THE NEW ZEALAND
LAW JOURNAL
21 JANUARY 1988

Respect for legal systems

At the time of writing the appeal in Malaysia in respect of the Cohens has not been heard. Irrespective of the result of that appeal however it has to be said that the news media (particularly Australian TV) have been extraordinarily foolish and biased against the Malaysian system of justice in its coverage of the Cohen trial. "White Australia" attitudes certainly showed through.

It is regrettable that so much of the commentary on the Cohen trial has been an open or a covert attack on the integrity of the Malaysian legal system and the Malaysian judiciary in particular. An understandable, indeed commendable concern about the death penalty has been turned by implication into an attitude that New Zealanders and Australians should not be subject to the laws of barbarous nations. Such an attitude is insufferable. Here is displayed a chauvinistic sense of racial superiority at its worst. Unfortunately it is not just restricted to this end of the Anglo-Saxon world.

An article by Gavin McFarlane in the *New Law Journal* for 20 November 1987 considers some recent situations that have arisen in England and the extraordinary comments that have been made there about foreign legal systems. The article deals mainly with cases involving British subjects in Europe. Gavin McFarlane refers to two specific cases, one that has led to much controversy, one that might, and the general issue of drug cases. The first case referred to is the trial in Sweden of a Captain Hayward. The charge and the result of the trial are not given, but what happened in that case was that Captain Hayward was charged with drug smuggling and convicted. There was great media interest in the case.

The trial and sentence apparently caused an outcry in England. One member of Parliament, a Mr John Gorst was reported to have referred to the case as a very grave miscarriage of justice and to say that he considered Captain Hayward to be innocent. He was then quoted in *The Independent* of 11 August 1987 as saying that Captain Hayward was convicted:

> largely on hearsay evidence which would not have been accepted in a British Court. It is only one more in that long list of violations for which Sweden is now notorious in the eyes of civilised Europe. Sweden has got to do a great deal to improve its judicial procedures if it wishes to stay in the Comity of Europe.

In the same newspaper article Sir David Napley, a past President of the Law Society, and the author of *The Technique of Persuasion*, said that hearsay evidence had been admitted that could not have been given in an English Court. He described the Swedish legal system as deplorable and said that once someone was charged in Court it was extremely rare for there to be an acquittal.

Drug smuggling and trafficking is unfortunately putting severe strains on all legal systems including our own. Gavin McFarlane refers to those cases where the accused says that he or she knows nothing about drugs found in their bags or in a secret compartment of their car and that they must have been put there by someone else. Those who have to deal regularly with these sort of cases are said to refer to this as the "Momma packa de bag" defence. This defence very seldom succeeds in England either before a Judge or a jury.

Gavin McFarlane goes on to refer to the trial due to take place soon in Belgium concerning the soccer fans and the riot at the Heysel stadium. He suggests it would be as well if the media in England did not comment in extravagant language on the trial which would follow the inquisitorial and not the adversarial form. He writes:

> The fact is that most European countries operate the inquisitorial system of criminal justice, in which investigation and magisterial examination bulk large. It is probably the case that the part which eventually takes place in Court before the eyes of the public may simply be putting an official stamp on a decision which in practice has been largely, if not wholly, arrived at previously. But that should not itself detract from a legal system with differing features. There is a much greater emphasis on what takes place at an earlier stage before the examining magistrate. The British adversarial system has historically been much more like a game played on the public stage, and some would say that it has erred too much in favour of the wrongdoer. . . . Criticism of foreign legal systems of the kind which has appeared in the British Press this year is likely to do no more than alienate the local population against Britons who have been brought before their Courts. A more constructive approach will serve our citizens better.

The same good advice should apply to the media in New Zealand in regard say to criminal trials in Malaysia or other Asian countries. Not all trials, even here, are beyond criticism, but the form in which this is expressed needs to show some understanding of other countries, their culture, their problems and their systems. No legal system can be perfect, but it is gross arrogance if we take the view that our citizens are entitled to be tried and punished differently from the citizens of a foreign country if they are alleged to have committed offences there. Neither a New Zealand nor a British passport should be seen as a shield from the full force of the criminal law of foreign countries.

P J Downey

Case and Comment

Statutory interpretation

Real Estate House (Broadtop) Limited v Real Estate Agents Licensing Board, [1987] BCL 1311 involved relatively simple facts. A real estate company changed its name from D J Lovelock & Co Ltd to Real Estate House (Broadtop) Ltd. The question was whether the Real Estate Agents Licensing Board had to approve that name under s 25 of the Real Estate Agents Act 1976, or whether the change of name should have been endorsed on the licence automatically. The argument in favour of the latter alternative, put forward by the company, was as follows. Section 25(1) of the Act originally provided that

> no licensee shall carry on business as a real estate agent under any name that is not –
> (a) His own name; or
> (b) Where the licensee is in partnership with any other person, the name of the firm or of one of the partners;
> or
> (c) In the case of a company, the name of the company – unless the name has first been approved by the Board.

Section 2, the interpretation section, provides in subs (2) that unless the context otherwise requires, every reference to a real estate agent in the Act applies to a company carrying on the business of a real estate agent. As s 25(1) originally stood, there could be little doubt that the context did "otherwise require": para (c) dealt specifically with companies, which meant that para (a) must have referred only to natural persons.

However in 1982 s 25(1)(c) was repealed. Counsel for the company argued, inter alia, that the result of the repeal was that para (a) now bore a new meaning: whereas it had previously not covered companies it now did, because without para (c) there was no context requiring any other interpretation of "his" than the one provided in the interpretation section. Thus, section 25(a) now applied to companies, and there was no need for approval of the new name under the section.

The Court of Appeal rejected this argument, and held that approval was required. Para (a) had not changed its meaning, and still referred only to natural persons.

The case raises two interesting points of statutory interpretation.

First, the Court held that in interpreting a statutory provision it is permissible to refer to part of the provision which has been repealed. A reference to the repealed para (c) clearly showed that para (a) originally had a limited meaning, and, in Cooke P's words, "manifestly that paragraph was intended to continue to mean what it has always meant." The fullest discussion of this point is in the judgment of Somers J, who relies on the case of *Attorney-General v Lamplough* (1878) 3 Ex D 214 where the identical point was decided. In that case Brett L J said:

> I do not say that the effect of repealing a portion of a statute can never be to alter the remaining portion of the statute . . . ; but where in the statute which is to be repealed there are separate and distinct enactments, and the repealing statute simply repeals one of those enactments, it seems impossible to construe the meaning of the repealing statute to be that it thereby gives a different meaning to the enactments with which it does not assume to deal at all.

Somers J noted that *Lamplough's* case had been mentioned with approval in the New Zealand Court of Appeal on several occasions, most notably *Horne v Dalgety & Co Ltd* (1913) 33 NZLR 405, *Public Trustee v Sheath* [1918] NZLR 129 and *Marx v Commissioner of Inland Revenue* [1970] NZLR 182. A contrary suggestion in *Bennion on Statutory Interpretation* to the effect that repealed provisions "are to be treated as never having been there, so far as concerns the application of the amended law for the future" was not followed.

With respect, the Court of Appeal's approach seems clearly right, but it does create at least one problem of a practical kind. If the Act is reprinted incorporating amendments, the original repealed provision will not appear in the reprint, and there must be a real danger that a reader, giving what is left of the section its natural meaning, will interpret it incorrectly. It is an assiduous lawyer indeed who turns up the old volumes to check the original form of all repealed provisions in a statute he is reading.

No lay reader would ever think to do so. Yet the effect of *Broadtop* is that sometimes repealed provisions are part of the context of the current section, indeed a part of the context without which the current section cannot be properly understood. Casey J was particularly struck by this problem:

> . . . (A)nyone reading the section in future could accept the plain meaning of its language, without requiring a knowledge of its history, or the legal sophistication needed to appreciate the significance of the repealed section or of any footnote referring to it. To provide for approval of a company name in this rather clumsy way runs counter to the repeated calls for clear and unambiguous drafting.

Cooke P and Casey J both expressed the hope that Parliament might intervene to tidy and clarify the drafting of this section as it now stands.

The *second* matter of interest appears in the judgment of Cooke P, and adds further authority to the growing list of cases where the Courts, especially the Court of Appeal, have referred to extra-statutory aids to assist in the interpretation of statutes. The old taboos are being well and truly exorcised. Members of the Court of Appeal, especially Cooke P, have now on several occasions referred directly to Hansard: eg *Marac Life Assurance Ltd v CIR* (1986) 9 TRNZ 331, 337-8, 345, 350, 353, 355; *Proprietors of Atihau — Wanganui v Milpers* [1985] 2 NZLR 468 at 478, *Director-General of Education v Morrison* [1985] 1 NZLR 430 at 435, *NZ Food Processing IUW v NZ Meat Processors IUW* (1986) NZ Employment Law Cases 78-059 (CA) and, most explicitly, *NZ Maori Council v Attorney-General* (The Treaty of Waitangi case) (1987) 6 NZAR 353 at 364. Far from regarding this as dubious practice, Cooke P in the *Maori Council* case said that not to refer to Hansard in a case of such national importance would seem "pedantic and even irresponsible". Yet, so far, it cannot be said that reference to Hansard has been of any great assistance. (Perhaps the case of which that could most nearly be said is *Marac*.) Cooke P acknowledged this in the *Maori Council* case, saying that this was one of the reasons for the "former practice" of never referring to Hansard. In *Maori Council* His Honour had the impression that the Members of Parliament who took part in the debate thought the Act would have the effect contended for by the Crown in that case, but the lack of discussion made that understanding on this point inconclusive and of no real help. Probably Hansard will seldom be of great assistance, simply because the point before the Court will seldom have specifically occurred to the Members and been discussed by them: what is significant is that the Court of Appeal is now prepared openly to peruse *Hansard* to *see* if help is forthcoming from its pages. That is a very substantial shift of practice.

The significance of the *Broadtop* case is that it opens the way to legitimising yet another aid which was once regarded as prohibited: the explanatory note to the Bill. In this instance the note read, helpfully:

> The effect of this clause is to ensure that the prior approval of the Board is obtained before a company name is used in respect of any real estate business.

Cooke P noted that such a note (or a speech in the House) could not be allowed to alter the meaning of an enacted provision which was clear beyond doubt. But here the provision was not clear in the sense contended for by the company, and His Honour was prepared to consider the explanatory note. In the end it simply confirmed the interpretation the Court had placed on the section.

Many will say that reference to such aids is sensible, and a good thing, because the Court's task is to divine the intention of the legislators, and what more direct evidence could there be of it? The Courts are at last marching in step with the legislature. But doubters there will still be too. They may ask why direct evidence is available of the legislature's intent when it is normally not admissible in respect of the intent of the makers of other documents, eg wills and contracts. The more politically minded may also argue that what one discovers when one looks at such sources is not really evidence of the legislature's intent, but rather evidence of the intention of the government Department which prepared the legislation. The Minister's speeches in the House (the most potentially fruitful part of *Hansard)* are written for him by his Department; and the explanatory notes to a Bill have a fair input from that source as well. The detractors may say that government officials already have enough power in preparing legislation and assisting it through the House, without also being able to tell us how to interpret it: in the past, saying what an Act means has been seen as the constitutional function of the Judges alone. An interesting case may someday arise where Parliamentary Debates, or an explanatory note to a Bill, suggest an interpretation which the Judges find inimical to established judicial traditions of justice and legal propriety. In such a case would they go along with the intent appearing from those sources, or would they assert the Court's traditional power of *controlling* the legislative intent by giving the words of the Act the meaning they, the Judges, would wish to see them bear? Perhaps a difficulty in looking at Hansard, and other extra-statutory material, is that one day they may tell you something you would rather not know.

J F Burrows
University of Canterbury

It's the law

The village of Lakefield, Ontario, passed noise-abatement legislation which permitted birds to sing for 30 minutes during the day and 15 minutes at night. The city council clerk who wrote the legislation, Earl Cuddie, was flooded with calls from all over Canada asking how he would get the birds to stop singing. Cuddie admitted, "I guess I drafted the law in such a hurry I just didn't stop to think."

Lawrence J Peter
The Peter Principle Revisited (1985)

A second Chamber of the New Zealand Parliament?

By R J O'Connor, a Christchurch practitioner

In this article the author suggests that the return to a bi-cameral Parliament could help in the resolution of the issues of uncontrolled executive power and of proportional representation. At a time when constitutional issues are very much before the country, with the two issues of a proposed Bill of Rights and of proportional representation, the question of a second Chamber deserves further consideration. In this article he looks at the need for a second Chamber, and the form and powers such a Chamber might have.

In the light of recent statements by the Government concerning proposed changes to the constitutional and electoral framework in New Zealand it is appropriate to consider alternatives to those proposed. Specifically in the area of controlling executive action it has been mooted by the present Minister of Justice that New Zealand adopt a Bill of Rights. In addition the Royal Commission on Electoral Reform has recommended that a form of proportional representation be adopted as part of New Zealand's electoral system. These proposals have provoked much public comment and some considerable opposition, and therefore alternatives should be considered.

The need for a second Chamber

In the first instance it should be determined whether a check on executive power in New Zealand is necessary. To the casual lay observer this country is a stable democracy, and will remain so for many years to come. Nevertheless it is not widely known, or even realised, that in this country there are no effective legal checks on executive power. Parliament is absolutely sovereign and its will prevails over all. The step from this to dictatorship is but a very short stride. The danger could easily show itself in the form of a strongly willed leader at the head of this dominant party in the House. He would only have to keep his party sweet or overawed, with the difficult members in gaol, and his power would be absolute. This is dictatorship.

The late D J Riddiford, a one time Attorney-General, said

> It would be folly for us with a history of only one hundred years to go by to say this danger is illusory, especially when we are faced with a world teeming with examples, ancient and modern, of men seizing absolute power and trampling on the liberties of nations who failed to defend them when it was in their liberty to do so.

Political and international instability abounds, and yet our democracy, which we hold so dear, is so unprotected.

New Zealand possesses a form of government which by very definition may be termed as an "elected dictatorship". While Parliament is elected triennially, the party dominating the House governs without effective fetter or control. I say without "effective fetter or control" as there are a number of apparent controls that can be said to exist.

The first of such controls takes the form of Cabinet responsibility to the House. This concept depends upon the Cabinet system which itself depends upon an organised party system within the House. The flaw in this form of control is that Cabinet is formed from among the leading members of the dominant party in the House. If Cabinet dominates the party, as it invariably does, it can control the House. How can Cabinet be effectively responsible to Parliament when it dominates the very same Parliament? Related to this concept of collective Cabinet responsibility is the notion of individual ministerial responsibility. This requires that a Minister answer questions in the House concerning

> **Experience, no less than philosophy, has declared unmistakably in favour of the bicameral system. But to devise a good second chamber; to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform — this is a task which has tried the ingenuity of constitution-makers from time immemorial.**
>
> **Sir John Marriott**
> *Second Chambers*

the activities of those Departments for which he is responsible. In recent times the passing into law of the State-Owned Enterprises Act has done much to erode the effectiveness of this concept by removing from ministerial control, and consequently Parliamentary control, the huge corporations created under that Act. Notwithstanding the passage of this Act Geoffrey Palmer said of the concept of ministerial responsibility that "neither collective responsibility nor individual responsibility seem to amount to much in New Zealand". [1] Indeed it is not since 1934 that a Minister resigned office because of the misconduct of his Department. In addition Constitutional conventions provide some measure of control, at least over the honest politican who is willing to obey them. Generally they are unwritten and uncodified. Convention has a peculiar status in that it is not law. It is sustained only by a general acceptance and recognition that one must behave in a particular way. Consequently if that "general acceptance" is lacking convention can be ignored with impunity. A further difficulty arises concerning the fact that convention is undefined and is extremely difficult to enforce.

A third possible control over executive power currently existing arises in relation to the role of the Courts in terms of reviewing administrative action. Sir Robin Cooke in the Court of Appeal has even suggested that there may be certain fundamental common law rights that cannot be legislated away by Parliament (*Taylor v New Zealand Poultry Board* [984] 1 NZLR 394, 398). Traditionally the Courts of judicial review have been primarily concerned with legality, however, in recent times, particularly in relation to cases of abuse of discretionary powers conferred by statute, Sir Robin has suggested that one may ask whether the complainant had been treated fairly. (*Daganayasi v Minister of Immigration* [1980] 2 NZLR 130). However this notion espoused by Sir Robin is only a developing one and generally the Courts when reviewing administrative action are only concerned with legality. As the legality, in the first instance at least, of a certain procedure or action is determined by Parliament, and as Parliament is controlled by Cabinet, one could argue that judicial review fails to provide an adequate check on the Executive.

A further existing apparent control on the power of the Executive is provided in the person of the Governor-General. Until 1986 the Governor-General's legal power to refuse the Royal assent to Bills was stated as follows:

> Whenever any Bill which has been passed by the said House of Representatives shall be presented for Her Majesty's assent to the Governor, he shall declare according to his discretion, but subject nevertheless to the provisions contained in this Act, that he assents to such a Bill in Her Majesty's name, or that he refuses to assent to such a Bill (New Zealand Constitution Act (UK) 1852, s 56).

However the Constitution Act 1986 repealed that section and replaced it with the following:

> A Bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent. (Constitution Act 1986, s 16)

The enactment of this new provision has given rise to serious doubts as to the continued existence of the Governor-General's legal power to refuse the Royal assent in that specific mention of the power to refuse has been deleted. Experienced commentators such as retired District Court Judge William Brown and the Member of Parliament for Marlborough, Mr Doug Kidd, have condemned the passage of the new provision.

It should be further noted that in this regard if the Governor-General still possesses the legal power to refuse the Royal assent according to Constitutional convention he may exercise such a power only and in accordance with advice tendered to him by his Ministers, that is Cabinet. Given this type of restriction Riddiford has concluded that the powers of the Governor-General are "dead letter".[2]

Fifthly by the way of existing control the Opposition party in the

Unelected opposition: The upper house

In Britain these days, the upper house of Parliament represents the only meaningful opposition to Margaret Thatcher's Conservative government. The peers have saved free busing for rural students, abolished caning in state schools and tacked $450 million worth of extra spending onto a social-security bill. Now they're preparing to saw through the Tories' legislative platform on taxes, education and criminal justice. Says Baroness Seear, a Liberal: "Without the Lords I don't know where we'd be — we'd simply have an elected dictatorship."

Instead, the country has an unelected opposition. Answerable to no constituency, the Lords are free to vote their consciences — or their eccentricities. The powers of the peers (who hold their seats for life) are limited; they cannot kill a Bill outright. But as the body charged with reviewing and fine-tuning legislation, they can delay a law's passage for as much as a year, and some of their "revisions" have been so extensive they are effectively defeats. During Thatcher's eight-year tenure the Lords have thrashed her 107 times. She has lost in the Commons only twice.

Most of the peers are in their 60s; more than a hundred are over 80. Apart from age, they are a diverse group. There are ex-prime ministers, an ex-coal miner and an ex-convict, as well as nine Nobel Prize winners, two card-carrying Communists and the world's leading expert on flying saucers. Sixty-seven of the Lords are, in fact, ladies.

Newsweek
1 December 1987

House provides a form of control in that it can publicise aggressive or improper Executive action. This however relies on a situation where the Opposition is allowed to function, and in the event of a crisis it may not be, and also on a public reaction sufficient to sway the minds of those in power. However recent examples of the Government's ability to ignore large bodies of public opinion would indicate the effectiveness, or rather the lack of it, of this type of control.

Perhaps the most effective form of control exercised over the Executive currently are triennial elections. Such require the Government to face the electorate at least on a regular basis. However when it is considered that most electors have neither the time nor the opportunity of knowledge to be able to scrutinise every detail of government it is realised how shallow this form of control is. New Zealand's electoral law is enshrined in the Electoral Act 1956, an Act which has been described as the most basic part of our Constitutional law.[3] Despite the fundamental nature of the Electoral Act it is an Act which a Government could amend or repeal at will without legal hindrance. Section 189 of the Act entrenches the basic provisions by requiring either a 75 percent majority in the House or a majority of electors at a national referendum to effect alteration. However when it is considered that s 189 itself is not entrenched in this manner, amendment or repeal of the Act would present no legal difficulty to a government with a majority in the House. Repeal of s 189 could be achieved by simple majority, and consequently the entire Act could be repealed in a similar manner. Thus any Government, which by very definition will possess a majority in the House, has the legal power to suspend triennial elections if it so willed.

Consequently having examined the various so-called "controls" on Executive power in this country it may be a fair conclusion to make that there are, if it ever came to it, no effective controls. Palmer has said that "Cabinet government poses an affront to the idea of separation of powers" (*Unbridled Power*, p 25), separation of power between the various arms of government being the epitome of control over executive action. Riddiford succinctly stated the position when he said

> As the only safeguard of our liberties we are thrown back on the spirit of the people, but how in the event of a violation of our liberties by a Parliament which refused to face an election could this spirit be expressed except by revolt. (ibid)

In order that we avoid the need to resort to the "will of the people as expressed by revolt" it is necessary to constitute a body or institution with the express object of monitoring the motives and actions of government. Such would not prevent change but would ensure that when such was necessary that it was considered carefully and in accordance with our traditions and the wishes of the electorate.

In recent times it has been proposed that a Bill of Rights be introduced to provide a similar check to that which I advocate here, however notwithstanding the lengthy list of objections to a Bill of Rights, it is as well to appreciate the limitations on the capacity of a Bill of Rights with judicial review to order society and contain social action. Palmer (*Unbridled Power*, p 134) quotes Justice Jackson of the United States Supreme Court who said:

> I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation and tyranny which have threatened liberty and free institutions.

In addition a catalogue of advantages may be cited to support the establishment of a second Chamber, notwithstanding and additional to the enormous practical need for such as detailed above. Firstly, and as Riddiford has said:

> For Parliament to consist of one Chamber, with the unlimited powers of Parliament today, is to violate both the principle of the impartiality of the tribunal and that of the necessity for a right of appeal.[4]

In New Zealand Parliament cannot claim to be impartial when

> The abolition of the Upper House, with powers nominally equal to the Lower, calls for a review of the reasons why a second chamber has so long been considered necessary. The empty form we can doubtless do without; now is the time to consider whether an effective second chamber should be established in its place.
>
> We are accustomed to hear that its principal function is as a revising chamber, and no one could without ignorance deny that it has done a useful service in pointing out the flaws and omissions in Parliamentary Bills. Indeed, without the Upper House, either it will be necessary for the House of Representatives to spend far more time in analysing Bills, or else special machinery will have to be set up. Unquestionably, an Upper House has a daily function to perform when Parliament is sitting which a Lower House, occupied by many other activities, would find it difficult to carry out.
>
> The function of an Upper House as a revising chamber is, however, secondary; this duty could be performed by some other body. Its primary function, its real purpose, is to be an essential check or balance in a stable constitution, to constitute a bulwark against tyranny or revolution, and to protect the rights of the community as a whole. There is always a danger that one chamber with supreme power will deem law, order, right, and justice to be whatever a Parliamentary majority decrees them to be, with the only check on its absolutism the necessity every three years of facing a General Election; but even this check is illusory, since Parliament may extend its own term of office, which happened here not long ago. Another way it can abuse its power is just before a General Election to alter the method of election when it knows its popularity is waning; this too has happened in New Zealand.
>
> **D J Riddiford**
> *An Effective Second Chamber*
> [1950] NZLJ 313

examining executive action as the very same Executive dominates Parliament, nor can it be said that any right of appeal exists from parliamentary decisions. Both of these requirements are fundamental to justice. Secondly, given that often the most significant and dangerous changes can occur piecemeal over extended periods of time a second Chamber would be in an ideal position to identify and prevent such from occurring. Further the recent Royal Commission on Electoral Reform recognised the colossal volume of work faced by individual Members of Parliament. A second Chamber would alleviate this by providing an additional source of Parliamentary personnel. In addition a second Chamber would effect a delay on the passage of legislation, and thus greater consideration could be given to Bills as they pass through the legislative process. This is a particular problem presently where legislation can conceivably be passed from Bill form into law within a matter of hours if the Government takes "urgency" on a matter.

Given the enormous practical need for a check on executive power and the various advantages that would accrue it is the submission of the writer that the best form of control on the Executive would be to constitute a second Chamber of Parliament.

The form and powers of a second Chamber

In the light of the continuing debate as to the shortcomings of our present "first past the post" electoral system and the perceived desirabilities of a proportional representation system it may be that the establishment of a second Chamber would provide the necessary means for compromise. While the certainty and stability provided by the "first past the post" system should, as far as is practical, be retained, there is an argument that there is a need for a greater degree of proportionality between the number of votes received by a particular Party and the number of seats won by that Party in the House. Such a balance, it is suggested, could be achieved by retaining the present method of electing members of the House of Representatives and at the same time constituting a second Chamber to be elected by a pure proportional system.

Such a system would have the dual advantage of retaining the desirable qualities of the "first past the post" system and at the same time alleviating its disadvantages. Under such a system members of the House of Representatives would continue to be elected, and represent their electorates, in the traditionally accepted way. In the same way governments would continue to be formed. However change would occur in that an intermediary tier between the House of Representatives and the Governor-General would be created. This "intermediary tier" in the form of a second Chamber would to some extent satisfy the demands of proponents of proportional representation and would also provide the very necessary check on executive power detailed earlier.

> It seems to me that a modern second chamber, in a country where the Cabinet and not the presidential system prevails, should have a delaying power only; in New Zealand, it should be at least one year, except for Money Bills, where the power to delay should be, say, twenty-eight days. It should have an absolute power to veto all Bills to prolong the life of the Lower House. There should be a written Constitution, which could be amended only after a referendum, with special rules as to the type of majority in such cases. The written Constitution should provide for the manner of determining electoral boundaries and the mode of election generally. The Upper House should have power in certain cases to call for a referendum.
>
> **D J Riddiford**
> *An Effective Second Chamber*
> [1950] NZLJ 329

There are two alternatives as to when elections for this second Chamber should be held. The alternatives would be to hold such elections at the same time as elections for the House of Representatives, or at some later time such as mid-way through the House of Representatives' term. In any event the proportion of seats gained by each Party in the second Chamber would need to reflect as closely as possible the proportion of votes gained. While, as recent general election results illustrate, no Party would gain a majority in the second Chamber, such would be achievable by two or more parties voting together. As this would require negotiation between the parties from issue to issue the Government of the day could not be permanently defeated in the second Chamber. Such could only occur if an issue was sufficiently controversial to bring together a sufficient number of votes in the second Chamber to defeat it. Consequently a second Chamber would provide the necessary check but at the same time not hinder the government's responsibility to govern. It is suggested that a coalition of parties such as would be necessary to defeat a particular measure would only be rarely necessary, and that permanent coalition arrangements be disallowed.

To ensure the adequacy of this check any second Chamber would need to be sufficiently independent as to be capable of standing up to a government when such was necessary. However as the government's first duty is to govern a second Chamber's powers should not be so extensive as to hinder the performance of this duty. It is therefore suggested that a second Chamber have the power to delay Money Bills for a period of one month with the power to delay all other types of Bill for a period of six months or even to reject them.

The record of governments voluntarily relinquishing power is not one to inspire confidence that change will occur easily. However the uncontrolled nature of executive power in this country and the need for greater proportionality between votes cast and parliamentary seats won are issues worthy of concern and consequently debate as to the remedies. □

---

1 Palmer, G W R *Unbridled Power* (1 ed), 1979, p 24.
2 Riddiford, D J, "An effective Second Chamber" [1950] NZLJ 313.
3 Palmer, G W R, Press Statement, 19 February 1985.
4 Riddiford, D J "A suitable second Chamber for New Zealand". [1951] NZLJ 102.

Halsbury and the New Zealand Commentary

By Sir Alexander Turner, former President of the Court of Appeal

During the 1987 New Zealand Law Conference a function was held to mark the commissioning of the last few Chapters of the New Zealand Commentary on Halsbury's Laws of England. *The two speakers were Mr Neville Cusworth, the Chief Executive of the Butterworth Group of companies, and Sir Alexander Turner who has been the Editor of the* New Zealand Commentary. *Sir Alexander spoke from some speech notes he had prepared for the occasion. The notes are now published in the informal way that Sir Alexander prepared them rather than having them rewritten to provide a formal article. At the end Sir Alexander conjectures about the future of* Halsbury. *It has now been decided in England that there will not be a fifth edition of* Halsbury; *but that replacement volumes will be issued for those that need replacement on a continuing basis. The first two volumes will be issued to subscribers during 1988.*

I am much honoured in being asked to speak this evening, and at the same time I am filled with gratitude and affection when I see around me so many of those who have laboured to bring the *Halsbury Commentary* almost to the point of completion. It is now nearly fifteen years since, about to retire from the position of President of the New Zealand Court of Appeal, and wondering a little how I should fill in the idle years of my coming retirement, I was one morning asked to receive in my Chambers at the Court of Appeal Mr Bob Christie the General Manager of Butterworths.

First approach

I knew Mr Christie slightly, I had at that time written and published the first two of my Spencer Bower books, *Estoppel by Representation* and *Res Judicata*. Although these were, of course, published in London, I had sent the scripts there through Mr Christie, and had had here contact and conferences with him as to the printers' proofs of these books as they arrived from England. Yet it was not about one of these that Mr Christie wanted to see me; he wished to ask, very gently, very tactfully, whether he could interest me, in my coming retirement, on being the General Editor for New Zealand of the *Commentary* on the new (fourth) edition of *Halsbury's Laws of England* which was about to commence publication in London.

Mr Christie did not disguise from me the task which he offered me would be a difficult, almost impossible, one. Indeed it was no less than to attempt to make the new edition of *Halsbury*, expected to include some 60 volumes issued over a ten-year period, a worthwhile purchase by the New Zealand practitioner. London was already fully aware of the fact that quite a proportion of the work in the new edition would be useless or irrelevant in New Zealand; and much more, though relevant to the New Zealand scene, would not be of practical value, indeed might be dangerous, unless accompanied by a reliable Commentary, each chapter written by a tradesman expert in the field of the particular chapter of which he wrote.

It must be my task, said Mr Christie, to find people capable of writing such Commentary, and having found them, to persuade them to write — by no means an easy matter. And to this must be added the further responsibility of scrutinising and revising the contributions written by such practitioners.

Mr Christie indicated to me that my opposite numbers in Australia would be Sir Gordon Wallace, lately President of the New South Wales Court of Appeal, and then both of us would be under the general supervision of the General Editor for Australia and New Zealand, Sir Garfield Barwick, Chief Justice of Australia.

Acceptance

Mr Christie, with unerring perceptiveness, timed his visit for exactly the right moment. I have never been a person to postpone decisions, and I made mine quickly, and said yes. From December 1973 I was the Editor in Chief Designate for New Zealand for this work. I

declined to commit myself to Butterworths as an employee, and in the result I was offered a Directorship in the firm, making my own hours and conditions of work. Butterworths leased for me a couple of rooms in an old building on Lambton Quay where I set out my own library and established myself in Chambers for several years, before transferring to a room at Butterworths when that company changed its quarters a few years ago.

I won't tell you in any detail about the next fourteen years. I remember *beginning* by publishing a page in the *New Zealand Law Journal* in which, about to embark upon my terrifying undertaking, I likened myself with due modesty to King Henry V calling his lords to battle; and pointing out to reluctant members of the profession how nice it would be later on to think of having been one of the band of scholars who had given their minds and time to the great work now being put in hand, and concluding "gentlemen of England, now abed, will think themselves accursed they were not here . . .", exhorting all and sundry to come and give much needed assistance.

I sometimes think that, when Butterworths cajoled Sir Garfield Barwick, Sir Gordon Wallace, and then myself, into undertaking this job, they did not really think that it would be possible to complete it. Perhaps however I am being too sceptical — perhaps they really had faith in us. Certainly we ourselves had faith in those whom we asked to write chapters for us. Our faith has been justified. Today only twelve chapters remain to be published in the *New Zealand Commentary* — and all these are now *commissioned*. By Christmas of next year the *New Zealand Commentary on Halsbury Laws* should be complete.

Original scheme

It has not been completed without ructions. I have had to stand up for the New Zealand practitioner. First we were all faced with a scheme settled in Sydney, at a meeting at which New Zealand was not represented, which involved *joint commentary* in New Zealand and Australia written together. That was how we started. It had been settled before they ever asked me to have anything to do with it.

At once there was trouble. I found that in Australia it had been thought that somehow or other they would get people to write Australian Commentary only, and that then appended to each Chapter would be a few pages dealing with New Zealand.

This was granted without too much difficulty — but at once I had requisitions from Australia about the quantity and quality of New Zealand Commentary. Too much detail, they said, appeared in the New Zealand section, and this did not take long to make trouble in Australia, because Australian practitioners compared the two halves of each booklet, and then asked why the Australian chapter was not as full as the New Zealand one.

This lead to a ruling from Sir Garfield Barwick that the decisions of the High Court of New Zealand should be omitted from the New Zealand Commentary — only those of the New Zealand Court of Appeal should appear. I respectfully insisted; Sir Garfield came to New Zealand to confer with me. Neither of us would give way. After a period of sulking in my tent I was summoned to Sydney, where in Sir Garfield's room at the High Court after a conference which had its dramatic moments it was agreed that thenceforth the New Zealand and Australian Commentaries should be published *separately* as they have been to date.

We are a little ahead of Australia in our publication of the *Commentary*. This is not because of any extra efficiency on the part of the New Zealand editorial staff or their authors, but because the multi-jurisdictional nature of the *Commentary* in Australia has made it impossible to deal with Chapters as efficiently or rapidly as we have been able to do in New Zealand. The two jurisdictions keep in touch with each other on *Commentary* matters in the most friendly way.

New Zealand topics

Of the 160 or so chapters in *Halsbury* only about 100 have attracted New Zealand Commentary. The reasons for this at once appear on even a superficial examination of the problems involved. In the first place many chapters are of no relevance whatever in New Zealand. One thinks at once of copyholds, allotments, smallholdings, London magistrates, royal forces, land registration, as being in this class — no one in New Zealand would even ever look at any of these chapters and any attempt at New Zealand Commentary would be futile.

Then there are the chapters which deal with departments of the law in which codification either in England or New Zealand has made paragraph by paragraph commentary impossible. In some cases, common law in England has been codified but not in New Zealand; in other cases each jurisdiction has a separate statutory code, but its provisions and arrangements in these codes do not allow of paragraph by paragraph commentary such as is necessary in *Halsbury*. Examples are Divorce; Criminal Law; Practice and Procedure; Town & Country Planning. There is no New Zealand Commentary for these chapters.

It has all been a notable achievement. I congratulate those of the authors here who have contributed to it. They have slaved for the benefit of their professional colleagues and have conferred an immense benefit upon them, receiving quite insufficient financial reward, since the smallness of the number of subscribers to *Halsbury* has made it impossible, right from the start, to offer them a fee of anything like proportional to the work involved. My very profound personal thanks, and the profound thanks of Butterworths and the heartiest and warmest congratulations, to every man and woman who took part in this adventure.

Now, laying down the responsibility, as I must presently do, for the *New Zealand Commentary*, I leave to my successor the job of *updating* the *New Zealand Commentary*, the original text of which has been under my direction. This has been a subject of some considerable research by Butterworths and the profession will shortly be acquainted with the method of updating which has commended itself to the company.

continued on p 10

Books briefly noted

Reviewed by P J Downey

Sport and the Law

By G M Kelly.
Published by The Law Book Company, Sydney pp 472. $A55.000.
ISBN 0-455-20712-7.

Even reviewers can be subject to prejudice and bias. So it should be acknowledged that this book starts off with three marks in its favour. The first is its genesis which the author refers to as flowing from three articles he wrote in the *New Zealand Law Journal* in 1968 – see "The Errant Golf Ball: A Legal Hazard" [1968] NZLJ 301, 322, 346. Secondly he refers to a report of the Human Rights Commission from the time when the reviewer was the Chairman of that body, which report he writes "had adduced careful arguments" on the sport and apartheid issue. The third favourable mark is that the author is a New Zealander, albeit presently at the Australian National University, Canberra.

This book is a substantial work. It is described as being written from an Australian perspective but the cases quoted range widely with the New Zealand Rugby Football Union certainly getting a fair amount of space. But other sports are referred to such as ice hockey, greyhound racing, jogging, golf, motor racing, boxing, grouse shooting, judo and so on, not to avoid mentioning soccer and cricket.

Sport is a universal human activity. It is by its nature a contest and so it is hardly surprising that it has led to lawsuits and statutory provisions. Definitions are not easy and Mr Kelly devotes some five pages to analysing the meaning of sport. He is of the view that like Cleopatra sport presents an infinite variety and he concludes that

> Like categories of negligence, and the Windmill Theatre, in short, the categories of sport are never closed.

Litigation concerning sporting issues would appear to be a growth industry as part of our increasingly litigious society. The extent of the involvement of the law with sport can be gauged from the chapter headings concerning such issues as liability of sporting bodies as occupiers, the legal liabilities of participants, the responsbilities of supervision, sport and information, sport and the media, sport sponsorship, sport and sex discrimination and the question of the sporting crowd and the law. *Sport and the Law* is a useful and interesting book focusing on a particular activity in relation to the law rather than a particular branch of the law.

Monarchy to Republic

By George Winterton.
Published by Oxford University Press, Melbourne. pp 212, $NZ23.95. ISBN 0-19-554862-1.

The Australian Labour Party has adopted as policy the principle that Australia should become a Republic. Mr Hawke has publicly affirmed his agreement with the policy, but said he considers it a matter of low priority, in other words that is not

---

continued from p 9

The future

I will permit myself, on this quite exceptional occasion, one final thought, which it pleases me to utter in the presence of Mr Cusworth who has honoured us with his presence this evening.

It is this: What will the fifth edition of *Halsbury's Laws* look like? To this I will give you my own guess. It is this, that it won't look like anything at all. We know that this question has been asked, is being asked in England. When a decision is finally made we will all of course be told of it, but the signs are there, the writing is on the wall. Can *Halsbury's Laws of England* survive, in a new edition, the impact of the Treaty of Rome? It may possibly be that, when we come to the year 2000, some decision must be made not to issue a fifth edition at all, but to go on updating the fourth, volume by volume.

If this should prove to be the final outcome, I will offer you, as I sit down, one revolutionary thought. Should we not, in the year 2000, sit down together with our Australian colleagues, and put one more cog into the machinery of CER by producing, say, somewhere between 15 and 25 volumes, of *Halsbury's Common Law of Australia and New Zealand*? Leave out all the principal complicated codified subjects, just include the common law stuff – agency, arbitration, animals, bailment, carriers, charities, and so on.

It would be interesting, he said, as he sat down, if the ultimate effect of the Treaty of Rome was proved by history to be, that the Common Law of England came ultimately to rest not in the House of Lords, but in the High Court of Australia and in the Court of Appeal in New Zealand. □

an issue he proposes to press while he is Prime Minister.

George Winterton is an Associate Professor of Law at the University of New South Wales. His book is an examination of the legal arguments about or the implications of becoming a Republic. He considers this is inevitable within the next generation.

The basic argument for republicanism is the same one as adduced for abolition of appeals to the Privy Council, first in Australia and now here. It is the argument of national identity. In these days of an increasing realisation of the need for a great degree of international co-operation, of the reality of international inter-dependence, and of the dangers and destructiveness of the ideology of nationalism, it is a somewhat strange and old-fashioned idea. All the more reason perhaps why it will be so attractive in Australia and New Zealand. George Winterton states the basic argument in a form that Mr Dugdale would probably, and rightly this time, describe as juvenile.

> The principal motivation for contemporary Australian republicanism appears to be the belief that Australia should, like almost all other nations, have its own individual head of state, and should not have to share its head of state with any other country.

Politicians here are not likely to advertise the abolition of the Privy Council appeal right of New Zealand citizens as the first stop towards republicanism. And in a sense they are right, it is not the first step but only another step. But certainly the arguments that are being used for the one step are the same as the arguments to be used for the final step. There is no point in being upset about this or accusing the politicians of duplicity. Things were ever thus; and New Zealand as a Republic, following where Fiji has so courageously led the nations of the South Pacific, is probably inevitable.

Monarchy to Republic is mainly concerned, of course, with the legal issues for Australia with its state system and its written constitution. Nevertheless, many of the matters discussed, like the types of republican government and the powers of and mode of election of a President would also be applicable in New Zealand.

Lawyers

By Julian Disney, John Basten, Paul Redmond, and Stan Ross.
Published by The Law Book Company Ltd, Sydney 2 ed, pp 944. $A59. ISBN 0-455-20654-6.

Everything you ever wanted to know, and a lot you would probably rather not know and a awful lot of opinion, about lawyers – particularly Australian lawyers – is crammed into this enormous compilation. With the name of Julian Disney on the work it is not surprising that it quotes extensively from the famous, or notorious inquiry into the legal profession conducted by the New South Wales Law Reform Commission between 1977 and 1984.

Although the authors would deny this, and indeed ostentatiously declare their neutrality in the Preface, the work in its overall emphasis questions the concept of an independent legal profession. This is done by criticising continuously the idea of the profession as a self-regulating body. The picture that emerges, whether intentionally or not, is that lawyers are a power elite concerned primarily with money.

This having been said by way of criticism, the book is a most useful and valuable one. It contains much interesting material, both from legal and extra-legal sources. It has 26 chapters divided into five Parts dealing respectively with the history and structure of the profession, entry and regulation, delivery of legal services, duties to client, and finally other duties affecting lawyers.

The book is intended first to serve as a text for law students, and then for lawyers and other interested people. Personally, I would have been delighted to have had such a work available when I was a law student. Although mainly concerned with the Australian situation *Lawyers* is undoubtedly a useful publication of source material for those starting their legal studies.

Informed Consent to Medical Treatment.

A Discussion Paper of the Law Reform Commission of Victoria.

In New Zealand at present the question of the relationship between doctor and patient is a very pertinent one in the inquiry concerning cervical smears. But more subtly, the issue is illustrated as this Report explains in such a case as *Sidaway* [1985] 1 AC 871; [1985] 1 All ER 643 concerning the amount of information that should be given a patient as to the risks inherent in an operation. In that case the Law Lords had different views. Somewhat surprisingly the discussion paper does not refer to the relatively early New Zealand decision of *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA) and the views of Woodhouse J at first instance. Nor was the *Smith* case cited in *Sidaway*. Much emphasis is given in the discussion paper to the South Australian case *F v R* (1983) 33 SASR 189 in which the basic and essential point is made that it is for the court, and not the medical profession, to decide whether particular matters should have been discussed. The discussion paper poses four possible standards as being the preferable norm that should be adopted and poses the question of which one is the preferable policy. The alternatives are (i) the particular (ie, individual) doctor standard, (ii) the reasonable doctor standard, (iii) the particular patient standard, or (iv) the reasonable patient standard.

This discussion paper has been issued in conjunction with the Australian Law Reform Commission and the New South Wales Law Reform Commission. A final Report, presumably with recommendations, will be issued after responses to the discussion paper have been assessed by the Law Reform Commissions. □

De factos engaging our attention

By W R Atkin, Senior Lecturer in Law, Victoria University of Wellington

According to the 1986 statistics, approximately five percent of the adult population are living together without being married. This is presumably a matter of choice or of legal prohibition in terms of the law of bigamy or some other prohibited relationship. Despite this, however, at the instigation of one party the Courts and Parliament are increasingly treating the parties as though they were married. In this article the author looks at some legal issues that are arising as a result of this, more particularly through the application of the law of trusts. The article is particularly concerned with the decision of the Court of Appeal in the case of Oliver v Bradley *[1987] BCL 1251.*

1 A Growth Industry

The latest census tells us that more people are living in de facto relationships.[1] Though there are no statistics, we can presume that more people's de facto relationships are also breaking up, though there appears to be less public concern about this phenomenon than with the increase in the numbers of marriages which are being dissolved by the Courts. One indicator of an increasing number of de facto relationship breakdowns is the level of claims brought in the Courts by persons who have been party to such relationships. Again there are no hard statistics, but any observer of the family law scene in this country and elsewhere will confirm that de facto relationships are becoming something of a growth industry for lawyers.

The law which deals with this industry is still in the process of being moulded. Some issues, notably those concerning any children of a relationship, can be handled in the Family Court and be treated in much the same way as if the parties had been married. The ethos of the Family Court, with the emphasis on conciliation, multi-disciplinary teamwork, non-judgmental outcomes and protection of the interests of children, is well suited to sorting out most custody and access disputes, problems over income maintenance and domestic violence cases. When we consider the division of property however we find that the Family Court is without jurisdiction and that the matter must be determined by the High Court and on appeal by the Court of Appeal. The result turns not on a reasonably coherent set of principles such as we find in the Matrimonial Property Act 1976 but on the vicissitudes of the general law and in particular the law of trusts, contract, restitution and (where a party has died) succession. In some cases the common law will provide an answer, but in others a raft of statutory measures may need to be called in aid and applied as best as possible to a social rather than a commercial arrangement.[2] In the latest Court of Appeal judgment on the question, *Oliver v Bradley*, (1987) 4 NZFLR 449 which it is intended to examine more closely in the course of this article, the law of trusts was interwoven with the Domestic Actions Act 1975, an Act specially designed to cover the situation of engaged couples who decide not to proceed with their marriage. Although the Court of Appeal found it possible to reconcile the approaches of the Act and the law of trusts, we can be less sure that this will always be so, and in some respects the judgment raises more questions than it answers.

The Government is planning to introduce legislation to amend the Matrimonial Property Act 1976 and will establish what will presumably be a comprehensive statutory regime for parties to de facto relationships. Although there are differing cultural attitudes and big moral issues about the direction the law should take in this area (eg some people would regard de facto relationships as wrong and not to be treated on a par with marriage, while others would oppose their regulation on the liberal grounds that personal freedom should not be interfered with), the experience of the Courts is beginning to suggest, in the opinion of the author, that some clarification and simplification of the law is rapidly becoming essential. In *Pasi v Kamana*, (1986) 4 NZFLR 417 Cooke P said that "it is a field in which perhaps justice may be better achieved in the end by proceeding cautiously on a case by case basis". But, with respect, that path may be too slow and uncertain. The time may well have arrived to accept the reality of de facto relationships and to bring them more purposefully within the modern framework of family law. That means making the Family Court fully available to them and to develop rules which, to again use words of Cooke J (as he then was), "reflect the reasonable dictates of social facts" and do not "frustrate them". (*Hayward v Giordani* [1983] NZLR 140, 148)

2 *Oliver v Bradley*

The case of *Oliver v Bradley* is unusual for several reasons. First, the couple who had been living together were also engaged to be married. They lived together for a little over three and a half years before both the relationship and the

engagement were terminated. Although the man apparently had still wanted the marriage to take place, the woman had lost enthusiasm for the idea and continued to wear her engagement ring merely as "something nice to wear". The house, the proceeds of the sale of which were the subject matter of the litigation, had been bought by the woman and had been registered solely in her name. However the man had paid a deposit of over $2000, over $13,000 on improvements, and over $7000 on outgoings and mortgage repayments, while the woman's main contribution was over $2000 from family benefit capitalisation. During the course of the relationship, the man earned about four and a half times what the woman earned and he paid her a weekly allowance of $100. There were no children from the relationship, although the woman had two children of her own and they all lived together as a family.

In these circumstances, the man had brought proceedings for a share in the house. The claim had two bases, first under the provisions of the Domestic Actions Act 1975 and secondly on the grounds of a beneficial interest arising from the existence of a constructive trust. In the High Court Bisson J held that the plaintiff could succeed on both counts and awarded him what amounted on the figures then available to the Court to approximately half the equity, this to be realised by the payment of a sum of money by the defendant to the plaintiff. The house was subsequently sold for a little more than had been anticipated but this was not the real basis for the plaintiff's appeal. His argument was that he had not been granted a sufficiently large share of the property to represent his beneficial interest under the trust or his entitlement under the Act. On appeal the respondent did not deny that the plaintiff had a valid claim. The main question was the share to which each party was entitled and to a lesser extent the form of the order.

In the result, the Court of Appeal upheld the appeal. The members of the Court agreed that the shares should be 70% to the man and 30% to the woman and that the order should take the form of a division of the net proceeds of the sale of the home, rather than the payment of a sum of money by the woman to the man. Despite there being agreement on the result, the members of the Court of Appeal were not unanimous in their reasons and in their analysis of the law.

3 The Claim

(a) Domestic actions

Although it was accepted in the Court of Appeal that the plaintiff had a valid claim, comments were nevertheless made by their Honours about this aspect of the case. Under s 8 of the Domestic Actions Act, there are two conditions to be satisfied before the procedures laid down in the section can come into operation. First there must have been "an agreement to marry" which has terminated. Secondly the termination of the agreement must have given rise to a question between the parties concerning the title, possession or disposition of any property. Cooke P and Henry J were not worried about the satisfaction of these conditions on the facts of the case, although Cooke P did wonder whether Parliament and the Torts and General Law Reform Committee (which had recommended the legislation) would have had in mind the kind of situation now before the Court. However considerable doubts were expressed by Casey J. The heart of the difficulty for Casey J lay in the problem of causation. That there had been an agreement to marry and that there was a question between the parties could not be denied. But the Act requires a causal connection between the two. In other words it must be shown that the reason why there is a question between the parties must be because of the decision not to marry, and not for some other reason. The position is complicated where the parties have been living together in a de facto relationship because this represents a decision independent of the decision to marry. The acquisition of property may, as in *Oliver v Bradley*, be because of the decision to live together, rather than the decision to marry. Likewise, as Casey J says, the dispute about the property arose not so much because of the breaking off of the engagement but because of the cessation of the de facto relationship. "The concurrent agreement to marry appears to be no more than a facet of that more fundamental association."

For Casey J s 8 claims should be confined to

> the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than in furtherance of some other personal relationship.

Giving the Act a liberal interpretation, it could be argued that the Courts should not be too rigorous in their analysis of the precise motivation for the acquisition of property. In most cases where couples living together are also engaged to be married, then it might be false and somewhat legalistic to split up their relationship into its component parts. The decision to marry and the decision to live together may be closely intertwined, although this could vary with the facts of each case. Property acquired under these circumstances might be due to the totality of the relationship, including the prospective marriage and it would be a pity to deny jurisdiction by too narrow a reading of the Act and assessment of the relationship.

On the other hand, the Courts must apply the law as laid down by Parliament and there is much force in the argument that a causal nexus must be established between the termination of the engagement and the dispute about property. A comparison can be made with s 8(d) of the Matrimonial Property Act 1976, by which property acquired in contemplation of the parties' marriage (and intended for common use or benefit) will be matrimonial property. Although the Courts have not construed this with excessive strictness (eg the property need not have been obtained just before the wedding ceremony), the mere existence of a de facto relationship at the time of acquisition will not be sufficient. (cf *Stallinger v Stallinger* [1977] 1 NZLR 559) There must be a connection between the contemplated marriage and the

property acquisition such that it can be said that the property was indeed acquired because of the impending marriage.[3] So, for instance, where the parties had been living in a de facto relationship and had property, a later engagement can hardly transform that property into property that was in the parties' ownership because of the intended marriage. It does not automatically follow that there can be no connection in these circumstances between the end of the engagement and a dispute (eg one of the parties, previously reluctant to do so, may have become willing to start paying outgoings in anticipation of marriage) but it is certainly more difficult to show causation than where the dispute is over the division of engagement gifts.

In the writer's opinion, Casey J has raised a genuine difficulty which may need to be tackled in some future case. It was not a problem in *Oliver v Bradley* because of the Court's view that the result would be the same whether the Domestic Actions claim or the trust claim was considered.

(b) Constructive trust

According to Bisson J in the High Court, the case was one "which cries out for the Court to hold that there is a constructive trust in the interests of justice and good conscience". This may be contrasted with a considerable number of recent New Zealand decisions where it was held that no trust existed at all.[4] What is it that makes *Oliver v Bradley* beyond controversy on this point?

As is well known, the formulation of the proper test for the existence of a constructive trust in the area of personal relationships has aroused much controversy. On a narrow view, it is necessary to show, if need be from the conduct of the parties, that there was a common intention of joint ownership. (The classic sources of this law are the House of Lords' decisions in *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.) But equity will not come to the aid of a mere volunteer (*Midland Bank PLC v Dobson* [1986] 1 FLR 171), and so it is also necessary to show that as a result of the common intention the plaintiff acted to his or her detriment.[5] Normally in the absence of these conditions, there can be no trust, unless there is a quite different basis for the imposition of a trust, such as in the situation where it would be a fraud for the party with legal ownership to deny the other party's interest in the property.[6]

The position has recently been summarised by May LJ in *Burns v Burns* [1984] Ch 317, 345.

> [W]hen the house is taken in the man's name alone, if the woman makes no "real" or "substantial" financial contribution towards either the purchase price, deposit or mortgage instalments by the means of which the family home was acquired, then she is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union.

Of course, the same summary applies where the role of the sexes is reversed.

A much broader approach to the application of trust law to de facto relationships can be found in the judgments of Lord Denning (Eg *Cooke v Head* [1972] 2 All ER 38, *Eves v Eves* [975] 1 WLR 1338 and *Hall v Hall* (1982) 3 FLR 379 and the doctrine of unjust enrichment. The latter is summed up by Dickson J in *Pettkus v Becker* (1980) 117 DCR (3d) 257, 273, and will be proven when there has been an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. In *Hayward v Giordani* (supra) Cooke J (as he then was) regarded this approach as being "very helpful in New Zealand" and McMullin J saw

> no good reason why the categories of cases in which the Courts have held trusts to exist should be considered to be closed. This branch of the law is not one where policy considerations should inhibit the Courts from developing it to meet different circumstances and relationships and changing social conditions.

The New Zealand Court of Appeal has thus indicated a preference for a more liberal approach to de facto relationships than that which would for instance be implied in *Burns v Burns*. The latest formulations from Court of Appeal confirm this and indeed the approach now being adopted by Cooke P in particular represents a radical departure from the language found in the leading English cases. In *Pasi v Kamana*,[7] His Honour has said that "[o]ne way of putting the test is to ask whether a reasonable person in the shoes of the claimant would have understood that his or her efforts would naturally result in an interest in the property." Cooke P had no difficulty in applying this test to the facts of *Oliver v Bradley* – "a reasonable person in the shoes of the plaintiff would undoubtedly have understood that his contribution and efforts would result in an interest in the property" – but he added a further limb to the test by asking what a reasonable person in the shoes of the defendant would have expected, and thought that such a person would have to acknowledge an expectation that the plaintiff would have an interest in the property.

The "reasonable person" test certainly does appear to be much broader than the traditional formulations. How true this will be in practice remains to be seen. The two Court of Appeal cases where the test was mentioned did not present the Court with any real difficulty on the facts. In *Oliver v Bradley* the plaintiff had made major financial contributions to such an extent that it is hard to see any reason why even on the narrowest of formulations of the test for constructive trusts he would not have succeeded.[8] He had contributed to the original purchase price, paid for improvements and outgoings, as well as for daily living expenses. By contrast, in *Pasi v Kamana* the woman had made no contribution to the cost of the house, performed no work by way of improvements, apparently contributed no more to the household expenses than would have been necessary for her own support, there were no children of the union and she was more like "an older sister" than a step-parent to the man's two children who lived with them. It is not hard to see why

a Court would deny the existence of a reasonable expectation on her part, let alone his, that she was to share in the property. As McMullin J put it, it was "no more than a case of two persons who for nearly ten years lived together in a relationship, sometimes happy and sometimes turbulent". The Court of Appeal's real attitude will only be extracted when a case falling somewhere in between these two comes up for determination. What for instance will happen to that situation ruled out in *Burns* where a person has not made real or substantial financial contributions to the house, but has worked hard for years maintaining the home and family?

4 Determining the shares

As has already been pointed out, the main issue before the Court of Appeal in *Oliver v Bradley* was not whether the man was entitled to a share in the proceeds of sale but what the extent of that share was going to be. The Court was unanimous that the man should end up with 70%, but there was less unanimity in the way in which that figure was arrived at. Part of the difficulty arose from the fact that the case was run on the two distinct tracks of trust law and the Domestic Actions Act, although counsel were agreed that the result should be the same under both approaches. Whether the same result will always be achieved must be a matter of some considerable doubt.

Casey J did not really address the issue. Both Cooke P and Henry J noted that the test under the Domestic Actions Act was that of "restoration" – ie restoring each party to the agreement to marry as closely as practicable to the position they would have occupied if the agreement had never been made. (s 8(3) Domestic Actions Act) Their Honours took different paths however when it came to apply the restoration test.

For Cooke P, restoration could be effected "by dividing the property built up by their common efforts in broad proportion to their respective contributions of all kinds". This meant that the Court was not limited to looking solely at financial contributions but, as with the approach under the Matrimonial Property Act 1976, domestic contributions (as will exist where there has been a de facto relationship) should also be weighed in the balance. "I would not exclude anything," said His Honour, "that has formed part of the consortium provided by one or the other partner." Even allowing a "reasonably generous allowance" for the woman's services and consortium, Cooke P was unable to assess her comparative contributions at more than 30%.

The line adopted by Henry J placed far greater emphasis upon a financial analysis of the situation. Although he stated that the Court must be pragmatic in a situation such as the one under consideration, he nevertheless worked through certain clear and logical steps. First, he did some sums to determine what each party's financial commitment to the property had been and in doing the arithmetic here, he excluded non-financial contributions. The following words are very interesting when compared to Cooke P's attitude:

> . . . matters such as servicing the property, serving the household, and providing for all the family household needs in the various aspects are really matters *peripheral* to the property dispute and may have been incurred in one way or another had there been no agreement to marry (emphasis added).

Henry J was of the view that repaying each party the amount that they had respectively contributed would to an extent restore their positions. On the facts, the man was entitled to $21,000 and the woman $2000 at this point in the calculation. The next logical step was to allocate any balance of the equity, which here amounted to $18,000. As this figure largely represented the effects of inflation and as the actions of both parties had enabled this inflationary gain to be incurred, Henry J could see no reason for not dividing the balance equally between the parties. The mathematics then produced a result of 73% in favour of the plaintiff and 27% for the defendant, which His Honour thought was close enough to the figure arrived at by Cooke P.

What exactly His Honour meant by describing non-financial contributions as "peripheral" matters is uncertain. The word "peripheral" suggests that such matters could be relevant but only marginally so. Judging by the way His Honour calculated the parties' shares, it is submitted that he was treating these matters as almost entirely irrelevant.

While the Court was in agreement on the outcome in *Oliver v Bradley*, it should be obvious that the global approach of Cooke P will not always achieve the same result as the step by step approach of Henry J. We must presume for instance that if there had been no balance of the equity left over for division, Henry J would have divided the property 21:2, whereas Cooke P would still have awarded the defendant a 30% share. And what would have been the position had the relationship lasted much longer than three and a half years and there had been children from the union? One would expect Cooke P to have awarded much closer to a half share, whereas Henry J's decision would probably have been about the same. We can see therefore that the law of "restoration" remains very murky.

There is a further twist however. The fact that claims were made under both trust law and the Domestic Actions Act was not a problem in *Oliver v Bradley*, but this does not mean that there will be no conflict of result in future cases. For, the rules for quantifying a beneficial interest in a constructive trust created out of a personal relationship do not necessarily operate on the basis of restoration.

First the Courts will have regard to the parties' common intention as to how the interest is to be quantified. (*Gissing*, supra, 908, per Lord Diplock) Indeed it has even suggested that solicitors should make express declaration of the parties' interests in the property at the time of conveyance (*Bernard v Josephs* [1982] Ch 391, 403) and failure to do so may amount to negligence. (*Walker v Hall* [1984] FLR 126) Then, unless they follow the terms of an agreement on the amount of shares, the Courts will divide the property according to contributions. In this sense there are clear echoes of the "restoration" principle, but the contributions must be limited to financial ones (direct or indirect) and the wiser approach of Cooke P outlined

above would be thought heretical.[9] Finally, there is the possibility of invoking the maxim that "equality is equity" but care is needed here, for it is really a maxim of last resort. As the English Court of Appeal has said

> It is only when there is no evidence upon which a Court can reasonably draw an inference about the extent of the share of the contributing woman [sic], that it should fall back on the maxim "equality is equity". (*Burns*, supra, 345. Cf *Gissing*, supra, 897 and 908)

Enough has been said to show that, given appropriate facts, the result of a case under trust law may be wildly at variance with the result under the Domestic Actions Act. The Courts may therefore be faced with a dilemma which will not be easy to solve.

5 Law Reform

As mentioned earlier, there are proposals to extend the Matrimonial Property Act 1976 to de facto relationships. The potential problems inherent in a situation such as that in *Oliver v Bradley* highlight the need for the law to be tidied up and this is unlikely to be achieved except by legislation. Through Parliament the right policy and a consistent and fair package can be developed.

If the Matrimonial Property Act were applied to *Oliver v Bradley* we would expect a very different conclusion. The proceeds of the sale of the home would be divided equally unless one of the exceptions to the equality principle could be invoked (in which case the property is divided according to the parties' contributions to the marriage). As the relationship lasted three and a half years, it would probably not be regarded a "marriage" of short duration under s 13 (which is a marriage of three years or less, although the Courts have power to extend the period of three years if they consider it just having regard to all the circumstances of the marriage). And the circumstances are hardly likely to be sufficiently unusual to be extraordinary under s 14. We can deduce that the property in *Oliver v Bradley* would probably be shared equally, and so the plaintiff would fare markedly less well under new legislation.

This of course assumes that new legislation will extend the equality principle which governs marriages to de facto relationships as well. Other options are feasible. In New South Wales, the De Facto Relationships Act 1984 uses the principle of just and equitable adjustment according to contributions, but including non-financial contributions and contributions made in the capacity of homemaker or parent. (S 20. This scheme is similar to the New Zealand Matrimonial Property Act 1963.) This approach may not find favour however. Perhaps the New Zealand pattern has been set by the 1976 Act and the principles there will influence the shape of the law.

There will nevertheless be numerous fish-hooks in slotting de facto relationships into the 1976 Act. We have already seen the conflict in the present law between trusts and the Domestic Actions Act. Because a couple may fit into both the latter Act and an amended 1976 Act, a similar conflict may still exist, unless the Domestic Actions Act is radically amended. Another conflict may arise where a person has been both married and living in a de facto relationship with someone else, leading to the possibility that two people could have genuine claims to property.[10] How does equality apply in these circumstances? The definition of a de facto relationship is not without difficulty because its commencement does not necessarily depend on a clear event such as a wedding ceremony nor is living under the same roof necessarily an essential requirement. This may be important not only for deciding the extent of the Court's jurisdiction but also for working the three year rule in s 13. Again, how will the Courts deal with relationships which have elements both of marriage and of de facto relationship, as where for instance a relationship leads into marriage? Will this be treated as one ongoing partnership for the purposes of such provisions as ss 8(d),8(e),8(ee), 13 and 18 of the Matrimonial Property Act, which as currently interpreted are in general limited to "marriage partnerships"? Likewise, what happens where a marriage is dissolved and the parties then enter a de facto relationship (eg this could be relevant when the s 24 limitation rule is in issue)?

Reform of the law may thus not be totally straightforward. Despite this, the problems are not insurmountable and may be less formidable than those which confront the present shape of the law dealing with those in de facto relationships.

6 Conclusion

An examination of *Oliver v Bradley* has revealed several things. It gives further support for the view that the New Zealand Court of Appeal will take a liberal line when applying the law of trusts to de facto relationships. That law is still in the process of being developed and in the meantime there is much uncertainty about the correct formulation and application of the law. The position is not helped by the realisation that the Domestic Actions Act 1975 can also, perhaps unintended by the legislature, apply to de facto relationships. The members of the Court of Appeal did not interpret that Act in a unanimous way, and in many circumstances it may be hard to know which interpretation should be adopted. In other cases, even though this was not true on the facts of *Oliver v Bradley* itself, there may be an awkward inconsistency of outcome as between a claim under the Act and one under trust law.

Oliver v Bradley shows that a case about the property interests of parties to a de facto relationship raises very similar issues to an ordinary matrimonial property application. Is the applicant entitled to an interest in property? If so, in what proportions should that property be shared? At what point in time should that property be valued?[11] What form should the order take to give practical effect to the division of property?[12] In the light of this, it could be argued that the law relating to the property of married and unmarried couples should be harmonised. Despite the need to overcome some technical hurdles, such a change should clarify and simplify the law. Whether this would be good law from the point of view of family

continued on p 17

Books

Medicine and Surgery for Lawyers

By A J Buzzard, Sir Edward Hughes, G L Hughes and J D B Wills

Published by The Law Book Company Limited, NSW, Australia, 1986 ISBN 0 455 20675 9

Reviewed by G S Tuohy QC

Medicine and Surgery for Lawyers is a comprehensive volume (675 pages) on the topic of diseases and injuries likely to be the subject to litigation. The authors are two medical specialists from the Department of Surgery at Monash University, Melbourne, and two Melbourne lawyers practising in the field of personal injury claims. Contributions by a panel of specialists in each of the fields of medicine and surgery involved must make it a most authoritative publication for lawyers in those jurisdictions where personal accident litigation is still possible. It will command, however, a very limited public in New Zealand unless our creaking Accident Compensation system breaks down completely and we are catapulted back into the days of common law claims for personal injury.

Those practitioners who work in the Accident Compensation field may find the book helpful in assisting to understand the causes, symptoms and treatment of the injuries suffered by their clients, but the text does not deal with assessment of degrees of disability or related compensation issues. Its purpose is to instruct and inform lawyers and to explain technical, medical and surgical terms so as to enable them to be better understood and advance their clients' cases in Court.

Medicine and Surgery for Lawyers contains a brief section on medico-legal assessments, medical interviews and expert witnesses, and a section on blood and breath alcohol testing which is informative and well presented, but these sections naturally form a very small part of the contents. Specialists practising in this particular forum will, I am sure, find little on this topic not already published in New Zealand. □

continued from p 16

and social policy may be a matter of debate and of clashing values within the community. However, some kind of more coherent framework for the law is rapidly becoming imperative. The law cannot merely ignore the phenomenon of de facto relationships. □

1 On census night in 1986, 114,279 people claimed to be living in de facto relationships, being 4.6% of the adult population, and representing a 30% increase on the equivalent figure in the 1981 Census, when a question about de facto relationships was asked for the first time in New Zealand.

2 Cf the recent decision of Doogue J in *Cook v Manconi* [1987] BCL 1332 where the Contractual Remedies Act 1979 was invoked.

3 Cf *Smith v Heappey* (1980) 2 MPC 171 and *Rodgers v Rodgers* (1982) 1 NZFLR 200 (the point was not relevant in the appeal in *Rodgers* (1985) 3 NZFLR 423).

4 Cf *Pasi v Kamana*, supra, *Sullivan v Evans* (1985) 3 NZFLR 449, *Stanniforth v Minnet* (Napier Registry, A47/84, 19 August 1985), *Murray v Murray* (Auckland Registry, A 407/84, 18 Sept 1986), *Re Allan* (Whangarei Registry, A23/83, 13 March 1986), and *Angell v Morresey* (New Plymouth Registry, A33/85, 1 April 1986).

5 This point has been explored in particular by the English Court of Appeal in *Grant v Edwards* [1986] 3 WLR 114. At 130 Sir Nicolas Browne-Wilkinson VC says that once common intention is shown, "any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify." But His Lordship warns that "[s]etting up house together, having a baby, making payments to general housekeeping expenses" may be referable to mutual love and affection and not to any interest in property.

6 This approach enabled Williamson J to find a trust in *Mikoz v Raats* (Dunedin Registry, A85/84, 11 Feb 1986).

7 Supra. Note that the English Court of Appeal also emphasises the reasonable expectations of the claimant, but this is only in relation to the issue of proving detriment; it is assumed that there is the preliminary element of common intention: see *Grant v Edwards*, supra n 5, at 122 and 129.

8 A possible exception might be where the maxim "the plaintiff must come to equity with clean hands" is invoked, as was done in the case of *Angell v Morresey*, supra n 4. The plaintiff in that case missed out on his remedy because the property had been placed in the sole name of the woman in order to defraud the Department of Social Welfare and the Housing Corporation.

9 Cf *Gissing*, supra, 907 (". . . the contributing spouse should acquire a share in the beneficial interest in the land in the same proportion as the sum contributed bore to the total purchase price."), *Pettitt v Pettitt*, supra, 804, 807, 818, *Walker v Hall*, supra, *Cain v Mason* (Blenheim Registry, A6/86, 24 November 1986, Eichelbaum J) (. . . "the Court's enquiry should be limited to matters relevant to the property in issue. However, the contributions to be taken into account may be indirect as well as direct. Furthermore . . . I regard the evidence of the parties' own intentions as important.").

10 Cf the competing interests of two wives of the same husband in the recent judgment of Greig J in *Kremic v Kremic* (Wellington Registry, M 35/73, 7 August 1987).

11 Cf discussion of this in *Walker v Hall*, supra, where the English Court of Appeal held that the date for valuing and quantifying the parties' share was a matter of discretion for the Court and it could not be assumed that the date would be fixed at the cessation of cohabitation.

12 In *Oliver v Bradley*, the Court of Appeal disagreed with the High Court order that the defendant pay the plaintiff a specified sum of money as this "leaves the defendant with the 'benefit' of inflation" (per Cooke P). Helped by the intervening sale of the home, the Court ordered that the proceeds themselves be divided according to the determined proportions.

Allies of a kind:

The politics of law reform

By B J Cameron, Member, Law Commission

This paper by a member of the Law Commission examines the relationship and necessary interaction between politics and law reform. The author acknowledges the need for law reform bodies to recognise that they are advisory not determinative bodies; but he is of the view that the work of such bodies justifies what he calls temperate optimism that worthwhile law reform can happen. In its original form it was delivered shortly after the Law Commission was established.

Law cannot be divorced from politics. The common origin of the words "politics" and "policies" is reflected in the realities. Worthwhile law reform is therefore political. That does not mean that it needs to be party political. Sometimes it may be, but if this happened more than rarely with law reform commissions' reports, it would be a serious danger signal. But except for the most limited kind of "lawyers' law" – and that is hardly the stuff of law reform these days – policy issues are involved in the proposals for legal change that law reform commissions consider. Likewise a substantial proportion of law reform measures are likely to arouse opposition on economic or social or moral grounds. Certainly this is true in New Zealand.

So governments cannot disinterest themselves in either the procedure for law reform or the substance of what is recommended. That is trite but it follows that neither can their departmental advisers on the one hand or their party caucuses on the other. And parliamentary oppositions are always and legitimately ready to make political capital.

What I want to say arises from these facts, and my theme is the complex and sometimes subtle interplay between a law reform agency and other government and legislative institutions. At least in the New Zealand context the actual lawmaking process, veiled behind constitutional cliches, has been relatively unexplored. It deserves to be better mapped.

Relationships between law reform bodies and major political institutions arise both at the general level and with specific topics. At the general level they subsume issues such as the degree of autonomy a Commission should have; how far it should decide what matters it will deal with; how far it should be able to advise governments how a particular matter ought to be handled.

Freedom to use initiative

One aspect is a Commission's freedom to take up a topic on its own initiative. This is seldom wholly conceded, at least in theory. Governments are reluctant to see their money spent on work that they may regard as untimely, academic or possibly embarrassing. A reference by the Minister is usually required, or at least his or her approval to programmes or items on those programmes. This can cast a key role upon the Minister's department. It may advise against a reference or an approval for many reasons, both good and bad.

New Zealand is an exception to this. Under s 6(2) of its constituting Act, the Law Commission has power to initiate proposals for the review reform or development of any aspect of the law, and under s 7(1) it has the duty of submitting to the Minister, at least once a year, programmes for the review of appropriate aspects. The Minister's sanction is not required, although he or she may refer other matters and may request the Commission to give priority to any matters. The Ontario Law Reform Commission has a similar freedom.

Some of the Australian jurisdictions, and Britain, represent a halfway house. Thus under the Western Australian legislation the Commission submits proposals to the Attorney-General, who may refer these or other matters to it. The Victoria Law Reform Commission has express power to propose references, and may also act on its own initiative with matters of "relatively minor concern" that will not require a "significant deployment" of its resources. The Australian and the New South Wales bodies require a reference in all cases.

One may suggest that if a Law Commission is to have a general co-ordinating role, if reform is to proceed systematically, some sort of initiating power is inevitable. But this could be de facto rather than as of right.

The differences in the legislation may indeed be less important than the practice. Proper consultation is highly important. A Commission is wasting its time embarking on a substantial project if it has reason

to think that opening it up is anathema to the government of the day. Similarly a Minister may well hestitate to force a reference on a Commission, as Professor Sackville noted in his article in the *Australian Law Journal* of March 1985. In New Zealand the Law Commission has now received four references. In all cases these have been preceded by consultation on both the making of the reference and its terms.

And where the law requires a Ministerial reference before a Commission can be seized of a topic, one may hazard that this reference often results from a Commission's initiative. Some Commissions (for example New South Wales) publicly acknowledge that they seek them.

Law Reform Commissions are almost invariably financed by public money, and in the last resort a government has the power of the purse. If a Commission was so rash as to persistently take up matters that the government thought inappropriate, the response could well be a severe curtailment of its budget. But as Lord Sankey said in a different context, that is theory and has no relation to realities. Or so one would hope.

Role of the Commission

The object in taking up a particular topic, or proposing a reference, depends on the purposes the Commisson sees itself as having. Some jurisdictions (the Canadian Federal Commission has exemplified it) espouse a sort of educative role. Early results in the form of legislation are not seen as essential or even perhaps important. To bring about changes in thinking that may in the longer run lead to a reshaping of the law can be sufficient. And of course this should not be despised, although it surely calls for a great deal of tolerance and even liberality on the part of the government concerned. It may be (whether or not by accident) that some of the earlier reports of the Australian Commission fulfilled this role. Again Professor Sackville's comments are in point.

Probably few governments would feel they could afford this luxury. New Zealand has always placed great stress on results visible in the statute book. Some statements over the years have gone almost as far as measuring the success of law reform in terms of a numerical strike rate. The purpose of reviewing a rule or a topic is to bring about desirable changes. Just as, to quote Lord Thring's saying, "Bills are made to pass as cakes are made to sell, reports are made to be given effect to".

This does not mean that they should simply contain what people want to hear or avoid treading on the toes of received wisdoms. A radical and well-reasoned approach can catch the public imagination. The best known modern New Zealand example is our accident compensation scheme.

There is of course the argument that the law will always lag behind. In his book *Ancient Law* Sir Henry Maine said this:

> Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them but it has a perpetual tendency to reopen. Law is stable; these societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

In passing, I observe that the last sentence admirably encapsulates the case for law reform commissions. But that aside, does New Zealand history support this pessimism? Not altogether. Our law reformers have occasionally worked at the frontiers of public opinion. Often they have not simply responded to a clamour, as the advent of the testators' family maintenance legislation in 1900 exemplifies. This is also true of some of the reforms sponsored by Ralph Hanan in the 1960s. A larger example is Reeves' industrial arbitration legislation of 1893, and possibly the 1976 matrimonial property legislation. In a sense public opinion has grown into such legislation.

This suggests an important Law Reform Commission function as being to anticipate; to take a path while it may still seem strange and perhaps even invisible to most people. That may not endear it to those governments and departments that prefer the comfortable life, to which one might retort by slightly misquoting a former Australian Prime Minister: "life wasn't meant to be comfortable".

Autonomy is regarded as being of the essence of modern Law Reform Commissions. So a Commission cannot be told to make a particular case. Arguably it should (subject to its own good judgment) be permitted to take up a topic notwithstanding that topic's lack of political appeal or popular interest. And it is and ought to be able to make its report public without anyone's leave, although Queensland is here an exception.

These are great advantages over reform through government departments. I suggest however that the latter method does have some virtues of its own. New Zealand is exceptional in that for 50 years the main vehicle of reform was the Department of Justice. A few other common law countries used this method for a while — Ireland and Jamaica are instances — but it has been untypical. One reason why a Law Commission in New Zealand has come so late is that applying a proof-of-the-pudding test there were periods when a lot was accomplished without one.

Relationships between our Department of Justice and the various former part-time standing Law Reform Committees are significant. I have an impression that bureaucracies in some jurisdictions were cautious and chain-dragging — adept at finding reasons why recommendations should not be adopted. In New Zealand on the whole, the boot was on the other foot. Some committee reports were seen as perfunctory, timorous or poorly reasoned. And indeed they were. A few of the early ones were little more than assertions with inarticulate premises.

Disagreement on policy

Occasionally however there was a straightout disagreement based on policy. One example, a few years back, was a report of the Criminal Law Reform Committee on the reform of bail law. The Department of Justice was unhappy with the report's reasoning. But the underlying quarrel was that whereas the committee's thrust was to make bail harder to get, the Department thought it should rather be

liberalised and (as it saw) made more fair. In the upshot nothing has been done yet on this undoubtedly contentious subject.

The same thing could happen with a Law Reform Commission report, although one would expect this to be a lot harder to challenge on internal grounds. To suggest that a Minister should not be able to seek advice from his department, or be influenced by that advice, is unrealistic. Likewise it is unreal to expect a department to support unquestioningly whatever conclusions a report embodies. So there is a real problem, one that appears inescapable in our system.

And some other departments may be much more resistant to having (as they see it) their policies called in question. They are jealous of these policies which they equate with the public interest, sometimes even on an "end justifies the means" footing. They do not like to see their powers trammelled. In other words they are a vested interest.

The problem can of course be diminished by giving departments whose policies may be affected a full opportunity to make an input while the topic is before the Commission. This ought to happen anyway, because it will make for a more thorough and better report. And the Commission is able to take into account what the department is likely to say to its Minister afterwards, provided the department is prepared to come clean about this.

Nonetheless, that is not a complete answer. Probably it can only be settled at the practical level of good and close relationships between members of commissions and senior departmental officers, and a habit of consultation and exchange of knowledge both formal and informal, not limited to specific topics.

Public reporting to Parliament is again of the essence of a modern Law Reform Commission. In Parliaments like those in Australia and New Zealand this may "create a constituency". It may encourage oppositions to include recommendations with potential political mileage in their election manifestos. But it does not by any means ensure that recommendations go ahead, especially if they are not obviously politically appealing.

Private members' bills are not common in New Zealand, and successful ones rare. Two outstanding recent exceptions concern adoption information and homosexual law reform, subjects where feelings on both sides ran high and which were dealt with on a "conscience vote". These are the sorts of topic a wise Commission will steer clear of. I confess that I do not see private members' legislation as a significant vehicle for implementing Commissions' reports.

One possible safeguard would be a statutory duty on the Minister to advise Parliament within a certain time whether the Government accepts or rejects a recommendation. This may not advance the matter much in practice. What if a report is acceptable in part? And more commonly the problem is not outright rejection but a relatively low government and hence departmental priority.

A Commission cannot expect that its proposals will be accepted as of course. A government takes responsibility for the legislation it introduces, and must be satisfied of its political viability.

Paradoxically, the very autonomy of a Commission can diminish its influence upon the Minister and the government. In New Zealand, legislative proposals get before Parliament by being put on the government's legislative programme. Inclusion in these programmes, and priorities among the matters included, is decided by the Legislation Committee of Cabinet, and subject to that by the respective Minister advised by his department. With almost all law reform proposals this is the Minister of Justice, who by practice is also chairman of the Cabinet Committee. Ministers will have their own — and their government's — policy proposals that call for legislation. And departments will have theirs, arising out of legislation that they administer. When it comes to crucial decisions, a permanent head has the ear of his Minister to a degree that the heads of autonomous agencies usually do not.

Separate department

One hypothetical alternative would be to create a Commission as a separate department with its own legislative programmes. However, this is untenable. For one thing it would destroy the Commission's independence. We cannot have it both ways. Or a Commission can go in to bat more or less publicly for its own proposals. This touches on the vexed question of "aftercare". Most Commissions do not see it as appropriate to lobby for their recommendations. There are however more subtle and acceptable ways of nudging governments into proceeding with recommendations.

Even where, as is generally the case, the department will try to find a place for a Commission's legislative proposals on its programmes, this is not an end to the matter. Most reports will not have a high political sex appeal, or they may be contentious. In New Zealand far more legislative proposals clamour for inclusion than draftsmen or parliamentary time can cope with. Some will be seen as urgent or important, or otherwise politically advantageous.

Others may be seen as liabilities. Thus the proposal of one of New Zealand's Law Reform Committees to modify the decision in *Searle v Wallbank* and introduce a measure of liability for wandering stock ran foul of the not unexpected opposition of the farming industry. And a government considering whether to include in its programme a hypothetical bill relating to de facto marriages would be very sensitive to the certainty of febrile opposition by fundamentalists.

A partial answer to the workload problem is to attach draft bills to Commission reports. This is common practice in Australia, and also in New Zealand even with our part-time committee reports. As long as the draftsman is a Parliamentary Counsel or has the confidence of the Chief Parliamentary Counsel, this is most valuable. Some would say it is indispensible.

Another procedural measure, that has served well for relatively minor matters since its adoption a few years ago and has become an almost annual event, is the omnibus Law Reform Bill. This Bill takes up recommendations on a number of disparate topics and is dealt with as a single measure through select committee and second reading stages. In Committee of the Whole the Bill is split up into its

appropriate components and is enacted as a series of separate statutes. This process however is not available for the sort of major reforms that are the raison d'etre for Commissions such as the New Zealand one. Nor has it been used for really controversial topics, or topics where a large number of interests wish to be heard.

The period after a Bill is introduced is also and increasingly significant. With all but major government policies there is a growing tendency for details of legislation to be altered by Parliament, sometimes very substantially. This is consistent with the concept of Parliament as the law-making body. Its development can be offered as an example of this constitutional role being reclaimed from the executive. One ought therefore to welcome it. But it does add another and often prolonged stage to the journey from suggestion to statute.

Interest groups from time to time include government departments and not infrequently academics who take a different view from the law reform agency of how things should be ordered. Commonly, as already observed, there is opposition from outside groups with economic, social or moral interests. This may be overt. Or it may be disguised as an attack on the report on which the Bill is based, or on the adequacy of consultation. This last is quite normal in New Zealand, and lack of consultation is of course proved by the fact that the views of the interest concerned did not prevail. The report of a Law Reform Commission is unlikely to placate or persuade all these interest groups. It may remove misconceptions. It may expose exiguous or fallacious objections, and so on. But the power of a reasoned report to overcome strongly held views, or a perception of economic disadvantage, is small.

Select committees

Thus the price of getting law reform bills into Parliament fairly easily is often to open them up to assault in select committees, and to make the government members of these committees (to say nothing of opposition members) less committed to them. In these circumstances the department is almost certain in the vernacular phrase to get in behind. Departmental officers often attend the meetings of government caucus committees where policy decisions on these bills are made, both before and after their introduction. And precedent indicates that our Law Commission is likely to be invited to appear before the select committee to assist it. Such an invitation ought not to be refused on purist grounds.

One facet of this process — it may be peculiar to New Zealand — is that the sponsoring department has the last say when a Bill is before the Select Committee. That certainly doesn't mean the department always gets its way. Nonetheless it is advantageous to occupy this high ground.

Conclusion

Modern law reform will not succeed, however good the machinery, unless there is a Minister well disposed to reform and with enough weight in Cabinet to get his or her proposals accepted. This is the bottom line. Once more it is illustrated by New Zealand history. One period that some New Zealanders would see as a golden era of law reform occurred in the 1960s when the late Ralph Hanan was Minister of Justice. In the first half of the '70s it languished; many useful and not notably controversial law reform committee recommendations were left on the shelf. During the next ten years the pace greatly speeded up. The only consistently different factor in the equation throughout this time has been the succession of Ministers of Justice.

Parliament can of course at any time abolish the Commission it has created. Short of that, the conjunction of an economising government and an indifferent or uninfluential Minister might see funding pruned to the point where a Commission was relegated to a few relatively trivial topics.

Some degree of tension between Law Reform Commissions and related institutions is almost inevitable. Tolerance, a sense of realism and a common understanding can make this tension profitable rather than destructive.

Commissions for their part should pay more than lip service to the fact that they are advisory and not determinative bodies. They propose, governments and Parliaments dispose. They have no right to complain if their advice is not always taken. But their members will properly feel frustrated if their reports are commonly pigeonholed, and demoralised if they are commonly rejected. The remedy is not solely in their own hands. Yet they can earn respect and mana through the thoroughness, objectivity and overall quality of their work, and a disciplined imagination is a not negligible aspect of quality. In that way, a Commission may be able to create (as some assuredly have) a climate of expectation for its reports in which governments will be reluctant not to be seen to act on them. And unless a Government has set up its Commission simply as a piece of fashionable window-dressing, it also may feel that it cannot afford to neglect lightly the advice of the body whose birth it has sponsored.

Pressure groups can inhibit rational change. This ought not to be over-emphasised. Even without the advantage of the sort of process that results in Commission reports, a good deal has been accomplished in New Zealand. Recommendations of Commissions may well be more widely accepted and harder to refute. But as far as New Zealand experience goes, expecting interests to be satisfied by their day in Court with a Law Commission would be asking leopards to change their spots. And, as time goes on, most of the easy and obvious reforms have been made. Commissions justify their existence by grappling with wider and more difficult issues where indeed there may be no right answer.

So in the end I conclude that a temperate optimism is justified. Worthwhile reform does happen, and it has happened. The quality and quantity of legal change have been enhanced in countries that have established Law Reform Commissions. The same I am sure will occur in New Zealand. □

Creditors' right to vote in s 205 proceedings

By Andrew Beck, Faculty of Law, University of Otago

The financial difficulties of a company can affect the interests of different classes of people in different ways. In this article Mr Andrew Beck looks at a recent decision of Quilliam J in which he decided that where votes within a class such as creditors, were tainted by personal or special interest then such votes should be discarded.

In *Re the Farmer's Co-operative Organisation Society of New Zealand Ltd* [1987] BCL 1259, application was made for an order sanctioning a scheme of arrangement in terms of s 205 of the Companies Act 1955. Five separate class meetings were held comprising:

1 Members;
2 Client creditors;
3 Secured creditors;
4 Other unsecured creditors;
5 Trade creditors paid interest.

The first three classes approved the scheme. With regard to classes 4 and 5, the chairman was unable to affirm that the requisite majority had been obtained and the application was brought on notice to the opposing creditors. Three areas of difficulty arose: some of the creditors were direct competitors of the company; various debts were disputed; and others were claimed to be the subject of set-off. The second two points were disposed of by the Court without difficulty; it is the first matter which raises questions of great interest and which will be discussed here.

It was argued that the creditors in competition with the company ("competitors") had cast their votes out of self-interest rather than in the interests of the class as a whole and that these votes should therefore be discounted in calculating the majority. Quilliam J reaffirmed the principle of *British America Nickel Corporation Ltd v M J O'Brien Ltd* [1927] AC 369 as developed in *Re CM Banks Ltd* [1944] NZLR 248; *Re Holders Investment Trust Ltd* [1971] 1 WLR 583 and *Re Jax Marine Pty Ltd* [1967] 1 NSWR 147. He concluded that, although the present case involved votes against rather than for the scheme, there was no difference in principle and that "if it is shown that any of the votes in dispute were tainted by personal or special interest, then they ought to be discarded".(9)

It was conceded by counsel for Elders Pastoral Ltd and Mount Stewart Grain Co Ltd that these were not disinterested parties and agreed that their votes should not be counted. (4) Quilliam J nevertheless found it necessary to consider whether this concession could be accepted. In this regard he held that:

> Although the memorandum of counsel filed on behalf of Elders and Mount Stewart Grain Co Ltd stated that neither company cast its vote in anything other than good faith, it does not seem to me that either vote can be said to have been exercised for the purpose of benefiting the class as a whole and no doubt this is the reason for it having been conceded that [Mount Stewart Grain Co Ltd] was not a disinterested party. The adverse vote of this company must be discarded. (13)

The adverse vote of Elders was dealt with similarly. The position of other competitors: Wrightson NMA Ltd; Agrisales; and Agri-Feeds Ltd was complicated by the fact that they filed no affidavits in opposition and did not appear at the hearing. Their votes were challenged on the basis that the liquidation of the company would automatically benefit competitors and disallowed on the unchallenged evidence. (14)

The total of claims in Class 4 was calculated as $2,798,188.90. Subtracting the claims disallowed on the basis of set-off and dispute ($172,026.06) the total of the class is $2,626,162.84. The value of votes cast in favour of the resolution was $1,636,333.12, ie 62%. By disallowing the competitors' claims ($446,358.72), the majority in favour becomes 75%.

As far as class 5 is concerned, the Elders vote was the only adverse one. Its claim was for $1,132,220.09, representing 30% of the total. Once this vote was excluded, the majority in favour was increased from 70% to 100%. (This debt was disputed but the nature of the dispute was not discussed in the judgment because of the concession made by counsel.)

It can be seen, therefore, that by excluding the competitors from the computation, it was possible to bring the scheme within the ambit of s 205(2). Because there was no other challenge to the scheme, it was approved by the Court. The question which arises, however, is whether some creditors were not effectively deprived of their rights in the process.

Before considering some of the issues involved, it must be mentioned that this application was brought as a matter of urgency and the order was granted shortly thereafter, the reasons for judgment being handed down subsequently. This may well explain partly the concession made by counsel for the competitors.

The crux of the matter rests on (a) the appropriate demarcation of classes for the purpose of s 205 and (b) the obligations which rest on each member of the class qua member.

Obligations of class members

It was only the second aspect which was considered by the Court and the situation was viewed as a straightforward instance of acting in self-interest rather than in the interests of the class as a whole. Such a proposition must, however, be viewed with great caution. As a general rule a shareholder – and indeed any voter in a meeting situation – has no obligations to other voters and may vote in an entirely self-interested way (*Pender v Lushington* (1877) 6 ChD 70). Where, however, a majority is given powers to bind a minority and in so doing to alter the minority's rights, the law recognises that the majority is in a position of *responsibility* (if not quite trust) and that the voting power is fettered. Thus the power to alter the articles of a company must be exercised for the benefit of the company. The same principle applies whenever the majority is in effect dealing with the property of the minority. (See *Clemens v Clemens Bros Ltd* [1976] 2 All ER 268; *Estmanco (Kilner House) Ltd v GLC* [1982] 1 WLR 2.) The majority's powers are not unlimited:

> They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. (*British America Nickel Corp Ltd v M J O'Brien Ltd* [1927] AC 369 at 371.)

The sanction for breaking this rule appears to be a disallowance of the vote: *Re Holders Investment Trust Ltd*; or at least a reduction in the weight to be attached to it: *Re Jax Marine Pty Ltd* [1967] 1 NSWR 147 at 150. (See further discussion of this below.) It must be borne in mind, however, that the reason for imposing such an obligation in the first place is to prevent abuse of power. The same situation arises in the case of an insolvent company: the company is dealing with – and has power over – the *creditors'* money, and it must be handled in a responsible way – as Cooke J said in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 240, this "accords with the now pervasive concepts of duty to a neighbour and the linking of power with obligation". (249)

The important corollary of this is that there is no duty on the individual voter to vote in a particular way; it can only be when one voter, or a group of voters is able to exercise control – and may possibly abuse the rights of the minority – that an obligation arises. Thus, if a class consists of 100 members, all with diverse interests and all acting entirely independently, there is nothing to stop each member voting as he or she pleases. In the absence of any oppressive motive or effect, what the majority decides is ipso facto in the best interest of the meeting.

Merely because 75 members happen to vote in a particular way cannot result in the ex post facto imposition of an obligation. Nor is there any magic in the fact that it is a class which is meeting rather than the whole company (See *Holders Investment Trust* at 586): exactly the same principles must apply. It is only because classes normally meet in a situation where rights are to be affected that the issue often comes to a head in that particular context.

Minority oppression

To return to the problem at hand: the competitors were clearly not in a situation where they could oppress a minority. Nor did they vote with such a motive in mind. On the contrary, it appears that all the relevant votes were cast in good faith (13,14). The competitors were merely blocking a resolution which they had the voting power to defeat. Quilliam J held that it did not matter whether the relevant votes were cast for or against the resolution (9) and although theoretically this may well be correct, there are some important distinctions between the two situations which have to be borne in mind. A vote against a resolution will not normally be a majority vote and the rule would therefore not apply. Secondly, because the designated majority is a prerequisite for approaching the Court, sanction would not normally be sought for a scheme without this; the circumstances would have to be extremely suspicious for a Court to disregard a majority vote.

In the third place, if a majority votes against the scheme, the status quo is maintained and there is not, in the absence of oppression, the same justification for interfering. On the other hand, even if the scheme is approved by a 75% majority, the Court still has the discretion not to sanction it; the vote itself is not conclusive. In the present case, where the competitors were neither a majority nor acting oppressively, there does not seem to have been any reason to fetter their right to vote. To impose an obligation on the competitors in this situation is saying in effect that a member can never vote in self-interest where the rights of others might be affected. This in turn presupposes that there is some *objective* position which is "in the best interests of the class".

That is demonstrably not the case. Suppose that a class consists entirely of competitors, who all oppose the scheme. Can their votes be dismissed as not in the interests of the class? Of course not, because

their interests *are* the class's interests. If the class on the other hand had no competitors and therefore unanimously approved the scheme, that too would be an acceptable result. So the situation cannot be determined objectively; it depends on the membership of the class. If the class is composed half of competitors and half of other creditors, there is no way of determining the "best" interests and the scheme must fail. As the law stands, a majority of 75% is required to give a class a particular character, provided that the majority is obtained without oppression of a minority.

Tainted nature of votes

In the instant case the Court appeared to accept that a competitor could *never* vote in the interests of the class by virtue of its own self-interest *as a competitor.* It seems that, whichever way they had voted, the competitors' votes would have been subject to this objection: although the Court held that the question of tainted votes was one of fact,(9) the aspect of direct competition was stressed (13,14) and it appears that opposition to the scheme was linked to this. (The concession by counsel makes it difficult to draw a definite conclusion on this point.)

Because of the tainted nature of the votes, they were discounted in calculating the majorities. This is contrary to the decision in *Re Hellenic & General Trust Ltd* [1976] 1 WLR 123, where, although its votes were discounted, an interested party was held to constitute a separate class and was therefore not entirely deprived of its rights. It is also contrary to the views of Adam J in *Re Chevron (Sydney) Ltd* [1963] VR 249:

> In so far as members of a class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the view of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class. (255)

Authority for disallowance was sought in *Holders Investment Trust* and an obiter statement in *Jax Marine.* In the former case (an application for reduction of capital interfering with class rights) there was a clear situation of majority control: 90% of the class was vested in three related trusts and they used their power to approve a scheme that was manifestly unfair; there was no problem with jurisdiction. In the latter case, the Court was concerned with its power to sanction a scheme *after* the requisite majority had been obtained. It is in this situation that different weight may be attached to the votes which have been cast.

The present situation is very different. The issue is whether the Court had jurisdiction to consider the scheme at all in view of the fact that the 75% majority required by statute had not been obtained. In *Jax Marine* it was stated that "[t]he fact of the prescribed statutory majority having been attained at a meeting provides the basis for coming to the Court for approval of the arrangement . . .". (147). In *Re Landmark Corporation Ltd* [1968] 1 NSWR 759, the majority requirement was held to go to jurisdiction (766) and s 205(2) seems to make it clear that there must be a 75% majority in addition to, and prior to, the sanction by the Court. That was simply not present in this case.

Composition of classes

The other important matter, which arises out of the first, is whether the classes were in fact properly constructed. The competitors were effectively deprived of their votes altogether and it is difficult to see how they could have avoided censure except by voting with the majority. This raises the question as to whether they should have constituted a separate class. While their rights vis-à-vis the company were the same as those of the other creditors in the classes adopted, their interests were clearly very different. The conflict between rights and interests in the matter of class construction is a somewhat disputatious one, but even if the most unfavourable test is adopted, there appears to be an argument in favour of separate classes here. In the words of Street J in *Jax Marine*:

> The test is rather one of whether or not the persons who, prima facie, appear to constitute [one class] should be dissected into separate classes by reason of some particular matter so affecting the rights of some as to render it impossible for them to pursue their own interests concurrently with participating in the pursuit of the interests of the class of which they appear to be members. (148)

The fact of being a direct competitor appears to be such a matter; it does not seem reasonable to expect competitors to ignore their trade interests when they have invested in the company as a competitor. By placing the competitors in a separate class, the confiscation of voting rights could be avoided and they could vote unfettered in the interests of their own class. Either way, however, they would be able to defeat the scheme. There does not seem to be any objection to this on the present facts; the situation would be more serious, however, where the competitors represented a very small fraction of the total creditors. In such a situation, however, it would probably be possible to pay them and make arrangements with the remaining creditors.

Division into classes

The decision as to the division into classes can make the difference between success and failure of the scheme. In *Jax Marine*, the Court's refusal to divide the class of unsecured creditors led to at least preliminary success. In *Re Gazelle Constructions Pty Ltd* (1985) 10 ACLR 140, *Jax Marine* was distinguished and the director-shareholder creditors were held to constitute a separate class, which meant that the scheme was doomed, just as it was in *Re Hellenic & General Trust.* This decision has been critised because a fair scheme was defeated (Hornby (1976) 39 MLR 207) and supported because it upheld minority interests (Prentice (1976) 92 LQR 13). In *Gazelle Constructions* the issue of fairness was not adverted to but in *Re Landmark Corporation Ltd* [1968] 1 NSWR 759, an ostensibly fair

continued on p 28

Language in law

Drafting laws in plain English: can the drafter win?

Many years ago the novelist Aldous Huxley wrote a couple of books on the effects of drugs such as Mescalin. A review of one of these books in the magazine Time *caused him to write a letter to the Editor complaining that the message of his book had been misrepresented in the review. He concluded his letter by saying something like "which just goes to show that you cannot say in 500 words what can only be said in 5000". This problem of clarity of expression is of special significance in the field of the law. An anonymous comment on the problem of legal language which is said to have circulated among members of the Commonwealth Association of Legislative Counsel was reprinted in the* Commonwealth Law Bulletin *in 1986. The article is entertainingly written but makes a very valid and pertinent point. The article is particularly relevant to one of the principal functions of the Law Commission as listed in section 3 of its empowering statute "(d) To advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable and accessible as is practicable."*

It is reported that when Moses came down from Mount Sinai to tell the children of Israel of the commandments given by Yahveh he said that he brought both good news and bad news. The good news was that he had persuaded God to reduce the number of commandments to ten from a higher number originally specified. The bad news was that one of the remaining ten still prohibited adultery.

Doubtless Moses sought thanks or praise for his efforts and perhaps he should have received high marks for brevity. But from any point of view the commandments were very poorly drafted and ought to have received very low marks for their lack of precision. For example, the commandment against killing did not contain any exceptions or qualifications; nothing was said about accidental killing, self-defence, provocation or insanity. On the other hand, in a later commandment the lawgiver decided to elaborate on the prohibition. A simple prohibition of covetousness was considered inadequate and instead the commandment contained a list of matters not to be coveted, such as one's neighbour's wife and his ox and his ass (the commandment appears to be directed only to men). The defect was that the commandment was over-precise and many matters in *pari materia* with the matters included were omitted. A good drafter would have relied on a general prohibition against coveting one's neighbour's property (which in biblical times presumably included his wife).

The moral in the foregoing is that simplicity and brevity, although desirable qualities in a law, are not enough. Precision is essential and the legislative drafter is engaged in a continuous struggle to attain precision without sacrificing simplicity and brevity. Whenever the drafter fails in the sisyphean task, obloquy is heaped on the product. No marks are given for effort. In Australia, at present, the legislative counsel are beleaguered in their temples. They are under attack for lapses from the path of righteousness, namely, for drafting laws that cannot be easily understood by the general public (whatever that expression may mean). Why has this criticism arisen to such a crescendo? How can it be answered?

In October 1984 the Standing Committee on Education and the Arts of the Australian Senate published a report on a National Language Policy. One of the recommendations in the report was that "a National Task Force be established to recommend on the reform of the language of the law". The Committee noted in particular that laws had been enacted in certain States of the United States of America that require legal documents to be subject to readability and comprehensibility tests. The author of this article is not aware of the sanctions that are applicable where the statutory requirements are infringed.

Since the Committee reported, there has been considerable agitation in the Australian community in support of the view that citizens have a right to understand the laws and regulations that apply to them. One of the main critics of existing legal and official language has been an associate professor of English at the University of Sydney. At first he directed his criticism at private legal documents, such as insurance policies, and official documents, such as taxation return forms, but he has since extended his attack to

the language of the statutes.

The Attorney-General of Victoria has joined this bandwagon and, after announcing his intention to reform the language of the laws in his State, he has asked the Victoria Law Reform Commission to study how more of the laws of Victoria can be written in plain English. Apparently the Commission is to inquire into practices and procedures that make it difficult for legislation, legal agreements and government forms to be written clearly.

Plain English is like motherhood; everyone is in favour of it. There is no doubt that many privately drafted legal documents and many old laws are appallingly drafted. However, so far as the laws are concerned, in recent years there has been a considerable improvement. No doubt some legislative drafters have better techniques than others so that statutes drafted by the former are on the whole better drafted than those prepared by drafters with poorer techniques. Nevertheless no sensible person could expect a statute to be as easy to read as a work of popular fiction or a tabloid newspaper. Works of popular fiction eschew unusual or long words and tabloid newspapers usually make each sentence into a separate paragraph. If such literary works or newspapers represent the level of comprehension of most of the adult population, no amount of effort by the drafters of legislation will render the statutes comprehensible to the average adult reader. If, however, the average citizen can be regarded as having a somewhat higher level of comprehension, the drafters have a duty to facilitate the citizen's comprehension of the statutes so far as it is practicable to do so.

However, the critics of the statutes have overstated their case by claiming that any complex idea can be expressed plainly so that all readers can grasp its meaning. To the legal drafter, struggling to find words to express an abstract concept, this claim is manifestly false. Moreover, its propagation is dangerous because the superficial attractiveness of the claim misleads the public generally, and many persons in authority, into believing that it is true. The complexity of modern laws regulating business activities, whether for the purpose of economic control, for the purpose of gathering revenue or otherwise, is largely due to the complexity of modern business operations. Business is frequently conducted in such a way as to minimise taxation and considerable technical complexity in the drafting of the laws is necessary to prevent this.

Apart from cases of complex policy or poor drafting techniques, the main reason why laws are difficult to understand was lucidly explained many years ago by Sir Ernest Gowers. He pointed out that legal English differed from literary English because literary English had as its prime objective the desire to convey an idea readily to the reader and it did not matter that the idea was not conveyed precisely. On the other hand, legal English has to convey an idea precisely and unambiguously. This involves the inclusion of exceptions and qualifications, the definition of expressions used otherwise than with their ordinary meanings, and the continual repetition of the same words where the same meanings are intended. The writer of a statute should, for example, avoid elegant variation. As Gowers has stated, lack of ambiguity does not go hand in hand with intelligibility, and the closer you get to the former, the further you are likely to get from the latter. In the case of a law dealing with complex matters, there is a substantial truth in the proposition enunciated by a former English Parliamentary Counsel that the intelligibility of such a law is in inverse proportion to the chance of its being right.

Nevertheless one could reasonably expect a law dealing with a simple topic to be able to be drafted so as to be capable of comprehension by the average reader. A law requiring the driver of a motor vehicle to drive as closely as practicable to a particular side of the carriageway is a good example. But not many laws are as simple as this and most have exceptions and qualifications, though in many cases these exceptions and qualifications can be set out in a way that enables them to be fairly easily understood.

The position is different in the case of a statute that deals with an abstract and complex concept. It would be very surprising if such a statute could be easily understood by the average reader. For one thing, the reader might not have the necessary background knowledge of the subject matter dealt with by the law. In addition, the concepts involved might by their very nature be incapable of being expressed in language that is appropriate to the average reader's level of comprehension. It might be necessary to use a mathematical formula. In that event, no matter how hard the drafter tries to simplify the text, the result will not be meaningful to a person who does not have an above average level of comprehension. In one case where a provision made use of multiple formulae, a member of the Australian Federal Parliament commented that it was a case of "mathematics rampant, Parliament couchant".

In trying to make a law as readable as possible there are constraints imposed on the drafter that are not ordinarily appreciated by the drafter's critics. In preparing legislation, the drafter has to satisfy three potential and quite different audiences. These audiences are, first, the Members of Parliament who have to enact the legislation, secondly, the citizens to whom the legislation applies and thirdly the Judges who have to interpret the legislation. The needs of these three groups are not always reconcilable and, in the last resort, the drafter has to ensure that the legislation is drafted so as correctly to give effect to the policy of the sponsors. This means that ultimately it is the third group, the Judges, to whom the laws must be directed.

Other, more practical, problems beset the drafter. Primarily, there is the problem of getting adequate instructions. To some extent, a draft can only be as good as the ability of the drafter's instructors to explain the policy clearly to the drafter. If the drafter and the instructors are not on the same wavelength, the drafter may be giving effect to what he wrongly believes to be the desired policy and the instructors may wrongly believe that the draft correctly gives effect to what is in fact their policy.

Another problem is the state of the existing law. A new law has to

continued on p 27

The Law of the Lot

By Marcel Strigberger

(*Reprinted from* Ontario Lawyers Weekly, *August 2, 1985.)*

LOT Co. Ct. J. (Orally) – This is an action for damages against the defendants for trespass, arising out of the towing by the defendant Quickie of the plaintiff's motor vehicle which he parked at the defendant plaza.

On or about February 11, 1984, the plaintiff parked his recently purchased 1984 Volvo in the parking lot at Corkdale Plaza. He went into the plaza to look for a certain book at the public library located in the plaza but the branch copy was out. The librarian called around and told the plaintiff that the downtown branch had a copy available. The plaintiff then had a coffee at a plaza coffee bar called Coffee Coffee and left. Rather than driving away, he decided to take the subway at the nearby station and he went to the downtown branch where he checked out the waiting book.

One and one-half hours later he returned to Corkdale by subway expecting to find his new Volvo waiting for him just like the book. His luck did not extend that far.

It seems that the defendant Quickie, at the instructions of Corkdale towed the car away and subsequently released it upon payment by the plaintiff, under strong protest of $58.

The plaintiff brings this action for damages, including punitive damages and damages for mental distress.

By way of defence, the defendants rely upon a huge sign strategically located in the parking lot which sign reads,

> Customer parking only.
> Others will be towed away.

As every law student knows, the common law is clear that the owner of a parking lot has an absolute right to tow away non-customers. As Brazingham J said in the case of *Buttersly v Ye Shoppers' Plaza and Goodfellow,* [1505] Some ER 124 at page 127, "A man's parking lot is his castle. And if a man parks his horse and cart there pretending to be a customer, and he is not, then the owner of the castle may throw both the horse and the cart into the moat."

There is in fact, an entire chapter devoted to this subject in *Mayne on Moats (Second ed.),* where the learned author says at page 233, "The law is well established. It may be harsh on the horse but it is well established."

The question therefore is, was the plaintiff a customer of the plaza when his car was towed? I shall deal with this question first.

Counsel for both parties have been very helpful in referring the court to several decisions. In the case of *Dingle v Town and Village Mall, et al.,* the plaintiff also had his car towed by the defendants, after leaving it parked in the mall parking lot.

The evidence was that Mr Dingle had some salad for lunch at a mall restaurant and then left his car behind in the lot while he travelled downtown, returning approximately 6.30pm.

The plaintiff was successful in that case as he was deemed still to be a customer entitling him to park at the parking lot during the interval.

But counsel for the defendant herein points out that case turns on its own facts. In the *Dingle* case, the restaurant in question had an all-you-can-eat salad bar and the plaintiff testified that at 6.30pm, he was in fact returning to the restaurant to continue where he had left off at noon to eat more salad.

---

continued from p 26

dovetail with the existing common law or statute law. This imposes restrictions that would not operate if the drafter were free to draft a statute in a legal vacuum.

Finally there are the time constraints that are almost invariably imposed on the drafter. Governments set deadlines that usually do not allow as much time for the drafting of a Bill as the drafter would like, and in some cases there is even less time than the minimum that would be required for the preparation of a Bill that is fit to be introduced. Certainly there is rarely time for revision for the purpose of improving the readability of the draft.

I conclude by saying that, in many cases, the drafter is in a catch 22 situation. If the provisions of the draft contain as much detail as is necessary to ensure that all matters are properly covered (for example laws relating to taxation), the drafter is likely to be accused of prolixity and verbosity. If the law is in general terms, it will be productive of much litigation to ascertain how it applies in particular cases (workmen's compensation legislation and the Sherman Anti-Trust Act are well known examples of this). If the drafter takes shortcuts, such as drafting by reference to, or by modification of, other existing statutory provisions, he or she is accused of being cryptic or of writing gobbledegook. In short, the drafter can't win. □

The evidence there was that at around noon, the salad bar was out of the plaintiff's favourite vegetable, carrots, and that the owner told Mr Dingle that there would be more carrots later on in the day.

In the case at Bar, the plaintiff indicates that he would have purchased another coffee at Coffee Coffee. But this is different from the *Dingle* case as the owner of Coffee Coffee testified on behalf of the defendants herein that his restaurant did not offer "bottomless cups of coffee".

To quote the owner, Nick Batzakalos: "Are you kidding? You want more coffee, you pay. That's it."

Counsel for the defendant referred the court to the case of *Wiggly v. Flowerdale Mall et al.*, where the plaintiff, on a Legal Aid certificate incidentally, was visiting with his lawyer, a Mr Figg, who had his offices at the Mall. While at the office, the defendants in that case towed the plaintiff's Thunderbird away.

Flowerdale Plaza had a similar "customer only" policy to Corkdale. The court found for the defendants, but once again that case turns on its own facts. The court held a customer is someone who enters into or potentially may enter into a commercial transaction with the hopeful vendor or merchant which transaction is potentially "profitable" to the vendor or merchant.

In that case, Mr Figg, who was subpoenaed by the defendants, reluctantly admitted that by doing work on a Legal Aid certificate, there is no way the transaction had any chance of being profitable. Accordingly the trial judge held the plaintiff was in no way a customer.

In the case at Bar counsel for the plaintiff argues that he intended to deal with the Corkdale Branch of the public library and when the librarian directed him downtown, she represented to him that the public library system is like a hand and that its branches are like the hand's fingers.

By going from finger to finger, one is not really leaving the hand and he is still deemed be present thereon.

Certainly if the defendant plaza wanted to ensure that parking is for customers of this finger only, so to speak, it could readily have stipulated that on its signs rather than mislead customers to think they could roam across the entire hand.

There will be judgment for the plaintiff in the sum of $58. There will also be judgment for the plaintiff in the sum of $1,000 for punitive damages as there ought to be some deterrence to these defendants against descending upon unsuspecting vehicles, and as I also frequently park my car at that plaza.

Finally dealing with the issue of mental distress, counsel for the defendant argues that by analogy to wrongful dismissal cases, damages ought to be recovered not for distress arising out of the actual towing itself, but only for the distress arising out of the manner in which the towing took place.

A psychiatric report (Exhibit 12) written by Dr Wilhelm Dunkelman reads in part as follows,

> Patient clearly indicated he was not upset by the actual towing itself. He was upset at how it was done; namely with the use of a tow truck.

Accordingly there shall be judgment for mental distress in the amount of $3,000.

Counsel may speak to me on the issue of costs, but I know what I'm going to do. □

---

continued from p 24

scheme was defeated by virtue of inter alia the opposition of a minority of creditors which could not be described as unreasonable. There is clearly a balancing of interests by the Court in the exercise of its discretion to sanction the scheme and it appears that there may be a link between the overall fairness of the scheme and acceptance of the classes as constituted.

That may well have been one of the motivations of the Court in the the instant case. No details of the scheme are given in the judgment and fairness was not mentioned, which may seem a little odd because one of the clearly accepted functions of the Court in a s 205 application is to ensure that the scheme is fair (*Re CM Banks Ltd*). Presumably the fact that no objection was raised as to fairness by the opposing creditors was considered sufficient. If the competitors did regard the scheme as fair, however, it is difficult to see how they could bona fide have objected to it. Assuming that the objections were bona fide, it would seem that the Court should have considered the question of fairness, and not been content with the majority vote in the classes concerned: reasonable objections by major creditors are obviously of relevance in determining the fairness of the scheme.

Conclusion

As mentioned above, this entire decision is occluded by the mysterious concession of counsel that the competitors were not entitled to have their votes counted. Despite this, there are a number of propositions which emerge from the discussion above:

1 The obligation to vote in the interests of the class is confined to a majority and is designed to prevent abuse of power. Thus no fetter should have been placed on the competitors' rights to vote.

2 Even if the votes of an interested party are viewed with suspicion, they should not be discounted when calculating the statutory majority. That majority is a jurisdictional fact which was not established in this case.

3 Not every vote cast at a class meeting is entitled to equal weight, but it is only at the discretionary stage that weighting is used. That stage was not relevant here because of the lack of jurisdiction.

4 In extreme cases of conflict of interest, a prima facie class should be split up to prevent a masking of incompatible interests. This action may well be justified in the case of direct competitors. □