some kind of judgment which is accepted by the parties to the accident on the spot, thus avoiding the notorious delays of the more sophisticated official Court system.

(c) *Civil legal aid* – Civil legal aid is generally accepted as operating successfully, although some complaints are made that certain fields of law should be added to this, eg legal advice and divorces, and that the scheme should be extended more effectively into Maori Land Court work and administrative tribunals.

(d) *Criminal legal aid* – The criminal legal aid scheme is creaking at the joints and is ripe for demolition. No access to a solicitor of one's own choice, no right of appeal against refusal of aid, fee scale determined by the Court – these aspects, together with the totally unrealistic rates of payment, are the most obvious deficiencies.

(e) *Operation of the Neighbourhood Law Office* – The Neighbourhood Law Office commenced operation in 1977. It has therefore been running for only a limited period of time. The case load has been building up steadily during September, October, November and December. The range of cases dealt with as at 31 December 1977 is:

	Telephone Advice	File Opened
Matrimonial	196	49
Traffic	50	22
Summons	19	8
Adoption	3	3
Maintenance arrears	4	5
Paternity	39	11
Criminal	69	33
Repossession HP	63	22
Tenancy	19	6
Estates	14	3
Maori land	5	3
Immigration	12	1
Neighbours	4	3
Wills	9	1
Accident Compensation	3	1
Custody	21	7
House purchase	19	4
Change of name	8	3
Miscellaneous/not classified	308	42
	865	227

The community in the Grey Lynn area appears to be accepting the Neighbourhood Law Office but this will be a continuing growth process. The staff of the office comprises a full time salaried solicitor, a second solicitor working part time in a voluntary capacity, a community worker and a typist/receptionist assisted by practising solicitors and students working in a voluntary capacity.

(f) *Duty Solicitor scheme* – The Duty Solicitor scheme meets an important need. Any person appearing before Court is likely to be anxious and confused. The Duty Solicitor scheme ensures every defendant facing a charge of any magnitude receives basic legal guidance. The present system of rostered volunteers does present administrative problems and the rate of remuneration has not been increased in the three years since the scheme was introduced.

(5) What more can be done

If the legal profession accepts that legal services should be accessible to all citizens, then we are further away from that ideal in 1978 than we were 10 or 20 years ago. In private legal practice there has been a greater emphasis on profit and less on service to the community, and increasing identification of legal practitioners with private enterprise business, particularly during the 1970-73 property boom in cities like Auckland when many practitioners became financially involved in property development and other linked businesses.

We believe that the legal profession has an obligation to ensure that legal services reach every sector of the community and we make the following proposals with a view to achieving this:

(a) The first essential is to identify the gaps more accurately and this will require comprehensive and detailed research work.

(b) Once these gaps have been identified in greater detail, then it will be necessary to evaluate the information and correlate it properly. The temptation to generalise and to apply the same measures throughout New Zealand must be resisted. In some areas the answer may be a Neighbourhood Law Office, in others, the problem may be solved by an increase in the Criminal Legal Aid fees.

(c) The existing civil legal aid should be extended into new fields like legal advice and divorce, and made more effective in fields like Maori Land Court and Administrative Tribunal work. The present indirect use of the legal aid procedure by the Social Welfare Department should be reviewed.

(d) The criminal legal aid fee structure must be revised as an urgent necessity, but in the longer term the whole scheme needs to be overhauled and all legal aid schemes integrated under the control of an independent statutory authority, eg a Legal Services Corporation. In particular, legal aid spending should be rationalised so that it will really help to narrow the gap between legal resources and community needs.

(e) A further solution is likely to be the spread of Neighbourhood Law Offices, however, this must not be classed as a panacea for all problems. Once again, proper evaluation of the needs is essential.

(f) Provided the present experimental trial period in the use of Small Claims Tribunals continues to be successful, then these should be encouraged.

(g) The present trend of diverting matters from the Court system into non-judicial or quasi-judicial bodies like Ombudsmen and Small Claims Tribunals is an effective means of narrowing the gaps and can be taken further. In Canada they have a "Rentalsman" to arbitrate landlord and tenant disputes. Family Courts in Canada also place the emphasis on conciliation and negotiated agreement rather than litigation and we should adopt a similar approach. The adversary system often only aggravates family law problems.

(h) The Duty Solicitor Scheme should be reviewed. The number of duty solicitors in the larger Courts could be reduced and more use made of lay assistance. A good deal of the duty solicitor's work is routine and could well be done by lay assistants. For a while in Auckland, Maori and Pacific Islander assistants were employed in this capacity, particularly in the Children's Courts. Often such lay people are better able to relate to the people they are seeking to help than the legal practitioner.

(i) Further consideration should be given to the introduction of a Public Defender Scheme and detailed research on the effectiveness or otherwise of this scheme is imperative. However, from the limited information obtained to date, neither of the writers of this paper favours the introduction of a Public Defender Scheme.

(j) Positive steps should be taken to encourage lawyers to start law firms in suburbs that need them and where the work itself is unremunerative. In particular, the Law Society could give help and guidance in the organising and building up of such practices, other lawyers and legal advice services could be encouraged to send clients to the new firms, the prohibition against advertising could be suspended for a limited period of time, and finance arrangements in the form of capital loans for equipment could be provided or arranged. Lawyers without the requisite three years experience could be encouraged to set up practice on their own account in areas currently underprovided with legal services, subject to certain conditions to ensure protection of the public. A senior

practitioner or the Law Society might provide the necessary supervision. It could be a condition of practice that the practitioner does not handle trust funds for three years.

(k) If the legal profession accepts that it is responsible for providing all sections of the community with adequate legal services then it is important that this obligation should fall as equally as possible on all lawyers. A simple system of differential practising fees could be introduced, so that the lawyers who are providing services to the poorer and disadvantaged would pay less than those who are not. At present, some firms and some lawyers do more than their fair share of unprofitable work.

(l) The Citizens Advice Bureau system could be more effective if a Bureau or several Bureaux exployed a lawyer between them. His job would be to assist with the training of volunteer interviewers, deal with legal problems and institute legal education programmes in the community. A number of Citizens Advice Bureaux in England now employ lawyers as full time staff members. These lawyers impart legal knowledge to specialist groups such as tenants protection socieities, civil rights groups and solo parents groups and encourage a do-it-yourself approach.

(m) Better use of para-professional staff would help to reduce the cost of legal services. Legal executives are already used by many of the larger firms and their effectiveness could be increased if they were allowed a limited right of audience in the Magistrate's Court, eg to obtain a judgment summons order or an adjournment.

(n) Larger law firms should be encouraged to second solicitors on their staff to work with Citizens Advice Bureaux or the Neighbourhood Law Office. Precedents for this are plentiful in the United States and in England.

(o) Positive steps should be taken to provide more continuing education in neglected areas of law such as social welfare law, landlord and tenant, immigration law, consumer law and civil rights. A legal resource manual should be compiled giving practical information on those areas of the Law most likely to affect the layman. An Australian manual of this type has already been most successful.

(p) Further steps should also be taken to train lawyers in basic human understanding of the clients that they serve. Some matters are purely public relations, others require a more effective means of legal education in the relevant sociological aspects.

(q) Detailed investigation should be made into the possibility of introducing a legal fees insurance scheme by which people could obtain insurance cover for future legal services as part of their premium, say, on their life and/or house insurance policies.

(r) Further steps should be taken to humanise the Law and make our Courts system more understandable to the ordinary citizen. Already the lay assistance of the Friends at Court scheme is of considerable value, but much of the procedure and format of the current Court system is an enigma to everyone apart from the practising Court lawyer.

(s) Positive steps should be taken to obtain a greater appreciation of Polynesian cultural values and structures and to use them to enrich our present legal system, which is still almost entirely oriented towards the original British model. Our legal system would then be multicultural, combining the best of Polynesian and Pakeha values and structures, and therefore relevant to all sections of the community.

(t) Finally, increasing thought must be given to renewing our legal system by supplying remedies for new wrongs that are at present arising without redress.

Conclusion

We believer that this subject is an open-ended one which defies the normal quick summary of salient points. Instead we raise one further but fundamental question:

Are we right to look upon the deficiencies listed in the sections above as gaps in a system which is basically comprehensive or have the gaps grown so wide that it would be truer to say that the legal profession now only provides part (and a small part at that) of the legal services required by the citizens of New Zealand?

The chihuahuas – It was not until this case that I realised that the Court was required to decide the fate of family pets, but I see that by the Act they are "family chattels" by definition.

Rosita was purchased in 1971 and Pablo in 1972. Each cost $50. Both parties claim to have purchased the first dog but are agreed that the second came from race winnings. The wife has had "custody" since December 1976. They seem to be costing her a small fortune in veterinary fees. Mr Boyle submitted that each party should have a dog, but applying the principles applicable to the custody of children I feel they should not be separated. In cross-examination the husband admitted that two King Charles spaniels, a pointer and a labrador were regular visitors to his home. I do not see them as appropriate company for such delicate animals as Pablo and Rosita. The dogs will be vested in the wife. *Pence v Pence* per Roper J.

THE DUNEDIN CHILDREN'S BOARD IN OPERATION

LOUISE M. CROOT *describes the operation of the Dunedin Children's Board.*

Preamble

There are 56 Children's Boards sitting in 75 places throughout New Zealand. They were set up by the Children and Young Persons Act 1974. A Board consists of three permanent members (a representative of the Social Welfare Department, a representative of the Police Department, and one appointed by the Department of Maori and Island Affairs) and a number of community-nominated resident members called "community members" in the article that follows. There are six community members in Dunedin who sit in rotation once every three weeks.

The Dunedin Board, like others, deals with children under 14 who have information laid about them by the Social Welfare or Police Department. Each board is autonomous and develops its own style of functioning.

A board is thus a combination of individuals with differing attitudes, backgrounds and skills, but with the collective aim of some preventative action resulting from the meeting with the boy or girl and his or her family. The way an individual board works is thus the sum total of the interactions that develop. The group dynamics are vital to the effective working of the group.

Dunedin Children's Board

It is now three years since the initial meetings of the Dunedin Children's Board, when the scope of the legislation and the procedures were discussed. More than that too; where we met each other to explore how as a Board we could help achieve the preventative-work concepts of the legislation, as well as the tasks set out by the Children and Young Persons Act 1974.

As a community member, I feel the role the Board plays as a helping, caring and resourceful unit for the families referred to it from the community, is vital. The resources the community provides need to be known and the skills of suitable referral are also essential. Co-operation and sharing with the aim of independent functioning are my goals for the families we see. Very idealist? Perhaps. But an aim nevertheless.

The Dunedin Board meets regularly every Tuesday and Thursday morning, starting at 9.30. Our neutral-ground meeting-place is in an insurance building in the centre of town. The room itself is an informal, warmly-coloured environment with low tables, comfortable chairs, a box of tissues and an ashtray. A blackboard can be used by playful pre-schoolers. The waiting-room has some toys and reading material, and is separated from the other room by a corridor. The tea lady calls at both venues.

Our secretary, who is crucial to the atmosphere created for positive co-operation and understanding, invites the families, who come to notice through police or Social Welfare complaints, to attend the Board meeting. Each written invitation is individual now, in the sense that a set form is not used. If there is no reply in a reasonable time a phone call is made, or sometimes a home visit is made. At other times a second invitation may be sent if no contact can be made. It is preferable for the child and his or her family to come to the Board, hence the effort. One pleasing result is the number of fathers who attend; some "separated" fathers coming at a different time also.

Our meeting times are flexible for special situations such as the one mentioned. We may meet in the afternoon for some families, have made home visits to out-of-town families, and difficult situations.

On arrival the faimily are met by the secretary, who explains further to the written invitation, details of what happens at a meeting with the Children's Board. Meanwhile Board members have been given a copy of the complaint to peruse. The family are introduced to the Board members by the secretary, who then retires to the waiting room. An average time of an hour is spent with the family, but this varies according to the situation and needs of the family. Firstly the complaint is discussed and the factors leading up to and surrounding the situation. Many interaction and communication patterns evolve, and at times the Board may discuss matters with a child alone, with the mother alone, the parents or any other appropriate combination of people in attendance with the child. As we deal with children under 14, and this includes babies, toddlers, school children and young adolescents, we find this flexibility to meet needs invaluable.

Many things are said, tears are shed, laughs are

shared, decisions are made, warnings are given, counselling is done, permission is asked for further reports to be obtained; an adjournment of a decision may be suggested to allow the family or the child to achieve certain goals or make decisions in a given time; family coping skills may be assessed; referrals are made with permission for further social work support. We use a variety of s 7 statutory statements with the aim of meeting the needs of the child and the faimly with a view to co-operative achieving of results.

It can be a forceful, stimulating time with the opening up of horizons for positive results that will benefit the whole family, but it can also be a time of calculated tension. Who knows what the outcome will be? Given the opportunity to achieve the prevention of further complaints, the tasks are set realistically, and knowledge has been given as to where to go for help, including ringing the Board secretary.

Some come only once, cope with the crisis, others return either for support and reporting achievements, or to cope with further complaints. Those over 14 don't return to the Board, but at times their families still come with younger children. Complaints are returned for action too, especially when a young child is in need of control and care and protection. Offences are closely tied to these prevention aspects of the legislation, so action is needed.

To encourage the concept of "early referral" to achieve the preventative aims of the legislation, Board members have undertaken public speaking and teaching roles. A variety of community groups have been addressed and questions answered. School classes studying social control in Form II have been addressed. This was achieved in four sessions over two mornings, as the members wanted workable groups. Many issues and community concerns can be discussed and resources tapped for early referral for help to the Board secretary, the Social Welfare or police Youth Aid section. The Board therefore plays the role of helping families in need in a positive way as well as through complaint action. In this way too it can be an advocate for children, their stresses and family problems in today's world.

Cross-cultural problems arise in our area, and we need the resources of our community with interpretation of language, understanding cultural life-style patterns that differ, and support from the community for the family in need. By knowing our resources we can achieve this task with a minimum of effort and a maximum of goodwill.

The Dunedin Board involves parents and children in communication activities with each other and gains where possible their co-operation in a search for a solution. It is a total group situation with assessment and helping skills that make the interview totally different from one with a social worker, Youth Aid representative, magistrate or any other authority figure.

APPENDIX

Total Figures for First 3 year Term (1 April 1975 – 1978)

Ages

Under 10	– 186
10 – 13	– 211
Over 13	– 203

Child Accompanied by

Both Parents	– 257
Mother Only	– 75
Father Only	– 9
One Parent Home	– 185
Other than Parent	– 15
In Absence	– 59

Result

Warned/Counselled	– 282
Other Counselling	– 189
Psychological Medicine	– 22
No Action	– 17
Court	– 90

Referrals from

Court	– 4
Police	– 403
Social Welfare	– 193

There have been 455 children involved in 600 matters for referral to the Children's Board in Dunedin.

Thanks to Miss V Hoyne for preparation of these figures.