THE NEW ZEALAND
LAW JOURNAL
21 JANUARY 1991

Administrative Law Trends

The President of the New Zealand Court of Appeal, Sir Robin Cooke was invited to give the fifth annual Azlan Shah Law Lecture for 1990 in Kuala Lumpur. These annual lectures were established by the University of Malaya in honour of Sultan Azlan Shah the hereditary ruler of Perak. The Sultan is the present King of Malaysia, the Yang di-Pertuan Agong IX. His Majesty had a distinguished judicial career, culminating in his holding the office of Lord President of what is now the Supreme Court of Malaysia. (The name Malaysia, incidentally, includes both Malaya and Borneo, each with its own Chief Justice.) It was in honour of His Majesty's legal and judicial career that these lecture's were established. The first four lectures were given by two English academics, Professor A G Guest and W R Cornish, and two English Law Lords, Lord Oliver and Lord Ackner.

The President delivered his lecture on 4 December 1990. In opening the President remarked that whereas, as W S Gilbert would have said, it was greatly to the credit of each of the preceding lecturers that he was an Englishman, he, as the fifth lecturer could not claim that same credit. He hoped however that a contribution from the South Seas would make up, in novelty at least, for this break with precedent.

The lecture was on "Administrative Law Trends in the Commonwealth". The theme was the tension rising from the competing demands upon the Courts of avoiding undue subservience to the executive, on the one hand, and frustration of the will of the elected representatives of the people, on the other. The struggle for simplicity in administrative law in the Commonwealth principles was said to be gradually succeeding; but because of the tension the cases were becoming harder to decide. The Courts were in a no-win situation, but had to accept this as inseparable from their role.

The lecture reviewed case law developments in New Zealand, England, Canada, Australia and South Africa. The latter country was included as the case of *Administrator, Transvaal v Traub* 1989 (4) SA 731, was described as being a recent significant contribution to the law of legitimate expectations and natural justice. In that case house surgeons had applied for promotion. They were unsuccessful. It was held against them that they had signed a letter protesting against conditions in the medical wards. The Appellate Division of the Supreme Court found in favour of the house surgeons who were held to be entitled to a fair hearing on the normal criteria for promotion.

On Malaysian law, Sir Robin noted that the core events of the episode involving the dismissal in 1988 of Lord President Salleh Abas and two other Judges had not been the subject of litigation. These events would have presented a challenge to an administrative law system, but the Malaysian Courts were spared the problem of constituting a bench able to try such a case. He said that he had read some of the writings about these events. (For a review of some of these books see [1991] NZLJ.)

The President discussed a number of Malaysian cases, commenting favourably on some as showing judicial review at its best. He considered, however, that others were rather worrying. In that connection he mentioned two cases. The first was *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, where by three to two the Supreme Court declined to entertain a claim that Government money was being improperly spent on a highway construction contract. The second case was the *Aliran* case [1990] 1 MLJ 351, where a refusal for unspecific reasons to permit a magazine to be published in Bahasa Malaysia, the national language, was held immune from judicial review. Sir Robin concluded that Malaysian administrative law had some notable achievements, but that the administrative law tensions had perhaps also taken their toll.

In the course of the lecture the comment was made that the Malaysian judgments were admirably concise and easy to assimilate. The criticism sometimes expressed that the Malaysian Courts were still colonialist at heart was described as unjustified. The President said he had observed in the Malaysian cases a judicious selection of which English dicta, sometimes conflicting, should be converted to Malaysian use. Somewhat ambiguously perhaps these references, which were presumably intended to defend the integrity of the Malaysian Judges from unjustified political criticism, led to the lecture being publicised in the Government-controlled press as being "a pat on the back" for the Malaysian judiciary.

The lecture concluded as follows:

> The tensions will not relax. As in other countries, one can predict from experience that administrative law cases will continue to get harder. A guiding thought for those charged with judicial responsibility is that in this field judicial review is an aspect of democracy. To suggest, as some people unreflectingly tend to do, that democracy equates with majority rule is simplistic and fallacious. A dictionary definition of democracy is "a state of society characterised by equality of rights and privileges". Administrative law is a servant of such a society.

P J Downey

Case and Comment

The pari passu rule in winding up *McMillan and Lockwood v Attorney-General* (1990) 3 BCR 654; *Attorney-General v McMillan & Lockwood* [1990] BCL 1508.

In *Re Walker Construction Limited* [1960] NZLR 523, F B Adams J considered that the pari passu rule contained in s 293 of the Companies Act 1955 conferred private rights on creditors so that creditors could contract out of the rule. However, as is well known, subsequent decisions of the House of Lords considered that public policy required the English equivalent of s 293 to be dominant in winding up: *National Westminster Bank v Halesowen Presswork Ltd* [1972] AC 785; *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390. As such, public policy prevented creditors contracting out of the pari passu rule.

Despite the fact that there were Australian cases to the contrary (which, it would seem, are generally accepted as not having been particularly well reasoned), Mahon J in *Re Orion Sound* [1979] 2 NZLR 574 followed the English authorities. The case seemed to meet with general acceptance in New Zealand and was said to mark the death knell of the *Re Walker* line of authority. (Farrar, [1980] NZLJ 100.)

If *Re Orion Sound* was the death knell of *Re Walker Construction Limited, McMillan & Lockwood Ltd (In Receivership) (In Liquidation) v The Attorney-General*, (1990) 3 BCR 654 gives *Re Walker Construction Limited* some sort of a burial, though not necessarily a decent one.

The plaintiff contracted to erect buildings for the Crown. The buildings were completed and there were sums owing under the contracts. In keeping with the policy behind the Wages Protection & Contractors' Liens Act 1939, the contract with the Crown empowered the Crown to pay to any employee of the contractor or to any subcontractor, supplier or other person to whom wages or progress payments were due for services or materials supplied the whole or any part of such monies as if such persons were "the lawful assignee of the contractor in respect of such monies".

The contractor was put into receivership and an order for winding up was made shortly thereafter. The liquidator claimed that these contractual provisions were void as contrary to public policy ie as contravening the pari passu rule.

Ellis J relied primarily on the *British Eagle* case and *Re Orion Sound* in finding for the liquidator. (Had the Wages Protection & Contractors' Liens Act been in force at the time of liquidation Ellis J would have been prepared to allow the policy which lay behind that Act to have predominance over the policy lying behind the pari passu rule. However, because the "Liens" Act had been repealed by the date of liquidation, the only policy that mattered was that which lay behind the pari passu rule). Ellis J did not refer to *Re Walker Construction Limited* or any of the Australian authorities. (There having been further Australian cases since *Re Orion Sound*.)

The decision is not surprising given that the position in the United Kingdom has been settled for some time. The *National Westminster Bank* case and the *British Eagle* case are high authority for the proposition that creditors cannot contract out of the pari passu rule and *Re Orion Sound* (supra) has added to this line of authority.

Nevertheless, the British cases have not escaped criticism. Critics have claimed that the assertion that public policy requires that parties may not contract out of the pari passu rule has not been the subject of any detailed analysis or reasoning ([1987] ABLR 80) and that even if there is good reason for such a policy in the context of the English legislation, the position is not necessarily the same in New Zealand ([1989] NZLJ 224).

One can readily see that contracting out, of the sort exemplified in *McMillan*, can favour one particular creditor or groups of creditors and why it should be deemed to infringe the pari passu rule. However, the same objection cannot be made with respect to debt subordination. Because the deferral of priority as between two or more creditors has no effect on other creditors, it is difficult to see why public policy should prohibit debt subordination in the context of a winding up.

Our Court of Appeal had not pronounced on the effect of contracting out of the pari passu rule. Despite the painfully and embarrassingly slow progress being made by the government in relation to company law reform, it is possible that we will have a new Companies Act before the Court of Appeal does get a chance to make any pronouncement. It is interesting to note that the Law Commission, in its draft Companies Act, has proposed that debt subordination be permitted. (Refer to clause 240). However, it would appear that the pari passu rule has been otherwise retained and that contracting out of that rule will not be possible. (Refer to clause 240(2)).

Practitioners will be aware that there are, in some circumstances, ways to avoid the application of s 293. For example, a scheme of arrangement under s 205 of the Companies Act can sometimes achieve the desired result.

Addendum

In *Attorney-General v McMillan & Lockwood Limited (in receivership) (in liquidation)* [1990] BCL 1508, the Court of Appeal has confirmed the High Court decision noted above though for slightly different

reasons. (As with the above note, the only point with which this addendum is concerned is whether contracting out of the pari passu rule is permissible.)

By a majority of two (Richardson and Bisson JJ) to one (Williamson J), the Court considered that the pari passu rule applies absolutely to all liquidations, ie both to voluntary and Court ordered liquidations. The main authority relied on was the *British Eagle* case. Because the rule applies absolutely in liquidations, the majority considered that there was no need to balance other public policy considerations eg the policy behind the Wages Protection and Contractors Liens Act 1939. Finally the majority stated that it "is arguable that the right to share equally can be waived by [a] creditor" and thus seems to have left open the possibility that a Deed of Postponement of Priority between creditors may not contravene s 293 of the Companies Act 1955. However, it was unnecessary for the majority to consider this matter in any detail.

In relation to the question of whether the rule applied to Court ordered liquidations as well as voluntary liquidations, the majority recognised that s 293 only refers to voluntary windings up and that s 104(f) of the Insolvency Act 1967 (which is imported into the winding up of insolvent companies by s 307 of the Companies Act), unlike its predecessor (s 120(e) of the Bankruptcy Act 1908) does not refer to the pari passu rule. Thus, it could be argued that the combined effect of ss 293 and 307 of the Companies Act is that the pari passu rule does not apply to the Court ordered liquidations.

However, without much more ado, the majority stated that the pari passu rule applies across the board to bankruptcies and therefore, by virtue of s 307 of the Companies Act, to all windings up. (Williamson J did not accept that the pari passu rule applies across the board to all bankruptcies but agreed that the rule applied to the winding up of all insolvent companies.) Though the majority's analysis was brief (a slightly more comprehensive analysis was undertaken by Mahon J in *Re Orion Sound Ltd* [1979] 2 NZLR 574), the conclusion surely must be correct.

The majority considered that because public policy requires universal application of the pari passu rule in windings up, competing policy factors were irrelevant. Williamson J disagreed. Like others before him (eg Grantham [1989] NZLJ 224), he considered that it should not necessarily be taken for granted that policy considerations which were regarded as being paramount in the United Kingdom in the 19th century should be regarded as being paramount in New Zealand when interpreting and applying New Zealand legislation in the 20th century. The public policy factors which lay behind the Wages Protection and Contractors Liens Act 1939 had to be weighed up against the public policy factors which lay behind the application of the pari passu rule. Accordingly, Williamson J concluded that because s 2(3) of the Wages Protection and Contractors Liens Repeal Act 1987 did not alter rights already acquired by subcontractors or suppliers prior to the passing of that Act, the contractual provisions which empowered the Crown to pay subcontractors and suppliers direct were not void as against the liquidator.

There is some cause for satisfaction because the majority decision will inject some degree of certainty into the law of liquidations. As it is unlikely that the Privy Council will take a different line, liquidators can now take it for granted that contracting out of the pari passu rule in general terms is prohibited.

However, it is unsatisfactory that the application of the pari passu rule remains uncertain in some respects. In particular, uncertainty remains in relation to Deeds of Postponement of Priority between creditors. There is no logical reason why such deeds should not be effective, and as has been adverted to, the majority of the Court of Appeal has left open the possibility that creditors may waive their rights to share equally in a distribution on winding up. It remains to be seen whether a right of waiver can be reconciled with the majority's statement that the pari passu rule applies absolutely to all liquidations.

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Acceptance of goods

Printcorp Services Ltd v Northern City Publications Ltd, [1990] BCL 1604.

This case illustrates the importance of the necessity to decide whether a contract which has elements of both work on, and supply of, goods is to be classified as a contract for services or a contract for the sale of goods. One important aspect of the distinction is that the remedies available in each case differ, because, once a contract is determined to be for the sale of goods, the provisions of the Sale of Goods Act apply.

The defendant company in this case was a publisher of two quarterly newspapers. The company entered into a separate contract respecting each of the two newspapers with the plaintiff, a printing company, that the plaintiff should print the two newspapers, the quality of the printing to be at least as good as that done by the defendant's previous printer. When printing was completed pursuant to the first contract, these newspapers were delivered to the defendant, whose managing director inspected them and indicated his approval. The other newspapers were delivered the following day when they had been printed. At that point, the defendant company said that the printing work was not up to standard and that both newspapers would be rejected. The plaintiff sued for the price of printing and supplying the newspapers.

Fisher J held that the printing work failed to achieve the agreed standard. However, the consequences of this finding could not be decided until the "threshold question" of whether the contracts to print the two newspapers were contracts for the sale of goods or for the supply of services. The provisions relating to remedies in the Contractual Remedies Act 1979 have no application to contracts for the sale of goods: *Finch Motors Ltd v Quinn* [1980] 2 NZLR 519 with the result that, in the cancellation of contracts, the Sale of Goods Act and the Contractual Remedies Act constitute mutually exclusive codes.

In considering the test to be applied in determining whether a contract was for goods or services, Fisher J observed that, in the past, two tests had been applied; the first

being that, if the contract resulted in the sale of a chattel, it was a contract of sale, even if the primary aim of the contract was to provide services, and the second using the criterion of assessing the relative importance of the work as compared with the materials, noting that the two tests could not be reconciled, and that the choice between the two was today "entirely arbitrary", Fisher J indicated his preference for the second test, and examined the real substance of the contract. While accepting that the printer's skill and judgment were significant elements in this contract. His Honour nevertheless was of the view that the contract was dominated by the physical ink and paper, with the result that the contract was one for the sale of goods.

The consequence of this finding was that the case fell to be determined within the provisions of the Sale of Goods Act, not the Contractual Remedies Act; and the fact that the former Act dealt specifically with the remedies available when goods had been accepted made this particularly significant in this case. Section 13(3) of the Sale of Goods Act provides that, if a buyer has accepted goods, he loses his right to reject the goods if a condition has been breached, and is confined to a remedy in damages only; and s 37 states that the buyer's intimation to the seller that he has accepted the goods constitutes acceptance. Because, in this case, the defendant had examined, and expressed approval of, the first newspapers to be printed, it was held that the defendant could not reject these, but was obliged to accept damages for the breach of contract. Compensation for this was assessed as being 50 per cent of the purchase price.

The result was different with respect to the second contract, however, for there was no intimation of any acceptance of the newspapers which were delivered pursuant to that contract. His Honour held that the deficiencies in those newspapers were sufficiently serious for him to hold that there had been a breach of a condition giving the defendant the right to reject the newspapers and treat the contract as at an end.

It is noteworthy that, had the contract been found to be substantially for the provision of services, and the Contractual Remedies Act therefore of application, the decision in respect of the second contract would have been the same, but that respecting the first contract would have differed. Fisher J considered that the acceptance of the newspapers by the defendant would have been of no legal significance in such a case, so that, given the seriousness of the breach of contract, the defendant would have been entitled to cancel the contract pursuant to the Contractual Remedies Act. It may be inferred from this that His Honour did not consider that the defendant's acceptance of the goods would have amounted to an affirmation of the contract within s 7(5) of that Act, for in such a case, the defendant would not have been entitled to cancel. The case therefore provides a neat illustration of the necessity to determine whether a contract is substantially for goods or services, and the consequences which flow from the distinction.

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Exclusive dealing arrangements — Anti-competitive or pro-competitive

Fisher & Paykel Ltd v Commerce Commission [1990] NZAR 241

Exclusive dealing arrangements entered into by Fisher & Paykel ("F&P") are not anti-competitive. The High Court decision in the F&P case (reversing the decision of the Commerce Commission) represents a blow to competitors of F&P.

The question for the Court was whether the exclusive dealing clause ("EDC") requiring retailers not to stock whitegoods of other distributors, breached s 27 of the Commerce Act 1986. In other words, does the EDC have the effect of substantially lessening competition in the market for the distribution and sale to retailers of whitegoods?

Briefly, F&P is the sole manufacturer of whitegoods in New Zealand. Approximately 55% of the retail outlets throughout New Zealand are F&P dealers. F&P has between a 75% and 85% share at the supply level.

F&P's agreements contain an EDC in the following form:

> You will not stock or sell any other make or brand name of product that is listed in Schedule One.

The agreements can be terminated on 90 days' notice by either party.

Email and Simpson, as competitors of F&P, argued that F&P's pre-eminence both in number and quality of its retail outlets confers on it the ability to foreclose the market by holding all its dealers to strict compliance with the exclusivity requirement.

They went on to say that F&P has a market power so great as to enable it to be in a position to maintain an EDC which breaches s 27.

In response, F&P argued that the EDC is pro-competitive. The consumer, it was said, through the retailer receives a package of information, quality product and good after sales service.

F&P maintained that there is no foreclosure of the market. Entry barriers are low. Retail outlets for whitegoods are readily available, and there are no tariff barriers restraining imports. In fact, consumer demand for F&P's competitor's products has increased.

F&P went on to say that the EDCs prevent the twin evils of free riding (ie, competitors get advantageous spin-offs from F&P's investment) and switch selling (ie, products are pushed without regard to customers' needs).

The High Court concluded that the majority of the Commerce Commission were in error in finding that the EDC breached s 27.

The Court's decision was based on a number of factors including:

1 F&P does have market power;

2 F&P is nevertheless significantly constrained by its competitors and is in fact facing fierce competition;

3 an EDC can be pro-competitive provided that retail space is not foreclosed;

4 no significant retail space has been foreclosed, in that the

establishment of retail outlets by the new entrants has been no more difficult than could be expected, given the history of support and tariff protection in New Zealand up to 1985; and

5 the agreement can be terminated without penalty on 90 days' notice.

Comment

Separate Market
The High Court accepted without argument that the relevant market was the national market for supply of whitegoods. There was no discussion as to whether there may be separate regional markets which may require individual consideration.

The majority of the Commerce Commission did not consider in detail the possibility of more than one market because s 27 was in their view infringed taking account of the national market.

It is surprising that Email and Simpson did not attempt to distinguish between markets. It may have been easier to show the EDC was anti-competitive if considered in the context of a local market eg, a one-store town, rather than in the context of a national market.

The national market may have been the appropriate market in this case. With modern technology and transportation full choice and supply is probably available even in small local markets. Clearly however Email and Simpson would have been more likely to succeed if they had attempted to distinguish different markets.

Market power
Section 27 should not apply to EDCs where they are imposed by a supplier without market power. If there is market power (as with F&P) there is potential for abuse. In practice it will be necessary to show that a dominant position exists before s 27 will be breached.

The F&P case shows that even where a market participant has a market share of say 85% it may be sufficiently constrained by the remaining 15% so as not to be in a dominant position. For example the industry may be characterised by excess capacity, by low barriers to entry, or by a real threat of import competition.

Protection of reputation
F&P's reputation, built up over many years, was enhanced by the EDC. As the dissenting Commissioner stated, that reputation should not be removed by a "knee-jerk" reaction to some expression like "level playing field".

The question is how far can you go to protect such a market share by exclusionary agreements. In the F&P case competitors of F&P are required to establish their own market by promoting a package to compete with that F&P provide.

The line which divides pro-competitive arrangements from anti-competitive arrangements is blurred. Value judgments (inherently unpredictable) based on particular facts will determine the question.

Kevin Jaffe
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Correspondence

Dear Sir,

re: Child sexual abuse

In their article on child sexual abuse ([1990] NZLJ 425) Henaghan *et al* make observations on our article on the same subject at (1990) 2 *Family Law Bulletin* 67 (and see publisher's corrigendum at p 74). Two comments need to be made in reply:

1 The authors state that rather than the general level of (eg) nail biting one requires to know the level of nail biting in the non-abused population. In fact both are right. It depends whether one is using the odds form or the probability form of Bayes Theorem. We were using the probability form; Henaghan *et al* base their argument on the odds form. Which one uses is simply a matter of preference. In either case one must also know the proportion of abused children in the population, however problematic that may be. The expert should also be in a position to give evidence of this.

2 The authors believe that our comment went too far in saying that the proportion of abused children who bite their nails is useless on its own. They argue that it will be of some value, may be the "last piece of the puzzle" and accuse us of dictating that evidence be examined one piece at a time.

In fact the evidence is of "some value" *only* if it is accompanied by a suppressed generalisation about the level of the behaviour concerned in the population at large. In this case the mind is simply applying Bayes Theorem in a rough manner instead of in an exact manner. Furthermore, unresearched assumptions about human behaviour have proved dangerously awry in the past (Eg Lord Sumner in *R v Thompson* [1918] AC 221).

Secondly it is precisely the point that Bayes Theorem is a mechanism for combining evidence. Not only is Bayes Theorem the mechanism for obtaining the probability we want from the information we have in respect of this particular piece of evidence it is also the only correct method for combining the resultant probability with all the other evidence in the case in a rational fashion.

Finally a jig-saw puzzle is an inapt analogy. Even the final piece of a puzzle must be the right size and shape to fit the hole. The manufacturers of jigsaw puzzles ensure that you are provided with the correct pieces. Life does not.

Yours faithfully,

B Robertson
G A Vignaux
Victoria University of Wellington

The form and powers of a new Second Chamber of Parliament

By R J O'Connor, a practitioner of Christchurch

This article follows on from an earlier one written by Mr O'Connor and published at [1988] NZLJ 4. In this article the author describes the variety of constitutional arrangements for a Second Chamber in a number of different countries including, historically, New Zealand. The author then goes on to make specific proposals for a new Second Chamber for New Zealand. This article can be read along with the three editorials on this same topic in the New Zealand Law Journal *at the end of last year that were published at [1990] NZLJ 341, 377 and 421 respectively.*

1 Introduction

In January 1988 the *New Zealand Law Journal* published an article by the author examining the adequacy of the limitations on executive power that exist within New Zealand's current constitutional system. It was the conclusion of that article that, while a variety of limitations do exist, they are largely insufficient and do not provide adequate constitutional protection. That article examined the possibility of establishing a Second Chamber of the New Zealand Parliament as a means of securing such protection. In this article the author seeks to compare the second Chambers of various countries as well as to examine past New Zealand experience in this area of constitutional law with a view to drawing conclusions on the form and powers that a new New Zealand Second Chamber might possess. In doing so it is as well to remember the comments of Sir John Marriott in his work, *Second Chambers* where he said:

> Experience no less than philosophy, has declared unmistakably in favour of the bicameral system. But to derive 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.

2 The overseas experience

(a) The United States of America — the Senate

Article I of the United States constitution establishes a Senate to be comprised of two Senators from each state, elected by the people for a term of six years. Senators are divided as equally as is possible into three classes. The seats of Senators of the first class are vacated at the expiration of the second year, those of the second class at the expiration of the fourth year and those of the third class at the expiration of the sixth year. The result of this division is that one third of the Senate faces re-election every second year.

Members of the Senate must be aged at least thirty years and have been citizens of the United States for at least nine years preceding their election. In addition a Senator must be an inhabitant of the state for which he or she is chosen. The Vice-President of the United States acts as President of the Senate but has no vote unless the Senate is evenly divided. The Senate is not permitted to adjourn for more than three days, nor to any other place than that in which it and the Lower House, the House of Representatives, shall be sitting, without the consent of the House of Representatives and vice versa.

The Constitution provides for constitutional equality between the Senate and the House of Representatives and accordingly, in general terms, the Senate has full power to veto bills passed in the Lower House. However, Article 1 Section 7 requires that "all bills for the raising of revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills". In addition the President may only exercise certain powers with the consent of the Senate. Article II Section 2 reads:

> [The President] shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators concur, and he shall nominate and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other offices of the United States whose appointments are not herein otherwise provided for, and which shall be established by law.

Interestingly, contained in Article II Section 7 are provisions which detail the Presidential power of veto of legislation and the procedure by which this may be overcome by the two Chambers. After a bill is passed by both the House of Representatives and the Senate it must be consented to by the President before it becomes law. If the President objects to it he may return it to the House in which it originated which must then reconsider it. If after that reconsideration two thirds of that House agree to pass the bill, it must

be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House it shall become law.

(b) The Union of Soviet Socialist Republics — The Soviet of Nationalities

Under Article 108 of the Soviet Constitution 1977 the highest body of state authority in the USSR is the Supreme Soviet. The Supreme Soviet is comprised of two chambers, the Soviet of the Union and the Soviet of Nationalities, which are deemed to possess equal legislative powers. Under Article 199 both Chambers elect a Presidium which acts as the standing body of the Supreme Soviet between sessions. The two chambers have an equal number of deputies, and the members of both Houses must be aged at least twenty-one years. The Soviet of the Union, the Lower House, is elected by the people by constituencies with equal populations. However, the Soviet of Nationalities, the Upper House, is elected to represent the territories that make up the Soviet Union. Thirty-two deputies represent each Union republic, eleven represent each autonomous republic, five represent each autonomous region and one each autonomous area. Deputies hold office for five years.

Article 109 provides that each Chamber possesses equal rights to the other and pursuant to Article 113 the right to initiate legislation in the Supreme Soviet is vested in the Soviet of the Union, the Soviet of Nationalities, the Presidium of the Supreme Soviet, the Council of Ministers, and the standing committees of the two Chambers, deputies, the Supreme Court of the USSR and the procurator of the USSR. However, money bills may only be initiated in the Lower House. Bills and other matters are debated by both Chambers at separate or joint sittings and become law only when passed by both Chambers.

Of particular interest are the provisions of Article 115 which deal with the procedure to be adopted in the event of a disagreement between the two Chambers. In that event the matter at issue is referred for settlement to a "conciliation commission" formed by the two Chambers on a parity basis. The matter is then reconsidered with the benefit of the conciliation commission's report by both Chambers at a joint sitting. If agreement is again not reached the matter is postponed for debate at the next session of the Supreme Soviet or submitted to a nationwide referendum for decision.

(c) Germany — the Bundesrat

The constitution of the Federal Republic of Germany (which now includes East Germany) known as "the Basic Law", was promulgated in 1949 following the defeat of Germany at the end of the Second World War. The Basic Law provides, inter alia, for the division of Germany into a number of states, called Lander, and for the establishment of a Council of Constituent States, called the Bundesrat. Under Article 51 the Bundesrat is comprised of representatives appointed by each state government, the number of which vary according to the population of each state. Each state appoints at least three representatives to the Bundesrat, states with more than two million inhabitants appoint four representatives and states with more than six million inhabitants appoint five. The term of appointment of members of the Bundesrat is not fixed whereas the parliamentary term in the Lower House, the Bundestag, is limited to four years.

The Basic Law contains detailed provisions concerning the relationship between the Bundesrat and the Bundestag. Unlike the United States Senate and the Soviet of Nationalities the two German Houses do not possess equal powers. The general provisions of the Basic Law in this area is Article 78 which provides that:

> A Bill adopted by the Bundestag shall become a law if the Bundesrat consents to it . . .

As far as all bills are concerned Article 77(2) provides that:

> The Bundesrat may within three weeks of receipt of a bill being adopted by the Bundestag demand that a Committee for joint consideration of bills be convened. Should the Committee propose any amendment to the adopted bill the Bundestag must again vote on the bill.

At this point in the procedure the Basic Law makes a distinction between those bills that require the consent of the Bundesrat to become law and those bills which do not. Bills that do require the Bundesrat's consent are those concerned with such matters as, inter alia, amendments to the Basic Law itself (Article 79), federal laws relating to taxes, the receipts from which are to accrue to the states (Article 105(3)) and the determination of states of Defence (Article 115a(1)). If the Bundesrat refuses to consent to such bills then they do not become law.

If, however, the matter to be considered is a bill for which the consent of the Bundesrat is not required the Bundesrat may enter an objection to the bill within two weeks of it being readopted by the Bundestag after consideration by a committee for joint consideration under Article 77(2). If that objection is adopted by a simple majority of votes in the Bundesrat, it can be overcome by a simple majority of votes in the Bundestag. If the objection is adopted by a majority of two thirds of votes in the Bundesrat, its rejection by the Bundestag requires a majority of two thirds of the votes in that House. Accordingly, in relation to bills which do not require the consent of the Bundesrat the Bundestag can overrule the Bundesrat provided that it does so by a majority vote which is proportionately not less than that by which the Bundesrat made its decision.

(d) France — the Senate

While the French have been often criticised for the number of constitutional experiments that they have embarked upon in their modern history their attempts at constitutional perfection provide a rich source of material for the constitutional scholar. The Constitution of the French Third Republic, which lasted from 1875 to 1940, provided for a Senate, election to which was vested in an electoral college in each Department and colony. Each electoral college was composed of Deputies from the Department and delegates elected from among the voters of the Commune by each municipal

Council. While the Second World War brought the Third Republic into disrepute the concept of indirect Senatorial elections was continued under the constitutions of the Fourth and Fifth French Republics. The constitution of the present Fifth Republic was promulgated in 1958, Article 24 of which provides in a fashion similar to the German Bundesrat, the United States Senate and the Soviet of Nationalities, that the function of the French Senate is to "ensure the representation of the territorial units of the Republic".

Under Article 45 of the 1958 Constitution each bill must be considered successively in both the Lower House, the National Assembly, and in the Senate. Of particular interest are the powers granted to the Executive arm of government when a disagreement between the two Houses arises. In this eventuality, such that it becomes impossible to adopt a bill, the Prime Minister has the right to have a joint committee, comprised of an equal number of members from each House, meet. He may instruct that joint committee to consider the matter in question and to put forward a text which may be then submitted to both Houses for their approval. If the joint committee fails to arrive at a common text, or if the text is not adopted, the Prime Minister may, after a new reading of the bill by the National Assembly and the Senate, ask the National Assembly alone to make a final decision. Alternatively, instead of instructing a joint committee to meet, the Prime Minister possesses the discretion to do nothing, in which case the bill in question would be defeated if not adopted by the Senate.

While it is apparent that the powers of the French Senate are limited and can be overridden by the National Assembly at the Prime Minister's intervention Articles 56 to 63 inclusive of the 1958 Constitution make some compensation by providing for the establishment of a Constitutional Council. The Constitutional Council is comprised of nine members, three each of which are appointed by the President of the Republic, the National Assembly and the Senate respectively. The Council possesses wide powers in constitutional matters and has the responsibility to secure the good conduct of the election of the President of the Republic, of deputies to the National Assembly and of Senators. It has further power to "pronounce" on the constitutionality of legislation if requested to do so by the President of the Republic, or the Prime Minister, or the Presidents of the National Assembly and the Senate respectively or sixty Deputies or Senators. Its power extends to declaring a legislative provision unconstitutional and thus void and there is no right of appeal from its decisions.

(e) Canada — the Senate

The constitution of Canada is largely comprised in the Constitutional Acts of 1867 and 1982. Section 17 of the Constitution Act 1867 provides that:

> There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate and the House of Commons.

The Senate is comprised of one hundred and four Senators divided between the provincial and territorial districts of Canada. The larger provinces of Ontario and Quebec are entitled to twenty-four Senators each whereas the sparsely populated Yukon Territory and North West Territories are only entitled to a single representative each.

Under ss 24 and 25 of the 1867 Act, Senators are appointed by the Governor-General in Council from a pool of names submitted by each province or territory. However the Government at Ottawa possesses the power to veto any name submitted by a provincial government. A Senator must be aged at least thirty years, be a Canadian citizen and be a resident in the province or territory for which he or she is appointed. While it may appear archaic, there is also a property qualification required under s 23 such that a person must have a net worth of at least $4,000.00 before qualifying for appointment to the Senate. Appointments to the Senate are made for life, however retirement is mandatory at the age of seventy-five years.

The power to legislate for Canada is defined in s 91 of the 1867 Act in the following terms.

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned to the legislatures of the Provinces . . .

On the face of this provision the power of the Senate would appear to be equal to the House of Commons. However, there are a number of provisions limiting this power, the most notable of which are those setting out the procedure for amending the Constitution. Section 38(1) of the 1982 Act provides that:

> An amendment to the Constitution of Canada may be made by proclamation issued by the Governor-General under the Great Seal of Canada where so authorised by . . .
>
> (a) a resolution of the Senate and the House of Commons, and
> (b) resolution of the legislative assemblies of at least two thirds of the provinces . . .

Under Section 41 of the 1982 Act certain matters are provided for that require the consent of all of the legislative assemblies of the Provinces, not merely the consent of two thirds of such assemblies ordinarily required. However, pursuant to s 47 of the same Act an amendment to the Constitution may be made without a resolution of the Senate authorising the issue of the required proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorising its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

There would appear to be some dissatisfaction with the functioning of the Canadian Senate as Part VI of the 1982 Act requires the annual convening of a constitutional conference to discuss inter alia, "Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representatives in the

Senate". The continuance of an appointed Upper House by a country of such recent constitutional development as Canada seems surprising, and this provision probably signifies a mood for change.

(f) Australia — the Senate

Under the Commonwealth of Australia Constitution Act 1900 the Australian Parliament is comprised of two Houses, the House of Representatives and the Senate. The Australian Senate is designed to provide representation by States and is comprised of twelve Senators from each State who are directly elected by the people of their respective states voting as a single electorate. Interestingly, the Constitution Act was amended in 1983 to increase the representatives of each state in the Senate from the original six members to the present twelve. Senators hold office for six years, however, s 13 of the Act divides Senators into two classes equal in number. That provision requires that the seats of Senators of the first class fall vacant after three years and the seats of those of the second class after six years with the consequence that Senate elections are held every three years.

Sections 51, 53 and 57 of the Act are fundamental to the powers possessed by the Senate in its relationship with the House of Representatives. Section 51 is a provision consistent with the empowering provisions of many Commonwealth constitutions and reads:

> The Parliament shall have power to make laws for the peace, order and good government of the Commonwealth of Australia . . .

Section 53 states that the Senate has equal power with the House of Representatives in respect of all proposed laws and accordingly it may reject or amend any bill, except a money bill where it is limited to the power of rejection without amendment. However, that same provision limits the type of legislation that may be initiated by the Senate by providing that "proposed laws appropriating revenue or moneys or imposing taxation shall not originate in the Senate". A procedure is available to the Senate when dealing with bills that it may not amend (ie money bills) but does not wish to reject outright by which it may at any stage return a bill to the House of Representatives requesting the omission or amendment of any of its provisions. Nevertheless while the Senate is denied the power to originate or amend money bills it does have the power to reject them outright.

Notwithstanding the provisions of s 53, the Act contains express provisions in s 57 detailing the procedure to be followed when the two Houses reach disagreement on a matter. This section is of such importance that it is worth reciting it here in full:

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendment, to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate and the Senate rejects or fails to pass it, or passes it with amendments, to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. . . . If after dissolution the House of Representatives again passes the proposed law, with or without any amendments . . . which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and the House of Representatives. . . . The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and the House of Representatives shall be taken to have been carried and if the proposed law . . . is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament and shall be presented to the Governor-General for the Queen's assent.

The complicated nature of s 57 has long confounded successive Australian governments, the most dramatic illustration of which occurred in October and November 1975. On 16 October 1975 the Senate deferred consideration of the Appropriation Bill. It then became clear that the Senate which was dominated by the Opposition party, was determined to refuse to grant Supply to the Government, without which all the ordinary services of government could not be maintained. The Governor-General was advised by the Chief Justice of Australia that a Prime Minister who could not ensure Supply to the Crown must either advise a dissolution of Parliament, and consequently a general election, or resign. Mr Whitlam refused to agree to either course and accordingly his commission as Prime Minister was withdrawn by the Governor-General on 11 November 1975. The Leader of the Opposition was invited to form a caretaker Government upon his undertaking to secure Supply and to advise a dissolution of Parliament. These undertakings were honoured by the new Prime Minister and a general election was subsequently held.

While the events of 1975 involve many other constitutional issues, particularly the powers of the Governor-General, they do illustrate the nature of the relationship between the House of Representatives and the Senate. In his statement, attached to his letter of dismissal handed to the Prime Minister, the Governor-General acknowledged that s 57 provided the usual means of resolving a disagreement between the two Houses. However, he noted that "the machinery which it provides necessarily entails a considerable time lag which is quite inappropriate to a speedy resolution of the

fundamental problems posed by the refusal of Supply".

As Mr Whitlam refused to advise a dissolution or resign the Governor-General felt obliged to interrupt the s 57 process and resort to his reserve powers of dismissal to ensure a continuation of government. The events of 1975 perhaps reveal the dangers that may be found to exist when a Second Chamber possesses the power to confound the Lower House as fundamentally as the Senate did in 1975. With the benefit of hindsight the actions of the Opposition in the Senate leading to the denial of Supply appear to have been tainted by the mere pursuit of expedient party politics. The consequence of this was the fall of a Government still in possession of the confidence of the Lower House and the disruption and uncertainty created by an otherwise unnecessary general election.

(g) The United Kingdom — the House of Lords

Of all the Second Chambers examined in this article the House of Lords is probably the most familiar, but unlike most its constitution is not the subject of a written document. Of ancient lineage the House of Lords is unusual in that its members are neither elected nor appointed in the customary sense. The qualification for membership is of course, to be a peer of the Realm, of which there are five classes. These include the Lords Spiritual, who number some twenty-five; approximately nine hundred hereditary peers of England; the hereditary peers of Scotland; approximately three hundred and fifty life peers and eleven Lords of Appeal in Ordinary. The potential membership of the House is accordingly well over a thousand, however the daily attendance over recent years has averaged below three hundred.

The House of Lords Reform White Paper of 1968 identified seven functions of the House of Lords. The House has a defined appellate judicial role and provides a further forum for debate on matters of public interest. It has an important role in revising Commons' bills, and in the consideration of subordinate legislation and in scrutinising the activities of the Executive. Further functions of the Lords include the scrutiny of private legislation and the initiation of less controversial public bills. However, in performing these functions the Lords is limited by the non-elective nature of the House and by its member being thought of as representing a small and isolated section of the community. The Lords' vulnerability is in the fact that it does not represent any particular body of constituents and therefore could be swept away by a hostile non-conservative government confident that the electoral repercussions of doing so would be slight. This vulnerability may have led to a reluctance in the Lords to exercise the suspensory powers over legislation that are imparted to it under the Parliament Acts of 1911 and 1949 respectively.

Those two statutes regulate the relationship between the Lords and the Commons and were passed as a result of a significant disagreement between the two Houses in 1910. The Parliament Act 1911 makes a distinction between money bills and other bills. Section 1 of that Act defines a money bill as one which, in the opinion of the Speaker of the House of Commons, contains provisions exclusively relating to central government taxation, expenditure or loans. Once certified by the Speaker as such, a money bill which has passed through the Commons is then sent to the Lords for consideration. If the Lords fail to pass it without amendment within one month then it may then be presented for the Royal assent and become law without the consent of the Lords. While the definition of a money bill is narrow, and not every finance bill has been so certified, a combination of these statutory provisions and convention has, in the view of de Smith, "deprived the Lords of all effective authority over raising and spending money".

With a number of notable exceptions, other public bills may also be passed into law without the consent of the Lords. Under s 2 of the Parliament Act 1911, as amended in 1949, a public bill can be presented for the Royal assent and become law if the requirements of that section are complied with. That section requires that the bill must be passed by the Commons in two successive sessions, whether of the same Parliament or not, and that at least one year must have elapsed between the date of the second reading of the bill in the Commons in the first of the two sessions and the date of the third and final reading in the same House in the second of the two sessions.

This Parliament Act procedure is not available in relation to, inter alia, bills which seek to prolong the life of Parliament beyond five years nor in relation to private bills where the consent of the Lords is still required. Interestingly, since 1911 only three Acts have been passed using the Parliament Act procedure, two in 1914 and the Parliament Act of 1949.

Notwithstanding that the veto power of the Lords is now merely suspensory, and that even this has been limited to one year, the Lords have in recent times conducted themselves surprisingly effectively. During Mrs Thatcher's tenure as Prime Minister, between 1979 and 1987, Government motions in the Lords were lost one hundred and seven times and many of their amendments to government legislation were so substantial as to effectively amount to defeats for the Government.

3 The New Zealand Experience

(a) The Legislative Council

Section 32 of the New Zealand Constitution Act 1852 established a New Zealand General Assembly consisting of the Governor, the House of Representatives and the Legislative Council. The Legislative Council possessed powers equal to the House of Representatives and its members were originally appointed for life. The period of appointment was reduced to seven years in 1891, however all appointees were eligible for reappointment. Originally appointments were made by the Colonial Office in London, but in 1868 the power of appointment was transferred to the Governor. Appointments were usually made by the Governor on ministerial advice, although it was not until the 1890s that the convention was established that the Governor had always to accept that advice. Membership of the Council averaged between thirty and forty in number, although the membership reached a peak of fifty three in 1885. It was not until 1941

that statutory provision was made for the appointment of women to the Council and even then it was not until 1946 that the first women councillors were appointed.

Robson notes that "until 1893 important measures sent up from the House of Representatives were frequently rejected, shelved or radically amended by the Council". He describes however, three events which made the Council more conciliatory to the House of Representatives in the early 1890s and that led to its eventual impotency. The reduction of the term of appointment of councillors from life to seven years in 1891 created a desire in some councillors to seek reappointment. A fear of the Government of the day swamping the Council with sufficient appointees to ensure it a majority, founded in the Colonial Secretary's ruling in 1892 that the Governor should make appointments to the council in compliance with ministerial advice, reduced the Council's effectiveness. In addition the overwhelming popular support that the Liberal Party received in the 1893 election dissuaded the Council from conflict with the House of Representatives. Robson is particularly scathing of the result:

> . . . it is doubtful whether the Council performed any useful function in its last fifty years. It was not an effective revising body; it did not prevent the passing of hasty and ill considered legislation; it did not relieve the members of the Lower House from the ardours of committee work; and it did not represent a distinct interest in the community.

This impotency led to the passing of the Legislative Council Abolition Act 1950 which abolished the Council on the 1st day of January 1951.

(b) Proposals for reform of the Legislative Council

Historically many suggestions were made for reforming the Legislative Council, however the Legislative Council Act 1914, commonly called Sir Francis Bell's Act, was perhaps the most comprehensive. That statute was passed into law in November 1914 and was originally intended to have effect from the first day of January 1916. The commencement date was however delayed as a result of the First World War to a subsequent date which was to have been appointed by proclamation. Such a further proclamation was issued in January 1920 but was cancelled by the Legislative Council Amendment Act 1920 which provided for the commencement date to be appointed by a further proclamation. Such a further proclamation was never issued and the Legislative Council Act 1914 remained on the statute books, inoperative, until its final repeal by the Legislative Council Abolition Act 1950.

Under the scheme of Bell's Act the members of the Council were to be elected rather than appointed. The first election was to have taken place simultaneously with the first election of members of the House of Representatives held after the commencement date of Bell's Act. Subsequent elections were to have been held simultaneously with House of Representatives elections held next after the expiration of five years from the last preceding election of members of the Council. At the original election twenty-two members were to have been elected by proportional representation from four electoral divisions and at subsequent elections it was intended that the membership was to be increased to forty. Bell's Act of 1914 was not only visionary in its reference to proportional representation but also in the provisions of s 18 which permitted the election of women as members "when and so soon as women are eligible for election as members of the House [of Representatives] . . .". As it happened the first woman was not appointed to the Council until well over thirty years later in 1946.

Specific provisions of the Act dealt with the relationship between the Lower and Upper Houses. Section 5, which dealt with the respective House's power in relation "to proposed laws appropriating revenue or imposing taxation", was drafted in a fashion almost identical to s 53 of the Commonwealth of Australia Constitution Act 1900. Under that section money bills were not to have been permitted to originate in the Council nor was the Council to have been permitted to amend any proposed laws imposing taxation or appropriating revenue or moneys for the ordinary annual services of the Government. Further under s 6, if a money bill was not passed by the Council within one month of its passing by the House of Representatives it was to have been possible to present it for the Royal assent and for it to become law without the Council's assent. A money bill was defined as "a public Bill, which in the opinion of the Speaker of the House [of Representatives], contains only provisions dealing with all or any of the following subjects — namely, the imposition, repeal, . . . of taxation; the imposition for the payment of debt or other financial purposes of charges on the Consolidated Fund; . . . supply; the appropriation . . . of public money; the raising . . . of any loan . . .". The Council was, subject to Section 7, to have the power to reject all other bills. Under s 7, if the Council failed to pass a public bill, or passed it with amendments to which the House of Representatives failed to agree, the Governor-General was to have power to convene a joint sitting of both Houses, and, if the bill was not affirmed by a majority present at the joint sitting, the Governor-General was to have power to dissolve both Houses simultaneously. The influence of the Commonwealth of Australia Constitution Act 1900 is also evident in the drafting of this section which contains many of the attributes of s 57 of the Australian constitutional Statute.

In Robson's view "the main reasons why Bell's Act was never brought into force were that conservative governments were uncertain whether it would be wise to establish a stronger Council that might be captured by a radical electorate, while the Labour Government of 1935-49 found the Council a convenient field for patronage". Interestingly, after the abolition of the Council a Constitutional Reform Select Committee recommended in 1952 that a thirty-two member Senate be established with power to delay legislation for two months. The concept of proportional representation was continued in that after each general election senators were to be nominated by the Prime Minister, the Leader of the Opposition and any other party

leaders in proportion to party strength in the House of Representatives. Nothing came of this recommendation.

4 A new Second Chamber for New Zealand

New Zealand is a small nation geographically isolated from the mainstream of world affairs and New Zealanders are a temperate people not partial to extremes of radical action. These factors have contributed to the stability of our system of government that has existed virtually uninterrupted since 1840. If constitutional change has occurred it has done so gradually and largely without popular moment. In this climate New Zealand is unable to draw upon a diversity of constitutional experience of its own when seeking to determine its constitutional development in the future. It has therefore been necessary to examine the experiences of and indeed the experiments in this area of constitutional law of other countries before attempting to formulate what the form and powers of a new New Zealand Second Chamber might be. With the benefit of this information it is possible to identify accurately certain desirable attributes that all Second Chambers should possess in order to be effective. In identifying those attributes most applicable to the New Zealand setting it is appropriate to consider matters under a number of heads as follows:

(a) Election or appointment?

With the notable exception of the House of Lords the members of all of the Second Chambers of the major western democracies are all either wholly elected or wholly appointed. It is clear that New Zealand society does not contain a readily identifiable class of persons who because of their birth or some other distinction should qualify for membership of a Second Chamber. Unlike the United Kingdom New Zealand does not possess a titled aristocracy nor the history which underpins the position of the House of Lords. While membership of a New Zealand Second Chamber could therefore not be determined by birth or inheritance there may still be some merit in the concept of appointment. While the majority of the members of the House of Lords are hereditary peers, approximately one quarter qualify by reason of "appointment" or more precisely "creation". Those hereditary peers of the first creation and all life peers have earned their places by distinguishing themselves in their respective fields of endeavour. The fact that the House of Lords contains people as diverse as a number of ex-Prime Ministers, ex-coal miners, Nobel Prize winners as well as the world's leading expert on flying saucers contributes to the effectiveness of that Chamber. It may be advantageous to have a Second Chamber comprised of people who have succeeded in a recognised way in the practical world scrutinising the affairs of the Executive. However, while the practice of appointing members also occurs in Canada and Germany, in those two instances appointments are made primarily for reasons of achieving regional representation.

Notwithstanding the perceived advantages of appointment it would be difficult to reconcile that method of choosing members with what might be called the New Zealand people's rather narrow view of the meaning of the word "democracy". It is apparent that one of the reasons why the Legislative Council came to be held in such contempt was the fact that the Government of the day often found the Council, as Robson describes, "a convenient field for patronage". The same criticism has frequently been levelled at the House of Lords. An appointed Second Chamber would be too open to this type of abuse and this could lead to its eventual ridicule. In the current New Zealand political context any Second Chamber would need to be elected if it were to capture the confidence of the people.

As to the form of elections, both indirect and direct methods have been employed historically. Indeed the use of indirect elections, as discussed earlier, has been a consistent feature of French constitutional history. Such a method would almost certainly imply the vesting of the power to elect members of a Second Chamber in the hands of members of local bodies. However, as Riddiford wrote "the principal defect . . . of indirect elections is that it is apt to infect local bodies with the virus of party politics". The limited population size of New Zealand would also count against any argument for instituting a system of indirect elections here. The present apparent public desire, as expressed through the opinion polls, for a so-called "more democratic" system of government would suggest that anything less than direct elections would fail to find popular favour. Quite clearly therefore, the method of direct elections would be the most applicable to New Zealand's current circumstances. Such a method would serve to strengthen the confidence of not only the general electorate in the abilities of the Second Chamber but also the confidence of the Second Chamber itself.

While the question of regional representation will be considered subsequently, strong arguments can be expressed supporting the proposition that the Second Chamber be elected on a proportional representation basis. As it would be desirable that members of the Second Chamber should not be encumbered with direct electorate responsibilities, it would be conceivable that the membership of the Second Chamber be decided by a pure proportional system. In these circumstances a preferential system similar to that employed by the Australian Senate would be suitable. The Constitutional Reform Select Committee's recommendations of 1952 that members be nominated by the various party leaders in proportion to party strength in the House of Representatives should not be adopted. A preferential system would permit the public the ability to choose the individual members of the Second Chamber and would limit the power of party organisations in this regard. Such a system would also permit the presence of third parties in the Upper House and therefore make it less likely that the composition of the Upper House would necessarily mirror that of the Lower House. The presence of third parties may also strengthen the Second Chamber's resolve to oppose an untenable measure sent to it from the Lower House.

(b) Regional representation

An additional factor to note is that of all of the existing Second Chambers examined earlier in this

article only the House of Lords does not contain some element of formal regional representation. There appears to be a perception, and this may be more true in countries which possess federal constitutions, that regional representation is a desirable feature. However, even within the federal framework variations arise. For example, each state of the United States is entitled to two Senate representatives. This is so notwithstanding that the populations of each state are by no means equal. The consequence of this is that, according to Havard, "the twenty-six smallest states, which contain only 20% of the nation's population, elect a majority of the Senate". By contrast the Canadian Constitution Act 1867 seeks to ensure that the Canadian provinces are represented in the Canadian Senate in direct proportion to their populations. Consequently the large provinces by population of Ontario and Quebec are entitled to twenty-four Senators each whereas the sparsely populated Yukon Territory is only entitled to one representative. Germany enjoys a similarly proportionate system of regional representation.

Havard notes that while the United States system of regional representation "frustrates the strict majoritarian propensities of democracy, the fact that the representative structure of the Senate . . . makes the federal idea specific in so far as national institutions are concerned is sufficient to satisfy most Americans of its utility". In other words, the reasoning behind the disproportionate American system is to be found in the federal nature of the American constitution. New Zealand does not possess a federal form of government, and therefore it would be difficult to justify the implementation of a disproportionate system of regional representations here.

There is however, some considerable value to be found in the concept of regional representation itself. The old New Zealand Legislative Council was so easily swept away because it did not represent a distinct constituency. It was vulnerable to a government which knew that few would be offended by its abolition. Regional representation would give a new Second Chamber that necessary specific constituency. The Canadian method of tailoring the number of seats per region to the regional population would appear to be the most equitable system and would accordingly be the most appropriate method of instituting such a system in New Zealand. The reformist Legislative Council Act 1914 divided the country into four electoral divisions represented by Councillors elected by proportional representation. This combination of regional representation and proportional representation should again be considered for implementation in New Zealand.

(c) Membership — size and qualifications

The number of members of the various Second Chambers examined in the earlier part of this article vary from country to country. The Soviet of Nationalities of the USSR is comprised of the same number of members as the Lower House, the Soviet of the Union. Equally the potential membership of the House of Lords is well over a thousand whereas the membership of the House of Commons is approximately six hundred. Conversely the membership of the United States House of Representatives, at four hundred and thirty-five members, is more than four times the membership of the Senate. A balance must be achieved and for a country the size of New Zealand a Second Chamber of approximately one half the number of members of the House of Representatives would seem to be most appropriate. There appears to have been an historical tendency in relation to most Second Chambers to encourage, whether by design or otherwise, an elderly membership. Indeed the average age of the House of Lords is well over sixty years. The United States and Canada have opted to require that members be at least thirty years of age, whereas a member of the Australian Senate must be at least twenty-one years of age.

In addition to an age qualification a United States Senator must also have been a United States citizen for at least nine years prior to his or her election and must be an inhabitant of the State he or she represents. The Canadian Constitution sets similar conditions but also requires that a Senator have a net worth of at least $4,000. Australia, which like the United States and Canada possesses a federal form of government, sets no such wealth condition, and simply requires that Senators be Australian citizens and Australian residents, not necessarily State residents, for at least three years prior to election. Under the Reformist Legislative Council Act 1914 the qualifications required of members of the Legislative Council were to be no more stringent and indeed were identical to those requirements for membership of the Lower House. Notwithstanding the persuasive authority of the United States, Canadian and Australian Senates it would seem illogical to provide for different membership qualifications between the two Houses. One House would be of no less importance than the other and the work conducted by each would be arguably of the same value. While it may strengthen the regional representative nature of a new Second Chamber to require residency of its members in the regions they represent, it would be logically inconsistent to formally require more stringent qualifications for Upper House membership. It is therefore appropriate that the membership qualifications for a new Second Chamber should mirror those in respect to the House of Representatives.

(d) Term of office and rotational elections

While the membership of a new Second Chamber would therefore be small it may nevertheless be worth considering the merit of providing for a rotational system of election of its members. United States Senators hold office for six years but Senators are divided equally into three classes with Senatorial elections occurring every second year to coincide with House of Representatives elections. Senators of the first class are elected in the second year, those of the second class in the fourth year and those of the third class in the sixth year, such that there is a continual rotation of membership. Australian Senators also hold office for six years and the Senate is similarly divided into classes with elections occurring every three years.

The purpose of this type of rotational system would appear to

be to ensure that the composition of party support in the Second Chamber would not necessarily mirror that in the Lower House. Such a system would therefore assist the effectiveness of a Second Chamber by ensuring that it did not slavishly obey the dominant party in the Lower House. It is important however, that this concept not be pursued too far, as the actions of the Australian Senate leading to the dismissal of the Australian Government in 1975 illustrate. Differing compositions of party support in each House may generally be a good thing but an Opposition majority in the Upper House must not possess the power to unreasonably thwart the intentions of the Lower House. This limitation is a question of the allocation of power between the two Houses, and this will be considered later in this article.

The term of office of members of a new Second Chamber should be determined in the context of the regularity of elections to the House of Representatives. Given the present parliamentary term of three years a six year term would permit three Upper House election cycles to occur, one after each two years, although the small nature of the membership may make this impractical and unnecessarily expensive. In any event, it would be desirable to ensure that Second Chamber elections do not always coincide with elections to the House of Representatives, although some coincidence will be necessary for reasons of practicality.

(e) Relationship with the House of Representatives

The primary responsibility of a government is to govern and accordingly a Second Chamber's power should not be so extensive as to unreasonably hinder that responsibility. Australia is a particular example of where a Second Chamber possesses effectively equal power to the Lower House and therefore the ability to hinder government. The events of 1975, leading to the dismissal of the Australian Prime Minister, illustrate the dangers inherent in such a system of equality. The United States Senate possesses the same power, but its exercise does not have the same potential to bring down the Executive in the same way as occurred in Australia in 1975.

However, a Second Chamber's powers should not be so limited as to make it impotent to oppose a determined Executive. In the final analysis a Second Chamber should possess a degree of genuine independence of the government and accordingly it should have power to prevent a government from altering such fundamental constitutional matters as the structure of Parliament, the composition of each House and the life of Parliament. It is clear from history that those Second Chambers that do not possess at least these powers lose their confidence and ability to oppose a government. The House of Lords, which possesses no control over its own composition, has been historically fearsome that the Government would swamp it with a sufficient number of peers sympathetic to the Government. The result has been that the House of Lords' power has largely been reduced from that of outright veto to a power to suspend the consideration of legislation for only one year. The position of the old Legislative Council was similar, however its lack of confidence in its own power led to not only its impotency but its eventual abolition. If a Second Chamber is reduced to impotency then the demand for its abolition is almost irresistible.

Clearly a balance is to be achieved as to the extent of the power bestowed on a Second Chamber. That balance is to be found in that most constitutions draw a distinction between "money bills" and ordinary bills. Money bills are perceived to be more fundamental to the functioning of government in that if the supply of money is denied to a Government then the provision of Government services must cease. Given that it is desirable that the day to day functioning of government should not be threatened in this way it would be reasonable for a Second Chamber not to have the power to defeat a money bill. Indeed, in almost every instance examined in this article money bills are not even permitted to originate in the Upper House. Under the English Parliament Act 1911 a money bill, as certified by the Speaker of the House of Commons, can become law without the consent of the House of Lords if after one month of its being presented to the Lords they fail to pass it. A similar mechanism was included in the Legislative Council Act 1914 to reform the old Legislative Council and such a provision would be appropriate in the modern New Zealand context.

In the context of ordinary bills however, it is a question of whether a Second Chamber should at one extreme, possess the power of outright veto, as the United States Senate possesses, or, at the other extreme possess merely a suspensory power similar to the current power of the House of Lords. As discussed, a Second Chamber should possess the power to veto untenable constitutional changes. However, the matter of less fundamental matters is less clear. Section 57 of the Australian Constitution contains a complicated procedure for determining disagreements between the two Houses. It provides for the reconsideration of contentious bills by each House, then the dissolution of Parliament if the matter is not then agreed, and then, if after a general election the two Houses still fail to agree, a joint sitting of both Houses is called to finally determine the matter. Article 45 of the French Constitution provides a system under which the Prime Minister may convene a joint committee comprised of members from each House to reconsider the bill in dispute. If the recommendations of that joint committee are not approved by both Houses the Prime Minister may then ask the Lower House to make a final decision. Under the Soviet constitution the power of final decision is vested in a referendum of the people and under the German system the Lower House can overrule an objection by the Upper House so long as it does so by a majority vote proportionately not less than that by which the Upper House made its decision.

In the New Zealand political context it is perhaps less likely that an absolute power of veto of ordinary bills would find favour. This was recognised in the Legislative Council Act 1914 and probably should not be deviated from. However, one of the main tasks of a Second Chamber is to ensure that adequate time is

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Interpreting the Bill of Rights

By Associate Professor J Elkind of the University of Auckland

In this article Professor Elkind points out that the interpretation of the recently passed Bill of Rights Act will be of fundamental importance in determining its effectiveness. He points out that English and Australian case law will not be of much assistance; but that of the United States and more particularly Canada may be, as well as the reports of various agencies of the United Nations.

The Bill of Rights Act 1990 is important constitutional legislation. The bearing it will have on individual clients' cases has yet to be assessed. But it is likely to provide quite significant protections. But how is the bill of rights to be interpreted? Since New Zealand has never had a bill of rights before, there will be no New Zealand case law on the bill of rights. Nor will there be any UK case law. The United Kingdom has never had a bill of rights. Nor has Australia or any of the Australian states.

United States case law might conceivably be of some assistance where our bill of rights resembles the US Bill of Rights. But our bill of rights hardly resembles the United States Bill of Rights so assistance from that direction is not likely to be significant.

So the question is, to where does a New Zealand lawyer turn for assistance in interpreting the bill of rights? The first instrument which is important to the interpretation of the bill of rights is the International Covenant on Civil and Political Rights. This is a treaty drafted by the United Nations which New Zealand became a party to in 1978. The Long title to the Bill of Rights Act says that it is an Act –

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

Where a statute is enacted to implement an international treaty, that treaty may be used to assist in the interpretation of the statute in question! Copies of the International Covenant on Civil and Political Rights may be obtained from the New Zealand Human Rights Commission.

There is also jurisprudence interpreting the Covenant. Under the first Optional Protocol to the Covenant, the United Nations Human Rights Committee which sits in New York City is empowered to hear complaints from individuals alleging that a state which is a party to the Optional Protocol has violated their human rights in a way which infringes the Covenant.[2] The Committee examines the petition, invites representations from the state involved, considers the petition and the state's reply and arrives at a decision as to whether the Covenant has been violated. Reports of these decisions are authoritative evidence of the meaning of the Covenant. They are published in the General Assembly Official Records (cited as GAOR). They may be found in a United Nations depository library. The former General Assembly

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permitted to properly consider bills, both in the parliamentary and the public arenas. Therefore, the Lower House should not be able to immediately override the wishes of the Upper House if the Upper House should reject a bill or part of a bill. It is therefore suggested that the Lower House only be permitted to overcome the rejection of the Upper House after an interval of one year has elapsed after the bill in question has been rejected. To assist the public's understanding of parliamentary procedure a procedurally simple method by which the Lower House would be able to overcome the will of the Upper House would be required. The German system of proportionate voting would lend itself well to these circumstances.

Therefore at the expiration of the one year interval after the rejection by the Upper House of the bill in question, the Lower House could reconsider the bill, or the part of if rejected. If the bill is again passed by the Lower House by a majority proportionately greater than the majority in the Upper House which rejected the bill, the bill could be presented to the Governor-General for the Royal assent and become law. If the majority in the Lower House was proportionately less than the majority in the Upper House then the bill would be deemed to be defeated.

5 Conclusion

To paraphrase Marriott, constitutional experience around the world has declared unmistakably in favour of a Second Chamber as a means of checking Executive power. In this article the author has attempted to glean from that experience a scheme for the establishment of a new New Zealand Second Chamber. To further quote Marriott such "a task has tried the ingenuity of constitution makers from time immemorial". However, constitution makers in this country have the critical task of shaping New Zealand's constitutional development into the future and they should not be dissuaded merely because such matters will try their ingenuity. □

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1 *Constitutional and Administrative Law*, de Smith (4th ed), 1983.
2 *Constitutional and Administrative Law*, Hood Phillips (6th ed), 1978.
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4 *Constitutions of the World*, Blaustein & Flanz (ed).
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6 *Five Constitutions, Contrasts and Comparisons*, Finer (ed), 1979.
7 "The Fourth Double Dissolution", *Australian Law Journal*, Vol. 49, No 12, 1975.
8 *The Government and Politics of the United States*, Havard, 1965.
9 *Limited Government, A Comparison*, Friedrich, 1974.
10 *New Zealand, the Development of its Laws & Constitution*, Robson, 1967.

Library (now called the Parliamentary Library) in Wellington is a UN depository library as is the Auckland Central Public Library in Lorne Street, Auckland. The Victoria University Library in Wellington is a partial depository library. The University of Auckland has copies of the Official Records of the United Nations General Assembly in its official publications Department.

A treaty which closely resembles the Covenant is the European Convention on Human Rights. There are two bodies which interpret the European Convention. Most states which are parties to the European Convention have agreed to a right of individual petition to the European Commission on Human Rights which acts in a way which is very similar to the United Nations Committee. There is also a European Court of Human Rights. This Court is not a Court of Appeal from the Commission. It hears two types of cases. Those involving disputes directly between states which are not a matter of individual petition and those which the Commission certifies to it as being of significant public importance. Reports of the Commission and the Court are published in the European Human Rights Reports (EHRR). Auckland University Law library has these reports as does the Victoria University Law library.

I would suggest that anyone wanting to interpret the New Zealand Bill of Rights would find the reports of the United Nations Committee and the decisions of the European Commission and Court to be rewarding sources of interpretation.

Finally there is the Canadian Charter of Human Rights and Fundamental Freedoms. The New Zealand bill of rights was modelled on the Canadian Charter. So decisions of Canadian Courts interpreting the Charter ought to be a very useful aid in the interpretation of our bill of rights.

Finally, in interpreting the bill of rights there is a need for what has been called "purposive interpretation". This kind of interpretation is somewhat alien to the New Zealand way of thinking. It is not the kind of narrow statutory interpretation which we are accustomed to. But it is interpretation aimed at filling in the gaps and at seeing that the rights granted by the bill of rights are extended as fully as possible to anyone who is entitled to the protection of the bill of rights.

In an address to the Legal Philosophy Society, Mr Justice Thomas criticised the right to silence in criminal proceedings. One of his grounds of objection to the right as it is practised in New Zealand was that it is really illusory. Criminal defendants are often not adequately informed of the right. Nor are they given the full opportunity to exercise it. A denial of the right may breach the Judges' rules which are, in any event not law and Judges have a discretion whether to admit evidence obtained in breach of the Judges' rules. A purposive interpretation of such a right would require the institution of something like the United States *Miranda* rule in New Zealand. Under the *Miranda* rule, a suspect must be cautioned of his right to remain silent and must also be told he has a right to counsel and a right to be provided with counsel if he does not have the means to pay for counsel himself. Failure to provide an accused with such a caution means that any evidence or confession thereby obtained may be inadmissible in a Court of law. Mr Justice Thomas was personally opposed to such a caution on the ground that he felt it would destroy the criminal justice system. Section 23 of the Bill of Rights preserves the right to silence.

Presumably, if the right is to be enjoyed, a purposive interpretation will be necessary. However pursuant to s 5 the Courts can subject such a right to such limits "as can be demonstrably justified in a free and democratic society". Canadian decisions are particularly useful in assisting with a purposive interpretation of the bill of rights. That is the approach they take to the Charter.

The New Zealand bill of rights could turn out to be a damp squib granting very little that is actually new to New Zealanders or it could turn out to be an important instrument for the protection of the rights of all New Zealanders. My guess is that it will be the latter. New Zealand is a party to the Optional Protocol to the Covenant. If our Courts do not give the bill of rights a purposive interpretation, then the United Nations Human Rights Committee certainly will. If our Judges do not know this, then they should be made aware of it. The problem for our legal practitioners is that they have to know what to ask for and how to ask for it. □

1 *Department of Labour v Latailakepa* [1982] 1 NZLR 632, 635-6: *King-Ansell v Police* [1979] 2 NZLR 531, 536-7.

2 New Zealand has been a party to the Optional Protocol since 1989.

Recent Admissions

Barristers and Solicitors

McKenzie R J	Auckland	27 July 1990
Manning L P	Auckland	27 July 1990
Mason P J	Auckland	14 September 1990
Mead N M	Auckland	27 July 1990
Millar L	Auckland	27 July 1990
Mitchell S R	Auckland	27 July 1990
Mocken S R	Auckland	27 July 1990
Molloy T E	Auckland	27 July 1990
Monrad P V	Auckland	27 July 1990
Morrison D A	Auckland	27 July 1990
Motuga K G	Auckland	19 October 1990
Nicholas T G	Auckland	27 July 1990
O'Brien S A	Auckland	27 July 1990
Payne A L	Auckland	27 July 1990
Pearson W J	Auckland	27 July 1990
Pilcher S L	Auckland	27 July 1990
Rajendra S R	Auckland	27 July 1990
Rapley J R	Auckland	27 July 1990
Razzell E R	Auckland	27 July 1990
St John E	Auckland	27 July 1990
Simester D J	Auckland	27 July 1990
Simmonds T A	Wellington	13 July 1990

"Baby C" : An adoption following a surrogacy arrangement

By C I Rotherham, Solicitor of Wellington

Surrogacy births are not just scientific or medical problems. They also raise legal problems. The author considers whether there were breaches in a particular adoption and surrogacy case of ss 25 and 26 Adoption Act 1955 forbidding payments for adoption, and advertising for adoption. In the case in question the woman who gave birth made no claim, but the married couple had advertised for someone to be a surrogate and had paid her money. The District Court Judge decided that whether or not there had been an offence he was not precluded from making an adoption order, and did so. He considered the area needed the attention of Parliament as ss 25 and 26 did not seem to be appropriate in respect of the new medical techniques.

In *Re The Adoption of C* (unreported, 26 September 1990, Nelson District Court, Adoption No. 20/89), the Court was asked to grant an adoption order in respect of a child conceived following a surrogacy contract. The case is the first of its kind in this country. McAloon J's judgment provides some indication of how New Zealand Courts might deal with such applications and some of the problems they will face in applying the law as it presently stands to cases involving surrogacy.

The facts were as follows. Mr and Mrs P were intent on having children. However their desire was thwarted by Mrs P's infertility. In October 1985 they placed the following advertisement in the newspaper. "Nelson couple desperate for a child. Can you help?"

M responded and entered into a surrogacy arrangement with Mr and Mrs P. M became pregnant to Mr P through natural intercourse. Six months later, on 29 January 1987, the parties signed an agreement by which M acknowledged Mr P as the father of the child. It was further agreed that Mr and Mrs P would be guardians of the child and that M would relinquish her guardianship rights. Mr P was to pay M $375 per week for nine months from 26 July 1986 along with all birth and legal expenses. These payments, referred to in the agreement as "maintenance" came to a total of $15,000.

The child was born and the contract honoured without any complications. When Mr and Mrs P applied and were granted an interim adoption order in December 1987 the child was already nineteen months old. They subsequently applied in June of the following year for the adoption to be made final. However, McAloon J concluded that the interim order had lapsed and that a new application would have to be filed. This was done after some time and the matter was finally decided in late September 1990 by which time the child was almost three-and-a-half years old.

There was perhaps no compelling legal need to apply for adoption. Mr P was biologically and by law C's father. Presumably the adoption was intended to formalise Mrs P's relationship with the child, and to legally excuse M from any responsibility (eg maintenance) to C.

McAloon J considered whether the arrangement entered into by the couple breached s 25 of the Adoption Act 1955 (the Act) which prohibits payments and consideration of adoption and whether the advertisement breached s 26 of the Act which prohibits advertising for adoption.

Section 25

Section 25 provides as follows:

> Except with the consent of the Court, it shall not be lawful for any person to give or receive or to agree to give or receive any payment or reward in consideration of the adoption or proposed adoption of a child or in consideration of the making of arrangements for an adoption or proposed adoption.

McAloon J found that the payment in question did not breach the section (pp 4 and 5). The reasons for this decision are not entirely clear. The Court was apparently most influenced by two arguments:

(i) That the payments in question were for the purpose of "maintenance" rather than profit; and

(ii) That the agreement contained "no reference in any of its clauses to the possibility of an adoption".

After a brief discussion of the issues involved, McAloon J stated (at p 5):

> I am prepared to regard the payments as maintenance properly so called as between Mr and Mrs P on the one part and M on the other and to conclude that such payments are not in breach of s 25 of the Adoption Act.

His Honour did not explain why "maintenance" payments are not "payments in consideration of adoption" under s 25. However, he did note that he "had particular regard to the judgment of Latey J

in *Re An Adoption Application (Surrogacy)* [1987] 2 All ER 826 where an actual payment of £5,000 was accepted by the Judge".

It is submitted that the aforementioned case was wrongly used as authority for the proposition that money intended as compensation as opposed to remuneration is not a "payment or reward" under s 50(1) of the Adoption Act 1958 (the English equivalent to s 25). This misunderstanding has been perpetuated by the head note of the *All England Reports*. The reporter concludes s 50(1) was not contravened "if payments made . . . did not include an element of profit or financial reward". The reporter relies upon a statement by Latey J at page 829 that "there was nothing commercial in what happened". However, his Honour did not conclude that this meant that there was no payment pursuant to s 50(1). This comment preceded the consideration of whether there was a payment or reward and was more in the nature of an account of the facts. Latey J prefaced his remarks with the comment "if the word commercial has any bearing on what is decided in this case"; he never concluded that it did.

In fact, the true ratio for the case[1] may be found on p 830 where Latey J stated that whether a payment was within s 50(1) was "a question of fact to be decided on the evidence". At p 830 he concluded that:

> It was only after the payments had been made and the baby was born that any of them [the parties to the surrogacy agreement] began to turn their minds in any real sense to adoption and the legalities.

Latey J reasoned that, because the parties had their minds on the child when the agreement was made and did not directly contemplate the adoption at this stage, any payment made could not be seen to be "in consideration of" the adoption, as is required by s 50(1).

Perhaps it is such reasoning that led McAloon J to emphasise the fact that the agreement entered into by the parties in the case before him never mentioned adoption. However, the fact that the word was not used expressly can hardly be determinative of the matter. The failure to refer to the legal concept of adoption may well have been deliberate and the references to the arguably more complex concept of guardianship and the careful references to the payments as "maintenance" suggest that the contract may have been formulated by a lawyer who was anxious that s 25 be seen not to have been breached.

McAloon J did not attempt to define "maintenance". Presumably the term refers to payments which are intended as compensation for losses incurred rather than profit. Though it may be an inviting conclusion in some respects there are practical problems inherent in holding that such payments do not breach s 25. It would be a difficult question of fact and degree for a Court to decide the point at which a payment becomes a reward instead of mere compensation. McAloon J appeared eager to accept that the payments in question were "maintenance" without any real analysis of the matter. In particular it was not clear whether M gave up a job during her pregnancy so that the payments could be viewed as compensation for loss of earnings. If this was not the case it is difficult to regard the payments as anything other than a reward for bearing Baby C.

In any event, if the parties were intended that an adoption would take place when the contract was entered into and M was paid on the condition that she relinquish her rights to the child by consenting to an adoption then it seems illogical to suggest that the payments made were not "payments in consideration of adoption" and hence in breach of s 25.

The whole tenor of s 25 is that wherever an agreement to adopt forms part of the consideration for a payment it will be unlawful. The proviso to that section specifically allows medical expenses approved by the Director-General of Health or in accordance with a scale approved by him and paid directly to the hospital caring for the mother. The fact that such a proviso was thought to be necessary in respect of mere medical expenses suggests that virtually any payment involving an adoption is likely to fall within s 25. There is no mention in *Re The Adoption of Baby C* of whether M was paid any legal expenses as were provided for in the contract. Such payments would also be likely to breach s 25.

Thus, it is submitted that if the parties to the arrangement were intending an adoption to take place the payments made in this case did in fact breach s 25 of the Act. However, even if the Court had found this to be the case a number of questions would still have to have been resolved.

Section 25 excludes from the prohibition on payments in consideration of adoption those made with "the consent of the Court". This exemption is doubtless applied to proposed payments which applicants seek to clear with the Court. However, it is unclear whether payments made without the Court's prior acceptance could be subsequently authorised. This issue was considered by Latey J in *Re An Adoption (Surrogacy)*, supra. The Court examined s 50(3) of the Adoption Act 1958 which provided that s 50(1) did not apply to payments which were "authorised by the Court". This was interpreted to allow the Court to permit a payment retrospectively. In *Re the Adoption of C* McAloon J noted this aspect of Latey J's decision but did not discuss whether the same approach ought to be taken in New Zealand. Certainly there are some considerations favouring this interpretation. In particular, it could allow for a humane decision by the Court in a case where the applicants do not deserve to be punished.

However, one would expect a reference to consent generally to require prior permission. Section 27 of the Adoption Act provides that a breach of s 25 is an offence punishable by up to three months' imprisonment. Allowing for retrospective consent would cause considerable uncertainty. Whether a criminal offence was committed would depend on the willingness of the Court to exercise its discretion to authorise a payment.

In New Zealand (unlike England) there is no provision preventing the Court granting an adoption if s 25 is breached. Thus it would seem that applicants may commit an offence by making a payment in consideration of an adoption and still succeed in their application. The fact that applicants may have breached s 25 should not prevent the Court from allowing an adoption

provided it is accepted that the paramount consideration in such an application is the welfare of the child, as McAloon J accepted in *Re the Adoption of C* (at p 11).

Apart from possible criminal liability the consequences of a breach of s 25 are unclear, especially in relation to surrogacy arrangements. Section 27(3) of the Act provides that if an offence has been committed, regardless of whether any one has been convicted:

> The Court may order the child to be removed to a place of safety until he can be restored to his parents or guardian or until other arrangements can be made for him.

It seems the procedure is permissive, meaning that the Court may leave the child with adoptive parents who have breached s 25. As the subsection provides for the child "to be removed to a place of safety", it is arguable that Parliament only intended that orders be made to remove children from adopters when remaining would be injurious to their welfare. The provision for restoration of children to their parents suggests the subsection has little application in the surrogacy context. In the case of surrogacy arrangements involving conception to a natural intercourse at least, the adoptive father will also be the child's legal parent. Again the interests of the child are likely to be regarded as paramount and consequently, if these favoured the child's remaining with the applicants or adoptive parents, as the case may be, the Court is unlikely to make an order under s 27(3) removing the child from the home.

Section 26

Section 26 provides —

> It shall not be lawful for any person . . . to publish any advertisement indicating . . .
>
> (b) that any person desires to adopt the child; or
>
> (c) that any person or body of persons is willing to make arrangements for the adoption of a child.

McAloon J concluded that the section was inappropriate for dealing with surrogacy and the question of reform ought to be addressed by Parliament. More importantly he concluded that while s 26 created a penalty it did not prevent the Court from allowing an adoption where applicants had breached the section. Thus he concluded that while "the appropriate authorities" might prosecute Mr and Mrs P for their breach of s 26, the matter only concerned this particular Court in so far as it related "to the question of the suitability of Mr and Mrs P as adoptive parents". The Court went on to conclude that Mr and Mrs P were indeed suitable as parents and the order was duly granted.

This approach might equally have been taken in relation to s 25 so that questions relating to criminal offences be left to the police and other agencies while the Family Court focuses on the welfare of the child.

Reform

The case highlights the need to reform the law as it affects surrogacy arrangements. Particular problem areas may be highlighted.

(i) *Adoption*

As the decision in *Re The Adoption of C* clearly demonstrates, the existing legislative scheme was not intended to deal with surrogacy arrangements and it is uncertain how it will apply to such situations. There is a very real danger that the application of existing legislation to cases involving surrogacy may cause injustice.

(ii) *The legal status of the parties*

Status of Children Amendment Act 1987 was implemented to deal with anomalies in the law resulting from the use of "new birth technologies". However the Act did not specifically deal with problems resulting from surrogacy arrangements. In fact, in some respects the new provisions confused the legal position of parties to surrogacy arrangements which utilised new birth technologies.

Section 5 of the Act governs the status and thereby the rights and responsibilities of parties to an arrangement involving artificial insemination by donor (AID), in relation to the child resulting from the procedure. However the situation apparently envisaged by those drafting the Act involves the AID procedure being used to deal with problems relating to male infertility. In such a situation, semen from a donor is implanted in the female partner. The intention of the parties is for the woman and her infertile partner to raise the child as their own, with the donor having no relationship with the child. Section 5 provides that if a woman, who conceives a child through AID is married and her husband consents to the procedure the husband is for all purposes the legal father of the child while the donor has no parental responsibilities.

While s 5 provides a satisfactory framework of rules for the usual AID scenario, in relation to surrogacy arrangements it may result in legal consequences unenvisaged by the parties. Generally, parties to a surrogacy arrangement involving conception by AID intend the commissioners to become the child's social parents and the surrogate to have no rights or responsibilities in relation to the child. However, the rules in s 5 have the reverse effect, resulting in a number of complications. The effect of the Act is such that the commissioning male, despite being the biological father of the child, must adopt the child to become, in law, its father.

A husband of a surrogate is also placed in an unusual position. Section 5 only requires the husband's consent to his wife's undergoing the AID procedure for him to become for all purposes the father of the child. The reason for the wife's insemination does not appear to be relevant under that section. Yet, in the surrogacy context, the husband will only have given his consent with regard to his wife's carrying the child for the commissioning parents. He will not have consented to assuming full responsibility for the child. The surrogate's husband could be placed in an unfortunate position if the arrangement is not complied with. If the surrogate mother keeps the child, even if she does so against her husband's wishes and even if they separate as a result, it would seem

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A usable quantity of cannabis seeds

By Richard Mahoney, Senior Lecturer in Law, University of Otago

In this article the author puts forward the contention that seeds are not to be confused with the resultant plant, and that there is an arguable issue whether cannabis seeds are a usable quantity as a drug. He argues that while cannabis seeds have the potential to be used for cultivation, the mere potentiality should not automatically mean they are prohibited.

The proposition I wish to support in this note is that in New Zealand it should, on the current state of the law, be impossible for the Crown to secure a conviction for possession of cannabis seeds. I recognise, of course, the forces which combine to severely jeopardise the chances of survival of my argument, should it ever be subjected to the forensic fire. Nonetheless, by considering it readers will, I hope, derive some amusement, if not an increased awareness of one small area of criminal law.

Prompting this note is the decision of Barker J in *Wilson v Police* [1989] BCL 2095. His Honour held that in a prosecution for possession of cannabis seeds it is not necessary for the Crown to prove that the seeds were capable of germination. This conclusion seems unarguable. Counsel for the accused appears, though, to have placed the issue of capacity to germinate in the context of the undoubted requirement in New Zealand that, to be guilty of possessing a drug controlled by the Misuse of Drugs Act 1975, the quantity possessed must be "usable". It seems safe to assume that counsel's argument was that cannabis seeds could not be said to be "usable" unless it was shown that they were capable of germination. Barker J rejected this argument and held that the "defence" of no usable quantity, as recognised by our Court of Appeal (*Police v Emirali* [1976] 2 NZLR 476) and Parliament, (s 29A Misuse of Drugs Act 1978) applies only to cannabis plant and cannabis resin as opposed to seeds. It is here that I part company with His Honour. True, cannabis seeds need not be "usable" as seeds from which cannabis plants can be grown, but I hope to show that they must nonetheless be shown by the Crown, when the issue is raised by the defence[1] to be usable *as a drug*. I also hope to show that cannabis seeds simply cannot be used in this way, and thus their possession is not illegal.

The factual foundation

It must be remembered that the DSIR is an available source for expert evidence for the defence as well as the prosecution. What the DSIR expert will confirm (and the Crown should agree to) is that there are no tetrahydrocannabinols (THC) or other active ingredients (consciousness-altering substances) in cannabis seeds. The only THC that might be present during a scientific analysis of cannabis seeds is there solely due to the fact that the seeds have been in contact with other parts of the cannabis plant (the flowering tops, leaves and stalks) which do contain THC. The amount of such "dustings" on the shell of free cannabis seeds of all but the largest of quantities would be indeed minute – far below the amount necessary to have any effect on a human being, however utilised. There is no practical way in which the dustings, if present, could be separated from cannabis seeds so as to form a usable quantity.

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that the husband is liable to maintain the child.

On the other hand, if the commissioning parents reneged on their undertakings, and left the child with the surrogate, they would not be liable to maintain the child. This is despite the fact that the commissioning parents were primarily responsible for the child's conception and the child was biologically related to one of them.

The unmistakable effect of the Status of Children Amendment Act 1987 has disadvantaged those making surrogacy arrangements involving conception by AID. The legal position would better reflect the intention of the parties to surrogacy agreements if conception is through natural intercourse instead. Thus, in *Re The Adoption of C* conception was through natural intercourse and the complications created by the Act were avoided. It is submitted that there is no compelling reason for the law to favour one method of conception over another, and that in this area the law should be reformed to deal rationally with the legal status of parties in relation to children who were born following surrogacy arrangements.

The issues raised in this case are not new. Reform of this area of the law was considered by the Law Reform Commission as early as 1985. Changes have already been implemented in England, Australia, and a number of states in both the United States and Canada as well as elsewhere. By failing to act New Zealand has lost the chance of being able to deal with its first surrogacy case under a rational legislative scheme. Ultimately, our Parliament will have to consider how it wishes to deal with the practice of surrogacy. How it will respond is uncertain. However, it is clear that the law at present does not adequately deal with the situation. □

[1]This was the conclusion of the New South Wales Law Reform Commission (Artificial Conception Discussion Paper 3: Surrogate Motherhood at p 46).

Though the above facts are crucial, further evidence may be desirable in amplification. Through a knowledgeable police officer or even the accused[2] it may be established that no one purposely smokes cannabis seeds simpliciter – they are only smoked incidentally when included in a large amount of cannabis plant. When smoked, the seeds "pop" and are a mere annoyance. In summary, then, though cannabis seeds are undoubtedly great for the purpose of growing cannabis plants, they are completely useless *as a drug* in their own right.

The legal foundation

Those readers having a passing familiarity with the Misuse of Drugs Act may think that any hope of success of my argument is foreclosed by s 13(1)(b), which prohibits the possession of the seeds ". . . of any prohibited plant . . ." As cannabis is a prohibited plant, this may seem an end to the matter. Somewhat surprisingly, however, s 13(1)(b) does *not* prohibit the possession of the seeds of *all* prohibited plants. Look again at the section. It prohibits (only) the possession of seeds *that are not themselves a controlled drug.* Schedule 3 to the Act specifies that cannabis seeds are a Class C controlled drug. They are thus outside the provisions of s 13(1)(b) and their possession is inevitably charged as an offence under s 7(1)(a) – possession of a controlled drug. Section 13(1)(b) is obviously aimed at preventing possession of seeds from which prohibited plants can be cultivated. In removing cannabis seeds from the operation of this section and treating them as a controlled drug in their own right, the legislature has (perhaps unwittingly) produced an undeniable result – the Act is not concerned with the obvious use of cannabis seeds to grow cannabis plants!

One of the ramifications of designating cannabis seeds to be themselves a controlled drug, I suggest, is that their possession is subject to the defence of no usable quantity. That New Zealand recognises the defence of no usable quantity was confirmed by the Court of Appeal in *Police v Emirali* [1976] 2 NZLR 476 and by the Legislature in the enactment of s 29A of the Act. This legislative response to *Emirali* was not, as might have been expected, to abrogate the defence. To the contrary, s 29A assumes the validity of the defence and simply protects the Crown from the ambush attack which might otherwise be launched by a submission of no usable quantity without a prior warning to the prosecution. Section 29A is of general import and does not exclude any controlled drug from its operation and though *Emirali* was concerned with cannabis, the judgment speaks generally of narcotics without distinction. There appears, therefore, no justification for the conclusion in *Wilson* of Barker J that *Emirali* and s 29A,

> . . . relate to the question of usable quantity which applies to cannabis plant or resin rather than to seeds, possession of which is clearly outlawed.

Possession of cannabis plant or resin is equally, with cannabis seeds, "clearly outlawed", yet this is merely the starting point for an argument of no usable quantity in defence of a charge of possession of plant or resin. The position should be identical when the charge is possession of seeds. The simple message of *Emirali* is that there is no illegal possession of *any* controlled drug unless the quantity possessed was usable. Though Barker J's quick conclusion is stated in the course of adopting the ruling in *Police v McKenzie* (unreported, 22 August 1977, White J, M 167/77 Wellington Registry) that proof of capacity to germinate is not necessary for a successful prosecution for possession of cannabis seeds, *McKenzie* provides no support for Barker J's view as to the irrelevance of the defence of no usable quantity to a charge of possessing cannabis seeds. Not only was this defence not discussed in *McKenzie* but, more pertinently, the case was decided under the Narcotics Act 1965 which (by s 7(1)(c)) simply prohibited possession of the seeds of a prohibited plant and did not (as does s 13(1)(b) of the current Misuse of Drugs Act) exempt from this prohibition those seeds which are themselves a controlled drug. Under the current legislation there is no justification for excluding any controlled drug, in particular cannabis seeds, from the operation of the defence of no usable quantity.

Any consideration of the issue of no usable quantity would be incomplete without noting the relative isolation in which New Zealand now stands in its recognition of the defence. Though *Emirali* cited some American authorities which have adopted the defence, it is clear that the majority of United States jurisdictions have taken an opposite viewpoint.[3] It is surprising as well that though Woodhouse J, in delivering the judgment of the Court, referred to the British Columbia Supreme Court decision of *R v McBurney* [1974] 3 WWR 546 (which adopted the defence) he made no mention of the British Columbia Court of Appeal decision in the same case ([1975] 5 WWR 554). While this latter judgment upheld the acquittal that Berger J had accepted in the Court below, this was done on the basis that the trace of cannabis resin involved was so minute as to amount, at best, to proof that the accused had possessed hashish on some prior occasion only. The Court of Appeal in *McBurney* appeared to go out of its way to reject the defence of no usable quantity (at 557) and this rejection has now been spelled out by the Court in a later case. (*R v Brett* (1986) 41 CCC 3d 170). Though *Emirali* noted that the position in England was at best unsettled, readers of this journal will already be aware (Shiels, "Possession of Minute Quantities of Controlled Drugs" [1982] NZLJ 423) that the House of Lords has since (*R v Boyesen* [1982] 2 All ER 161) unanimously rejected the defence. The only line of defence left open by *Boyesen* is that if the quantity of the drug is "so small as not to be visible, tangible, and measurable" then there cannot be a conviction because such a quantity would in reality be nothing at all (at 166). So too the High Court of Australia in *Williams v R* (1978) 22 ALR 195 refused, by a majority, to apply *Emirali* and adopted a somewhat stricter test in the interests of certainty. Gibbs, Mason and Jacobs JJ concluded that the statutory prohibition of possession (at 201):

> . . . contemplates possession, not of a minute quantity incapable of discernment by the naked eye and detectable only by scientific means, but a possession of such a quantity as makes it reasonable

> to say as a matter of commonsense and reality that it is the prohibited plant or drug of which the person is presently in possession.

In the face, then, of this near universal rejection outside New Zealand of the defence of no usable quantity, it is always possible that our Court of Appeal will reconsider the issue at some future time. Though this possibility needs to be recognised in any case where the defence is being advanced, it is to be hoped that the existence of s 29A and the reasoning in *Emirali* itself will preclude such a step. (See too the policy arguments set out by Davidson, f 3.)

The argument and a fly of straw in the ointment

On the basis of the facts and law just set out, the argument I wish to propose is by now obvious. The defence of no usable quantity applies to all controlled drugs, even cannabis seeds. Cannabis seeds, except perhaps in huge quantities, are not usable as a drug. There can be, then, no conviction under s 7 of the Act for their simple possession.[4]

Because of the inevitable distaste with which such an argument will be met, it is worthwhile to anticipate the one possible line of attack. Though cannabis seeds are, like any other controlled drug, subject to the defence of no usable quantity, "usability" may be argued to take on different meanings for different drugs. For cannabis seeds to be usable perhaps the Crown need only show that there were sufficient seeds possessed (ie, one whole seed!) to enable a cannabis plant to be grown (with Barker J's judgment in *Wilson* available to support the further proposition that no proof need be given that the seed could actually be germinated).

Now it is true that there are real difficulties presented by the issue of what exactly is meant by a *usable* quantity of a drug. Indeed, these very difficulties have been relied upon by some Courts as a reason to refuse recognition of the defence (*People of Michigan v Harrington* 238 NW 2d 20 (1976) at 25-26; *Williams v R* (1978) 22 ALR 195 at 201). It is likewise true that in New Zealand *Ramjam v Police* (unreported, Roper J, 4 February 1986, M 484/782, Chch Reg)), as in most United States jurisdictions which have accepted the defence of no usable quantity,[5] it would be fruitless to attempt to convince a Court that the requirement of usability means that the Crown must show that the amount of the controlled drug in question was such that it would have an actual, measurable effect on human physiology or psychology. Beyond this, however, the universal assumption to date has been that usable means usable *as a drug*. To suggest that a completely different focus should be adopted when the controlled drug involved happens to be cannabis seeds would be to fly in the face of the structure of the Misuse of Drugs Act and the underlying rationale of the defence upon which *Emirali* and the other existing authorities are based.

Looking first at the Act, it seems unarguable that the legislation, in proscribing the possession of controlled drugs, was concerned with their use (only) to produce an effect on the human mind or body. The central point has already been made regarding s 13(1)(b) that in taking cannabis seeds outside the scope of that section Parliament has exhibited a lack of concern for the potential use of such seeds to grow prohibited plants. Beyond this, a review of the Act as a whole reveals that unless there is a specific focus on some peripheral aspect of drug abuse (as in s 13(1)(b) itself) the attack launched by the Act is against the use of controlled drugs by persons wishing to experience the effect of an alteration of their body chemistry — use as a drug. Thus in respect to offences relating to controlled drug analogues (the so-called "designer drugs"), s 29C exonerates the accused if (basically) he or she proves that the drugs were possessed for some purpose other than a use "intended to have a pharmacological effect on the user". The same message is evident in a review of the Schedules to the Act. The Second Schedule, which lists class B drugs, defines prohibited cannabis preparations as those (only) containing any tetrahydrocannabinols. Without THC a cannabis preparation is innocuous and its possession is not prohibited. In the Third Schedule, which is where cannabis seeds are listed as class C controlled drugs, not only are coca leaves (from which cocaine is derived) exempted if the active ingredients have been removed, but also removed from the operation of the Act is cannabis plant from which the resin (which contains the THC) has been extracted. The Act consistently focuses on the pharmacological use of controlled drugs and this must surely be the context in which "usable" should be defined in s 29A's recognition of the defence of no usable quantity.

Turning to *Emirali* and the other authorities recognising the defence of no usable quantity, it is likewise clear that the issue is always one of usability as a drug. In giving the judgment of the Court, Woodhouse J stated:

> It is important that the Courts should give every proper support to those who have the responsibility of controlling the serious problem of drug abuse, but when one attempts to understand the ambit of (now s 7 of the Act) it is necessary to keep in mind that the real purpose of the statute is not to proscribe the existence of narcotics as an end in itself. Instead it is to prevent their illicit use.

This reflects the sentiments of Mahon J in the Court below, who stated ([1976] 2 NZLR 286 at 292):

> What is "usable" depends upon the nature of the drug. A speck of lysergide is usable, as also is a drop of hashish oil or a diminutive quantity of heroin or cocaine.

The reason such small amounts of these substances, as referred to by Mahon J, are usable must be because they are "usable under known practices of narcotics addicts" (*State of Arizona v Moreno*).[6] There is no such practice in the case of cannabis seeds, at least in so far as producing an intoxicating effect is concerned, which is clearly the focus of the remarks of Mahon J. Similar sentiments are expressed in the other United States authorities which have recognised the defence. Looking simply at the two American judgments referred to in *Emirali*, in *Edelin v US* 227A (2d) 395 (1967) at 399 the test adopted was "usable as a narcotic". In *People v Leal* 413P

(2d) 665 (1966) at 670 the California Supreme Court concluded:

> . . . in penalising a person who possesses a narcotic the Legislature proscribed possession of a substance *that has a narcotic potential*; it condemned the commodity that could be used *as such*.

Cannabis seeds have no such potential.

Though the mere existence of a precedent is rarely a conclusive factor in any legal argument, it is at least worth noting that support does exist for the usable quantity argument as applied to cannabis seeds. In *Watson v State of Nevada* 495P (2d) 365 (1972), seventeen cannabis seeds were found on the floor of the bedroom of the accused's daughters. Expert evidence established that the active ingredient was "practically nonexistent" in cannabis seeds, and they would be useless *as a narcotic*. As might be imagined from this outline of the facts, one reason given by the Supreme Court of Nevada for the acquittal of the accused was his lack of awareness of the existence of the seeds in his daughters' bedroom. Of equal importance, however, was the Court's view that, based on the scientific evidence, the seventeen seeds did not amount to a usable quantity of a narcotic, and therefore there could be no conviction.[7]

Conclusion

I conclude with the daring suggestion that the apocalypse may not be heralded by the recognition that it is legal to possess cannabis seeds. If people want to keep them to look at, make into a necklace, or feed to their budgie, is there really any harm in that? Courts in England have not been daunted by the proposition that the possession of cannabis seeds may in fact be legal. Lord Diplock in *R v Goodchild* (No 2) [1978] 1 WLR 578 (HL) at 579 noted the numerous legitimate "non drug" uses that have been made of cannabis seeds by other cultures since time immemorial. The English Court of Appeal in *R v Mitchell* [1977] 1 WLR 753 concluded that because "clean" cannabis seeds are innocuous and contain no resin they did not come within the definition of "cannabis" in the English legislation under consideration and their possession was therefore legal. The English Parliament shortly thereafter specifically excluded cannabis seeds from the definition of "cannabis" under the English Misuse of Drugs Act (s 52 Criminal Law Act 1977).

While it is true that cannabis seeds do have the *potential* to be used as implements by which the crime of cultivation may be committed, this potential itself should not automatically require their prohibition. Many common items, from crowbars to automobiles, have the potential for criminal use yet their possession is not prohibited. Even the crime of attempted cultivation requires that the seeds be soaked or planted (*Higgins v Police* (1984) 1 CRNZ 187). Before any such use is made of them, cannabis seeds are innocuous, with less potential for abuse than nutmeg or cough syrup. It may be that their simple possession is equally legal. □

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1 The effect of s 29A(1) of the Act is that the Crown need only prove that the drugs were of a usable quantity if the accused "puts the matter in issue".

2 The accused could refrain from answering any questions on how she or he came to possess such knowledge if such answers might incriminate the accused on a charge other than that of possession of the seeds (s 5(4)(a) Evidence Act 1908). After all, the knowledge might have been gained from observing others. Only the most aggressive prosecutor would press such a line of questioning in any event.

3 Davidson, "Criminal Liability for Possession of Nonusable Amounts of Controlled Substances" (1977) 77 *Colum LR* 596. This note contains a fine review of the wide range of possible approaches to the issue of usability of controlled drugs.

4 The argument would probably not be successful to a charge under ss 6 or 7 of sale or supply of cannabis seeds. The mere fact that the seeds are sold illustrates that they were usable for *that* purpose: *People v Hardin* 197 *Calif Rptr* 194 (1984). This line of reasoning should also prevent the defence being recognised in a charge under s 6(1)(f) of possessing the seeds for the purpose of sale or supply. If possessed *for that purpose*, they must have been usable for that purpose. My argument goes only to a charge of "simple" possession (s 7(1)(a)).

5 *State of Arizona v Martinez* 485P (2d) 600 (1971); *People v Shenk* 101 *Calif Rptr* 75 (1972). The District of Columbia appears to be the one place where usable has been interpreted to mean "sufficient to produce a narcotic effect": *Singley v US* 533A 2d 245 (1987) at 248.

6 374P (2d) 872 (1962) at 875. But cf Davidson, f 3 at 601 n 38.

7 As noted in the report of *Watson*, the relevant legislation was soon altered to provide that if a narcotic was present in an amount sufficient to allow for identification this was sufficient for conviction. The legislatures of many American states have dealt specifically with the issue of a usable quantity, and this should of course be kept in mind in reviewing the US authorities.

Recent Admissions

Barristers and Solicitors

Sinclair M D	Wellington	13 July 1990	Townsend C E A	Auckland	27 July 1990
Smith C R	Auckland	27 July 1990	Treacy B C	Auckland	27 July 1990
Smith S F	Auckland	27 July 1990	Vague B S	Auckland	27 July 1990
Stanbridge V J	Auckland	27 July 1990	Vodanovich I M	Auckland	27 July 1990
Stringer G D	Auckland	27 July 1990	Weir S J E	Wellington	13 July 1990
Sullivan J L	Auckland	27 July 1990	West I H	Auckland	27 July 1990
Symmans N J	Auckland	27 July 1990	White K M	Auckland	27 July 1990
Taylor J W	Wellington	13 July 1990	Wilson D M	Wellington	13 July 1990
Te Rangiita J Te R	Wellington	13 July 1990	Yep S	Auckland	27 July 1990
Thain I J	Auckland	27 July 1990	Zumbach P J	Auckland	27 July 1990

The new look legislation

By N J Jamieson, Lecturer in Law, University of Otago

The author of this article was at one time in the law drafting office. In this article he looks at the problem of legislation by reference, that is to say, where a statute refers to some other statute so as to incorporate the provisions of the earlier statute in the new one. Alternatively, as was done in the case of the Fisheries Act, reference is made to a non-statutory document, in that case the Treaty of Waitangi. The position was made even worse by the reference being to the "principles" of the non-statutory document, which itself does not enunciate any "principles" as to its meaning of interpretation. The author is concerned also with the shift that is occurring in legal drafting from the common law principle of specifics to the Continental concept of legislative expression which is general rather than particular and abstract rather than concrete. The article points out certain difficulties and dangers inherent in the new system that is developing.

In October 1988, the editor of *Capital Letter* wrote an editorial complaining of the waffly way in which the inclusion of "second generation" rights debased the currency of a Bill of Rights. He was really complaining about the way in which the Justice and Law Reform Committee supported the inclusion of some social and economic rights which would be very hard to enforce. These included the right to an adequate standard of living and the right to participate in cultural life. In the editor's opinion, these are archetypical matters "for political evaluation and do not form a base from which the Courts can construe statutes, regulations, or bylaws, or determine the validity of administrative acts". When construed in the context of the saving provisions in article 3 of the proposed Bill of Rights which lay down the limits of law in a free and democratic society (and thus reverse the Rule of Law by making social and political values superior to legal ones) "they are meaningless for the legal process, and too readily fudgeable for the legislative and administrative processes". Perhaps this waffly meaninglessness, fudgeability, and unenforceability of "second generation" social and economic rights arise from the difficulty of determining just what these rights mean. Just what is "the right to a standard of living adequate for a person's health" in these days of renal dialysis and heart transplant technology? Just what is the right to participate in the cultural life of the community, when one is the last of the Gaelic speaking settlers in Dunedin surrounded by government financed kohanga reo.?

We could instead ask what is meant by "everyone had the right to leave New Zealand"? As we have already seen (at [1990] NZLJ 143) "the right of everyone to leave New Zealand" is not self-explanatory. What is meant by the right to participate in the cultural life of the community is even less self-evident. For that reason it may be helpful to have another look at everyone's right to leave New Zealand – this time in the context of complaints against the waffly way in which second generation rights debase the currency of the proposed Bill of Rights.

As we have already seen the proposal by the Justice and Law Reform Committee commenting on the White Paper for a Bill of Rights that "everyone has the right to leave New Zealand" is nothing new. On the contrary, the provision appears in the White Paper itself, as article 11(3) of the proposed Bill of rights. It is dealt with under the rubric of freedom of movement, in company with rights of entry and residence. Elkind and Shaw also deal with it in pages 64-68 of their critical commentary on the proposed Bill of Rights for New Zealand *A Standard for Justice*. We know what it could mean for Soviet Russia in allowing the Jews to leave the country. Still we ask, what does it mean more specifically for New Zealand where the same anti-semitic restrictions do not exist? Just what is our standard of living and cultural life that makes residence here worthwhile and does not provoke us to leave the country? Is it not the fact that we do not need a Bill of Rights?

Perhaps the fundamental rights expressing freedom of movement are just as waffly as the proposed "second-generation" rights? Is it not the case that the whole concept of our proposed Bill of Rights testifies to the fact that some things are terribly wrong with law and society in New Zealand, but the most terrible thing of all is that no one, least of all any lawyer, can put his finger on what's wrong. How, then, can anyone set it right? The only possible result of such indeterminate legislative action as covering up a sore and sick society with a plastered Bill of Rights will be intensified litigation to expose and heal the sore. The legal cover-up will not enhance the law, because it will not heal the hurt. It will only hide the wound.

Why is the proposed Bill of Rights so attractive to many lawyers? Some say simply because it will bring them more work. In his *Law of the Constitution* Dicey equated litigiousness with federalism but it took McIlwaine's *High Court of Parliament and its Supremacy* to show that litigiousness is the consequence not of federalism but of a written constitution. A Bill of Rights makes

more work for lawyers.

Why is our proposed Bill of Rights also a cover-up? Because it runs completely counter to, and also glosses over what is wrong with our heritage of common law. Perhaps those who in all innocence support the Bill do so ignorantly of their common law source of strength, and those who support it knowledgeably, do so by weakening the common law values from which they derive their status.

The conflict between common law and Continental drafting

Just as the editor of *Capital Letter* complains about the waffly way in which the inclusion of second generation rights debases the currency of a Bill of Rights, so others complain that the whole concept of the Bill debases the currency of the common law. The issue is where to draw the line, but this cannot be decided in relation only to the Bill of Rights. It depends also on the context of the common law.

What makes one find all or part of the concept of this Bill of Rights waffly in comparison with the common law? The question, never mind how naively put, is genuinely jurisprudential. The answer lies in a conflict between concepts of law that divorce academics like Hart from practitioners like Devlin. In the old English universities it arises from a vestigial allegiance to civil law. This provokes a transatlantic response from an essentially common lawyer like Fuller. For the purposes of the proposed Bill of Rights, this debate over different concepts of law centres, often without our knowing it, on the vastly different traditions of Continental and common law drafting.

The Continental concept of legislative expression is typified by characteristics that run contrary to the concept of legislative expression held at common law. The resulting dichotomy in legislative outlook testifies to conflict between the command and customary theories of law. For in ways which common lawyers are prone to overlook, the Continental character of legislative expression is –

simple rather than complex
general rather than particular
abstract rather than concrete
academic rather than experiential
formal rather than functional
principled rather than elemental
algorithmic rather than heuristic
concise rather than verbose
purposive rather than literal
conceptual rather than textual
extensive rather than intensive
substantive rather than procedural
categorically complete rather than illustratively referenced
politically motivated rather than legally addressed
rule orientated rather than case-instanced
deductively construed rather than inductively interpreted
formally enforced rather than functionally implemented

The fact that this list of archetypal characteristics would not convince a common lawyer is illustrative of the way in which this kind of explanation conforms to Continental drafting. Out of is own Continental context, it becomes over-simplified, over-generalised, over-abstract, over-academic, over-formal, and overly categorical in the experiential and case-instanced context of the common law.

Nevertheless, the Continental character of legislation is not altogether alien to our heritage of common law. Almost all of Edward I's legislation, by which Burnell, the greatest of all English draftsmen credited his royal master with the title of the English Justinian, has a Continental character. *In consimili casu*, which so excited Lambard and Blackstone to explain the source of action on the case in statute, is typical of Continental legislaiton. So also are all Edward's early statutes laying down the feudal basis of our land law, from *De Donis* to *Quia Emptores*. The same goes for much later landmarks like the Statute of Uses and the Statute of Frauds. Our very own Treaty of Waitangi is one of the most delightfully drawn instances of Continental drafting – a legal value completely misunderstood by those who disparage it for its lack of common law complexity.

The Continental character of some statute law still continues in New Zealand. The trend away from common law specificity in identifying the grounds for divorce in matrimonial law and the generalisation of company powers under the open slather principle rather than their particularisation under memoranda and articles of association confirms a growing Continental outlook in legislative communication. It will be interesting to see whether the commercial failure of companies can compete with the divorce rate, now that both are drafted with Continental dimensions.

The principles of the Treaty of Waitangi

The now notorious reference to the principles of the Treaty of Waitangi contained in the Fisheries Act 1908 and the State-Owned Enterprises Act 1986 is an example of Continental styled legislation. The reference to abstract principles rather than substantive text offends against the principle of textual amendment incumbent upon the New Zealand legislature. It is also referential legislation at its worst because of vagueness and uncertainty surrounding what the reference to the principles of the Treaty really means. Its Continental character sprang from the legislative draftsman being prepared to compromise his own advice against incorporation of the Treaty into the statute book. In the face of this advice the political intention was to window-dress the Treaty on the basis of principles having less legal value than positive law. The continental character of the provision reversed the role of the principle for legislation in a common law context, however, thus preparing the way for the revolutionary decisions in *Te Weehi v Regional Fisheries Officer* (1986) 6 NZAR 114 and *New Zealand Maori Council v Attorney-General* (1986) 6 NZAR 353.

It is hard to imagine how the resulting revival of indigenous law in New Zealand could have been any more awesome had the legislative draftsman openly confronted the issue by explicitly reversing the contrary line of authority in *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, *Moore v Meredith* (1889) 8 NZLR 169, *Nireaha Tamaki v Baker* (1894) 11 NZLR 483, *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, *Waipapakura v Hempton* (1914) 33 NZLR 322, and *Keepa v Inspector of Fisheries* [1965] NZLR 322.

The awesome effect of the principles of the Treaty effected through *Te Weehi's* case on fisheries legislation from 1877 to 1983 and the *Maori Council* case on s 9 of the State-Owned Enterprises Act 1986 confirms the latent forcefulness of the continental character of legislative drafting already inherent in the New Zealand Statute Book. The present trend, institutionalised by the creation of a Law Commission, is at odds with Sir John Samond's conception of a Parliamentary Counsel Office. Contrary to the best of all possible legislative intentions this only increases the chaos brought about by double standards of legislative expression. The Law Commission is more responsible for the new look in legislation than any other legal institution in New Zealand.

Confusion of systems

The result is to confuse two vastly different systems of jurisprudence represented by quite different schools of legislative drafting. The centuries-old division of labour and specialisation of function between the civil and common law are thus brought into conflict without sufficient regard for the vastly different systems of jurisprudence that respectively support them.

We are apt to take the common law drafting of our statute book for granted because ours is a common law jurisdiction. When the Statute Law Society reminds us of the shortcomings of common law drafting, which are many, it does so with a sense of grievance that overlooks the strength of the common law's many achievements. Tempted by Sir William Dale's clarion call to espouse Continental-styled drafting by getting rid of parliamentary counsel (*Legislative Drafting — A New Approach*) we are apt to agree with him that the grass on the Continental side of the fence seems greener. Unlike Britain, however, we are not expressly heading for a United States of Europe. Also unlike Britain, we have so far managed to avoid the worst deficiencies of non-textual drafting. For the blessing, on which the continuing strength of the New Zealand statute book depends, see "Current Problems in the Legislative Process" (1976, 3 *Otago LR* 529) by D A S Ward.

New Zealand's heritage of common law drafting began with what James Stephen described as that "remarkable collection of laws" drafted by Swainson with Martin and Outhwaite in 1840-41 on the way out from Britain. In terms of its age, consistency and innovativeness it is among the best developed of all English language jurisdictions. It would be pathetic to forgo this for the copycat legislation, borrowed from Continental countries, that is being promoted as being novel to New Zealand today. In this, too, there is a strange paradox: that just as the New Zealand government takes steps to enforce copyright over its own legislation, it contravenes the copyright of other countries by filching legislative provisions which it puts forward (sometimes without any source citation) as being entirely its own creation.

The real danger of Continental drafting arises from mistaking the positive value it places on simplicity of expression. This is meant to make for easy comprehension, unequivocality of interpretation and decisiveness of enforcement. The history of Continental legislation in a common law context, from Magna Carta to the Treaty of Waitangi, proves otherwise. Like the land law legislation of Edward I as described by Plucknett in his *Legislation of Edward the First*, it consistently brings about the reverse of what it first intended. What is worse is the deceptive appearance it gives to the enterprise of legislation that law-making is easy — anyone can do it.

It is this search for simplicity in legislative expression, spurious in the long run because it sacrifices both unequivocality of interpretation and decisiveness of enforcement, that puts our common law heritage of legislation most at risk. It brings someone like Sir William Dale to suggest that Britain could do best without parliamentary counsel. It brings New Zealand's Prime Minister to hand over the drafting of school charters to school boards of untrained laymen — a far move from the the great charter of Magna Carta from which school charters presumably seek to share a claim to fame.

Briefly the distinction between Continental and common law approaches can be drawn by legal fiction. If the law is a spider's web, as Swift so cynically surmised, then the Continental approach is to deal only with describing the spider, whereas the common law approach is to define only the web. Carrying the figure of speech still further, then the Continental approach identifies the spider with the concept of the state (for USA and Latin America no less than Europe) whereas it is merely the state of affairs making up the web of the law that supports the concept of the Crown as the spider at the centre of our common law.

Getting rid of the spider but keeping the web — the demise of the Crown at common law

How far is our commitment to the common law a matter of professional ethics? How far does our commitment to the Crown as custodian of the common law go to the root of this country's constitution?

The answer to both these questions is a matter of fealty. This is the real fidelity fund of the legal profession. Without any commitment of faithful service to the law, all material insurance is utterly worthless. At heart, the issue is this — what moves the legal profession?

Answering this question is pivotal to this paper. What moves the legal profession is not something that lawyers can decide entirely for themselves. There is a social context that determines legal outcomes no matter how much law is made by lawyers.

The fact is that the concept of faithful service is far older than the monetarisation of modern society. Indeed it has been the monetarisation of modern society that has put an end to many of the most fruitful relationships based on faithful service. Look at the way in which both liability for taxation and social welfare payments have operated with the same concerted effect, despite being at opposite ends of the social spectrum, to erode away the legal status of marriage. Even citizenship is changing its basis from allegiance to a monied right of entry. As Robin White writes of British nationality in the *Hong Kong Law Journal* (1989, p 14) "nationality now tends to be regarded as a matter of immigration law".

This is the changing context in which the right to belong to a

country has been seen for centuries to exact the reciprocal responsibility of allegiance in return for which one may exercise the privilege of practising law. In a rough and ready way we overlook which comes first, being a subject of the sovereign, owning allegiance, or owning real property. On these matters, legal history ebbs and flows between personal and territorial jurisdiction. Practising a privileged profession, however, invariably requires allegiance. These days (although Dr Bonham's case survives to remind us of the pitfalls) our professional allegiance is directed to some delegated body such as the Medical Association or the Law Society.

One way or the other, the common lawyer still owes allegiance. It is not for nothing that he was once entitled *esquire*. Perhaps this now offends against women's rights, for there is no way in which a woman can be *esquire*. Less than a generation ago, however, lawyers still recognised the responsibility of this chivalric status to uphold the law. A letter from one lawyer to another without being addressed esquire would be a rank discourtesy. Of course now that is all gone. Law practitioners may advertise, which brings a closer presentation than ever before of legal values as social values. Committees enquiring into professional misconduct have lay members. And clients prefer a more familiar approach — if possible on first-name terms. What takes the place of fealty, then, when the common lawyer no longer swears allegiance and cannot be entitled *esquire*?

Oath of allegiance

Most law practitioners in practice now have sworn oaths of allegiance. These express our fealty to the Crown. This is not a vestigal hangover from feudalism, for it is still thought necessaary for Judges to take the oath of allegiance before appointment to the bench. After the commencement of the Law Practitioners' Act 1982, however, oaths of allegiance are no longer required of candidates for admission as barristers and solicitors. This might make it easier for citizens of the USA who would otherwise lose their citizenship, Scots Nationalists, and Irish Sinn Feiners, but it makes further inroads into the concept of faithful service to the state, divorces the legal profession from any allegiance to the Crown, and so sets the stage for cutting the royal spider free from the hitherto seamless web of the common law. The centuries-old chivalric status of the common lawyer had ceased in New Zealand for those newly admitted to the legal profession. A former generation of *esquires* would have labelled them *upstarts*.

"Sticks and stones may break my bones" but it is not so true that "words will never hurt me". Legal language has a substantive forcefulness, whether as the text of the law or an oath of allegiance. This is especially the case when one is duty-bound by the text of the law to take the oath of allegiance. Most law practitioners in New Zealand today had no alternative but to take the oath of allegiance on their admission to the legal profession:

> I, NIGEL JOHN JAMIESON, of Wellington, Law Clerk, swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second Her heirs and successors, according to law. So help me God.

The oath is made before God. "When a man takes an oath" as Paul pointed out to the Hebrews, "he is calling upon someone greater than himself to force him to do what he has promised, or to punish him if he later refuses to do it; the oath ends all argument about it". The quotation is taken from the *Living Bible*, Hebrews 6,16. In 1661, the Marquis of Argyle, before being beheaded on the scaffold, expressed the corollary to this principle when he said ". . . it passeth the power of all the magistrates under heaven to absolve from the oath of God."

What bearing then does the oath of allegiance taken by every law practitioner of more than seven years' standing have on present policies to do away with the Crown? So far, the only challenge to the sale of State assets comes from the Maori but not the pakeha partner under the Treaty of Waitangi. New Zealand lawyers have sworn themselves to uphold the Crown. Her Majesty's Judges continue to swear the oath of allegiance — perhaps not now just for themselves but also vicariously on behalf of the whole legal profession. Yet the significantly unreported decision of *Wellington Regional Council v Post Bank Ltd & Others* (CP 720/87) sees no conflict between the privatisation of what was once Royal Mail and the oath of allegiance to uphold the Crown as responsible for the constitution. Of course this is also consistent with the way in which the centuries-old royal writ is no longer seen by the judiciary to be relevant to commence any Court action. May one be forgiven for wondering whether Her Majesty's Judges still consider themselves to be Her Majesty's Judges?

Fortunately, one may be forgiven. As the Right Honourable Mr Justice Richardson has himself written about the *Role of an Appellate Judge* "for myself, I would be sceptical of the true relevance of the work of the Courts if our judgments were not subject to rigorous scrutiny and debate."

Where the issues are immense, it is of course intensely difficult to make the scrutiny rigorous. What engages this country at present by way of legally enacted policies of privatisation, corporatisation, commercialisation and regionalisation is an ongoing revolution in constitutional law. It moves inexorably, not from the bottom up, but from the top down. The responsibility of the Crown is relegated to private enterprise — and all this done in little more than the seven years since law practitioners ceased to take oaths of allegiance. What possible opportunity can there be for rigorous scrutiny, either from the Courts or commentaries, when one is simply trying to shelter from, and survive the continuing avalanche of legislation that seeks to overwhelm existing values. The consequences of this avalanche are constitutionally disturbing so that at the same time as it rumbles down the hillside on humble villages below, there are various parliamentary processes already at work to sweep the resulting debris under the carpet. Among the worst of these parliamentary processes is the technique of referential legislation.

Keeping up the appearance of a straightforward statute book by way of referential legislation

Under stress one takes shortcuts. When pushed by the parliamentary

process, the legislative draftsman recognises this stress-related syndrome as being "session-happy". Unfortunately some of these shortcuts of legislative drafting become routine and institutionalised. Once incorporated into the customary basis of the common law, they become reinforced as positive values. Eventually, instead of providing a shortcut for the exigency of the moment, they forever after push the parliamentary process the long way round.

Referential legislation is like that. It begins as a shortcut. Under stress, the provisions of one Act can be incorporated in another. Sometimes the incorporation is not even substantive. The only thing required then is a simple cross-reference.

The recent controversy over appointments of school trustees illustrates the risks of referential legislation. Under s 13 of the School Trustees Act 1989 "a person who . . . is mentally disordered (within the meaning of the Mental Health Act 1969) or [who] is disqualified for election by s 112 of the Local Elections and Polls Act 1976 – may not become an elected, appointed, or co-opted trustee" for the purposes of the School Trustees Act 1989. This glosses over the duty of every returning officer of elections under the School Trustees Act 1989 to comprehend the meaning of the Mental Health Act 1969 or to come to grips with the Local Elections and Polls Act 1976.

The Local Elections and Polls Act 1976 is one of the most abstruse pieces of legislation on our statute book, full of legalese, convoluted prose and local government gobbledygook. One has only to refer to s 112 as referred to in s 13 of the School Trustees Act 1989 to find out that s 112 suffers even more serious shortcomings. The critical subss (4) and (5) were both repealed by the Local Government Amendment Act 1975, and then subs (5) hurriedly reinstated restrospectively by the Local Government Amendment Act 1986 (No 3) (later wiped out by State Sector Act 1988).

It is not surprising that as a drafting technique the process of producing referential legislation lends itself to all sorts of parliamentary misuse. Something so unique and previously unknown to constitutional law as a state-owned enterprise can be fobbed off as a commercial company by a one line legislative reference to the Companies Act 1955.

Referential legislation and constitutional law

The constitutional arguments against referential legislation are ancient. The constitutions of Pennsylvania 1874 and New York 1894 expressly prohibit it. "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." (sec 6, art III, Penn, 1874). Similar provisions can be found in the Constitution of Michigan, 1963.

These provisions reflect a long history of legislative experience to explain the hatred of referential legislation by early settlers. The particular pain was caused by extending laws from the motherland to the early settlements. Often this was done indirectly by referential legislation. The imperial misuse of legislating for a colony by reference to the laws back home, sometimes even when the laws referred to were unavailable in the colony, is referential legislation at its worst.

A colonial example of the way in which referential legislation became commonplace for New Zealand is the Supreme Court Ordinance 1841. Article 2 provided that the Supreme Court of New Zealand should have jurisdiction "in all cases as fully as Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster, have in England". In declaring the Law of England so far as applicable to the circumstances of this colony to have been in force in New Zealand from 14th January 1840, the English Laws Acts of 1858-1908 went the whole hog. So it is not surprising that referential legislation should persist to smooth over large areas of the unknown in our legal system. Thus s 22 of the Administration Act 1969 continues to provide that "where a person dies without leaving a will that effectively appoints an executor, his estate shall, until administration is granted in respect thereof, vest in the Crown in the same manner and to the same extent as formerly in England . . .".

The question is whether referential legislation should be outlawed, being always bad in principle, or whether it can be justified within proper limits. In 1940 Horace Read wrote a paper (18 *Can Bar Rev* 415) asking "Is Referential Legislation Worthwhile?" After quoting Halsbury (sec 787, vol xxxi, *Laws of England* (2 ed, 1938) to the effect that "referential legislation, while improper where those whose duty it is to approve it and those who are bound by it must look behind the four corners of a statute in order to comprehend it . . ., is proper when the object of reference is to incorporate certain general acts, or parts of general acts, made for and adopted to incorporation", concluded that "whether referential legislation is worthwhile cannot be determined in the abstract. After all, in each particular case it is a question of good jdgment and skill on the part of the draftsman". Read accordingly concluded that referential legislation was not outlawed on principle but admissible to a proper degree. Basically this is *Halsbury's* view, and Read concurs with it, but what is significant for the paper is to see that every example of referential legislation quoted herein, from within the range of state-owned enterprises to school trustees legislation fails both *Halsbury's* and Read's criteria for the permissible exercise of referential legislation. The current issues raised by the creation of state-owned enterprises and the election of school trustees are precariously poised on the impropriety of their referentially empowering legislation.

Favouring referential legislation

Nevertheless what arguments can be advanced in favour of pushing back the limits of impropriety affecting referential legislation? Perhaps *Halsbury* drew the limits too far in favour of the four corners doctrine of statutory interpretation. Perhaps, as with any American, Read was too far influenced (subconsciously, rather than consciously, for he doesn't mention this point at all) by the inapt and often inapplicable extension of laws from the homeland to the American colonies by referential legislation.

At the outset, referential legislation saves drafting time. That means a more economic

deployment of manpower. It also saves space on the statute book. That means concise legislation. What began as a short cut can soon be seen to have positive value in providing uniform law.

The trouble is that none of these attributes are absolute. The time allowable for drafting legislation and the available space on the statute book are especially relative. The success of unified legislation depends less on using the same words in the statute book than it does in establishing and maintaining integrity among the judicial, executive, and legislative powers. The question then becomes one of how to make these relative values absolute.

Today's answer is increasingly one of economic jurisprudence. Saving manpower means saving money. Less drafting, with fewer words for more substance, means getting the greatest return for the least outlay. Putting pressure on the draftsman makes him take more shortcuts. encouraging him to aim at unified legislation allows him to accept referential legislation. Ultimately the reference is as wide as the imperial fiat to the American colonies — just do as we say for ours is the full return from the initial investment.

Unified law frequently becomes a political fetish. This happens not just in empires, and among federal states, but in unitary legal systems. The expression "unitary legal system" is a give-away for the same integrative and disintegrative forces working within one and the same state. At one time the policy is to reduce all legislative concern to social welfare. At another time the preferred reductionism is to human rights. Later still the unified aim is commercialism. What will be the next grundnorm of the legal system remains to be seen. Some see the same forces operating in australasia and polynesia as in europe, the soviet union, and the united states towards One World State. (The transference of the customary capitals and lower case is meant to provide whatever provocation it takes for readers to discover their own stance.)

Common form or common style

The real risk of referential legislation is that instead of setting out the same substantive law in different enactments the original shorthand would be continued so as to develop into highly complex pieces of referential legislation. Sometimes the same statutory formulae would become so hidebound and unthinkingly applied as to resemble the old medieval writs. A new formulary period takes over twentieth century statute law — despite Symonds' nineteenth century admonition in his *Mechanics of Law-Making* (1835, pp 64-65) against drafting legislation from precedents. Symonds wrote:

> A good draftsman should have no recourse to forms but to preserve an uniform style . . . . His practised skill will give him all the use of precedents, without that tameness and servility of expression, which must result from the habitual practice of the copying system. There will be as much difference between an act of parliament so drawn, as between the tawdry copy of a copy, and a spirited picture drawn from nature.

What counts in the end is not common form but common style. It is this common style which of itself gives rise to the right common form.

On the face of it, the cross-reference from s 13 of the School Trustees Act 1989 to s 112 of the Local Elections and Polls Act 1976 is clear and precise. It is just as clear and precise as the cross-reference in the same section of the School Trustees Act 1989 to the Mental Health Act 1969.

On the face of it, too, referential legislation does provide a means of keeping up appearances. This can be made a reality, if the continuity of the statute book is safeguarded both by profession and practice. Herein lies one of the responsiblities of that little known parliamentary officer the Compiler of Statutes. The consequence of all this would be to make the statute book a fact instead of a legal fiction. Without the literary continuity, however, referential legislation operates adversely to the enterprise of legislation. The straightforward statute book which it presents is but a deceptive appearance. And in the end the formal slovenliness and substantive fetishism that go hand in hand with referential legislation give rise to worse misdeed.

Consider how something so unique and previously unknown to our constitutional law as a state-owned enterprise can be fobbed off as a company under the Companies Act 1955. No wonder the judiciary, as in *Wellington Regional Council v Post Bank Ltd* (CP 720/87) finds the concept of a transfer of allegiance from constitutional to commercial law difficult to admit of judicial review — the more so that changes to the Companies legislation by way of the Companies Amendment Act (No 2) 1983 amend the whole concept of company law. Here we have an instance of linguistic versus conceptual clarity won by words at the expense of concepts. Under the new legislation a company had "the rights, powers, and privileges of a natural person" and may not extend but can only prohibit or restrict the exercise of any of those rights, powers and privileges by way of its memorandum or articles of association (s 15A, Companies Act 1955).

How far do these provisions operate for a state-owned enterprise? The answer depends on the slightest of statutory references. The title to the State-Owned Enterprises Act 1986 authorises the formation of companies to carry on certain government activities, and s 2 of the Act defines "company" to mean a company formed and registered under the Companies Act 1955.

Could common lawyers accept that state-owned enterprises marry, procreate, and obtain custody orders for children? It may be argued that these rights, powers, and privileges are not subject to the Companies Act 1955. How far, then, can a state-owned enterprise go in the reverse direction by closing down its own enterprise, as it may be argued on economic grounds? This may open a new arena of argument to up and coming economic jurisprudence. The answer seems to depend on the composite picture presented by both the state-owned enterprises and the companies legislation.

This highlights the truth that

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Books

May Day for Justice

By Tun Salleh Abas with K Das
Magnus Books, Kuala Lumpur, 1989. ISBN 9-839631-00-4

Conduct Unbecoming

By Raja Aziz Addruse
Walrus Books, Kuala Lumpur, 1990. ISBN 983-9690-00-0

Reviewed by P F Whiteside, legal practitioner of Christchurch

The interest of New Zealand lawyers in the Malaysian judicial crisis of 1988 has been increased by the publication of *Judicial Misconduct* by Peter Williams QC. In a curious and much criticised work Williams mounted spirited support for the Malaysian government and attacked Malaysia's leading Judge Tun Salleh Abas, the Lord President and head of Malaysia's highest Court, the Supreme Court.

May Day for Justice is Tun Salleh's version of the events in question in which he has been assisted by Mr Das, a journalist and former Malaysia Bureau Chief of the *Far Eastern Economic Review*. It is the first in time of the three publications. *Conduct Unbecoming* is the third and last and constitutes a most compelling response by Tun Salleh's senior counsel to *Judicial Misconduct*.

The writer should immediately declare a personal bias as one New Zealand practitioner who attended the LAWASIA Conference in Kuala Lumpur in June 1987 and well remembers Tun Salleh giving the keynote address at the opening session. This diminutive Judge demonstrated in his speech which can be found at [1987] NZLJ 250 a concern then about tensions between the executive and judiciary which in less than a year had erupted into a constitutional crisis. It was a stimulating address well received by a very diverse audience. It was clear from the remarks of Malaysian legal practitioners of all races that the Tun had the complete support and admiration of the Malaysian bar.

May Day for Justice

It is not surprising that this work can be criticised as lacking in objectivity. The former Lord President recognises this when he says at p 188 "the line I am pursuing here may sound unnecessary, even petty, if not altogether personal". It is also repetitive and contains many mistakes in grammar and spelling. The book is also laced with sarcasm. The volume has acquired its title from the allegation that on 1 May 1988 the Prime Minister, Dr Mahathir, was requested at an audience with the King of Malaysia by the King to take action against Tun Salleh Abas in relation to a letter the Judge had written to the King on 26 March 1988 on behalf of all the Malaysian Judges expressing concern at attacks on the judiciary by the Prime Minister. In fact 1 May 1988 was a Sunday in the middle of the Muslim Holy Month during the annual Labour Day holiday weekend, a most unlikely time for the King and the Prime Minister to be meeting. Normally the Prime Minister saw the King on Wednesdays which was Cabinet Day. The Attorney-General in his address to the Tribunal set up to advise the King as to whether the Judge should be removed under the Malaysian constitution referred to the fact the relevant audience took place on Wednesday, 1 May 1988. This mistake was not apparently picked up by the Tribunal during the course of the hearing or referred to in the Tribunal's decision. This issue not in itself of earth-shattering importance is seized on ad nauseam by the authors throughout the book.

Likewise the authors overplay the fact the Chief Justice of Malaya, Tan Sri Hamid Oman, who had been a long-standing judicial rival of Tun Salleh Abas, chaired the Tribunal which recommended the Lord President's removal and who then became Lord President, in a letter to the International Commission of Jurists defending the Tribunal's decision mistakenly forgot he was one of four Malaysian Judges or retired judges who sat on the Tribunal (and not three as mentioned in the letter).

These criticisms are minor however as against the importance of the fact the former Lord President has placed on record his version of the events which has damaged the standing of the Malaysian judiciary both within

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referential legislation contains a hidden and deceptively difficult compromise between what is needed for, and aimed at by way of, being the vastly different techniques of both drafting and interpreting Continental and common law. Furthermore the ability to conceal and hide the substantive truth through the deceptive simplicity of referential legislation opens the process to misuse. The deceptive simplicity of Continental legislation will always explode in the face of the common law statute user. So much for our new look legislation. □

that country and internationally. The Tun did not participate at the substantive hearing of the Tribunal which amazingly lasted only four hours because of his objections to the personnel of the Tribunal, (the Malaysian Attorney-General publicly expressed the view any Judge could be appointed to the Tribunal), a refusal by the Tribunal to grant a sufficient adjournment to allow Mr Anthony Lester QC to appear and a perceived bias on the part of the Tribunal. This important work therefore constitutes the Tun's defence to the charges and demonstrates that his conduct did not justify his removal. There was also a fundamental defect in procedure in that the hearing was held in private contrary to the Tun's request and the principles of the United Nations and International Commission of Jurists.

The crux of the removal of the Lord President was undoubtedly political and in particular a clear failure of the Prime Minister to recognise the concepts of independence of the judiciary and natural justice. The Prime Minister regards the Malaysian Judges as a branch of the civil service in the social service category. Hence whenever the Government or the Prime Minister's political party UMNO got into strife in the Malaysian Courts, the Prime Minister attacked the decision as a political attack on his Government and said Judges were making these decisions because they were politically opposed. The Prime Minister took the strict view that Judges were not entitled in public speeches to say anything remotely critical of the Government because that was "political". This rigorous political approach of Dr Mahathir is epitomised in a speech he gave in October 1987 when he said "a branch of service, such as the Police, Army and Civil Service or Judiciary, should not interfere in the jurisdiction of another".

The political ramifications of the removal stem from the decision of Mr Justice Harun Hashim in the Kuala Lumpur High Court on 4 February 1988 when that Judge ruled that the Prime Minister's party, UMNO, was an unlawful society. UMNO appealed against that decision and on 23 May 1988 the Tun Salleh appointed a full coram of 9 Judges to hear the appeal. Four days later the Prime Minister summonsed the Lord President and told him (according to the Judge's version of events) that he had been asked by the King to tell him he should step down firstly because of the letter he had written on behalf of the Judges following a meeting held on 25 March 1988 and also because he was biased and not qualified to sit on UMNO cases. Tun Salleh was immediately suspended from office. The then Chief Justice had travelled as far as Singapore on sabbatical leave but strangely immediately cancelled that leave and returned to Kuala Lumpur to immediately assume the role of acting Lord President and cancel the fixture for the UMNO appeal within the hour of Tun Salleh being suspended from office!

This book interestingly reveals that three days before the Tribunal was due to sit, Tun Salleh was summonsed by all the State Rulers other than the King to be told he should be reinstated forthwith as the Lord President and all he had to do to be reinstated was to apologise to the King for a breach of Royal protocol in sending a letter on behalf of the Judges in March directly to the King complaining about the Prime Minister's attacks on the judiciary rather than going to see him personally. This led to a humiliating meeting between the Lord President and the King three days later when the King told the Lord President in front of the Attorney-General and the Chief Secretary to the Government he was only an ordinary "civil servant" who had been appointed by His Majesty and could be dismissed by him at any time! Shades of the Prime Minister!

Part of the tragedy of this crisis was the removal of two other leading Supreme Court Judges who sat on an application by the Lord President for an order for prohibition against the Tribunal headed by the Chief Justice. The Chief Justice tried to prevent that application being heard as his Tribunal was about to deliver its decision by arranging for the Registrar to lock the doors of the Supreme Court and lock away the Court seal!

As this book amply demonstrates and as the authors say at p 179 "the whole affair is packed, top to bottom with strange mysteries and puzzles and wonderful riddles and enigmas and other queer muddles, ambiguities and conundrums". Who knows what part Tun Salleh's prosecution of the King when he was still a prince in 1973 had in the whole affair?

A symbolic feature of the book is the use of line drawings of all the personalities involved in the crisis. At the last minute *The Star* newspaper, now closely allied to the Government, went back on its agreement to supply photographs from its library.

There are two very compelling forewords by Mr Justice Kirby and Malaysia's first Prime Minister Tunku Abdul Rahman to this volume. As Mr Justice Kirby says, "this book is an important one – not only for Malaysians and for lawyers, but for free people everywhere".

Conduct Unbecoming

Of the three volumes, this is the most succinct and compelling. Point by point, Raja Aziz Addruse destroys the arguments raised by Williams in *Judicial Misconduct* to support the dismissal of the three Judges. At p 37 the author comments, "Reading through *Judicial Misconduct* one tends to forget that it is written by a lawyer. Assertions are constantly made without their value having been examined."

Raja Aziz Addruse also rightly tackles Williams at pp 48 and 49 over his criticism of the application for prohibition by Tun Salleh Abas as reverting to "a fair amount of fancy footwork". The author amply demonstrates the lack of fairness in the Tun Salleh Abas tribunal in refusing to allow time for Lester to be briefed and holding the hearing in camera.

Tun Salleh's counsel also criticises the first Tribunal's comment in its decision that its recommendation might have been different if the Judge had appeared. As Geoffrey Robertson QC observed in the London *Observer* in August 1988:

> In a matter of such gravity, to acknowledge that the man found guilty of misbehaviour may well be innocent is an approach which exhibits a deplorable disregard for proper legal standards of proof.

To anyone who wants a short potted version of these important events in Malaysia in 1988, I commend *Conduct Unbecoming*. □

Hong Kong Litigation Conference — A great success

The first Hong Kong Litigation Conference held at the City Garden Hotel, Causeway Bay, from 31 March 1990 to 4 April 1990 proved immensely popular with the delegates who attended and their partners.

A full Conference programme was arranged under the co-chairmanship of Mr Bernard Gross, QC of Sydney and Mr Dominic Williams, a Councillor of the Law Society of New South Wales. The first session was opened with a welcoming address by Mr Donald Yapp, President of the Hong Kong Law Society. Mr Yapp pointed out that the Hong Kong Law Society was currently debating the question of whether or not to make legal education in Hong Kong mandatory as it now is in New South Wales. It is now recognised in that state and in other states of Australia that it is the duty of legal professional bodies such as the Law Society to ensure the competence of their members by encouraging M.C.L.E. which now has been implemented in England, Wales, New South Wales and 33 states of the United States, among other countries. Papers were delivered at the Conference by Mr Bernard Gross, QC, Mr Antony Whitlam, QC and Mr Anthony Puckeridge, QC all of Sydney, on topics relevant to litigation law. A panel discussion on the modern approach to litigation preparation and management was led by Mr Dominic Williams and included well-known lawyers Carol Foreman, Solicitor of Messrs Clayton Utz in Sydney, Mr Brian Clancy, Solicitor of Messrs Phillip K H Wong & Co in Hong Kong and Mr Peter Graham, Barrister of Hong Kong. The husband and wife team Niall Carney, Barrister of Sydney, and Helen Carney, Psychologist, delivered a most useful paper entitled "Professional Stress in Lawyers — Avoidance and Management". A feature of the Conference was the friendly and informal atmosphere which was encouraged by the organisers. The special guest speaker at the Conference Banquet was Mr Geoffrey Bentley, Consul-General for Australia to Hong Kong. Following the precept recommended in the last paper some of the delegates managed to find time on their days off from the Conference to attend the Hong Kong Rugby Sevens which coincidentally was held during the Conference. For those delegates who preferred the "Sport of Kings", a visit to the Happy Valley Race Course Members' Enclosure on Saturday rounded off a busy Conference schedule on a relaxed note. The organisers were indebted to Mr Peter McCarthy for his contacts through the racing fraternity for a most enjoyable afternoon. Those who preferred to visit China or Macao were given the opportunity to see at first hand their way of life and culture with a short trip to those countries.

The invited speaker for the Conference Dinner next year will be Professor Paul Scully-Power of Mystic from the United States of America who will be delivering a paper on space Law. Mr Scully-Power is no stranger to Space having spent 8 days aloft as a crew member in the Challenger Mission in October, 1984 in which he is credited for making major scientific discoveries in the structure and dynamics of the world's oceans. □

Second Hong Kong Litigation Conference, March 1991

The second Hong Kong Litigation Conference is to be held at the Marriot Hotel, Central Hong Kong, commencing on Sunday, 17 March 1991 and ending on Friday 22 March 1991. This conference will deal with recent developments in various areas of litigation. The topics chosen will be of value to barristers and solicitors involved in this area of the law.

The organisation of the Conference is being arranged by Creative Conference Management, Sydney — telephone 692-9022 and fax — 6603446.

The Conference committee is under the co-chairmanship of Mr Bernard Gross, QC and Mr Dominic Williams, Solicitor. The papers to be presented will cover a range of topics relevant to litigation in the personal injury, commercial law and family law areas, including:

- Developments in Australian negligence law 1980 — 1990.
- Occupiers' liability.
- Medical negligence litigation.
- Commercial arbitration.
- Conflicts of laws relating to contracts.
- De Facto relationships.
- Property settlement disputes.
- The Commercialisation of Space and its Implications for International Space Law.

Speakers will include Bernard Gross, QC; Antony Puckeridge, QC; Anthony Whitlam, QC; Professor Paul Scully-Power; Peter Semmler (Barrister); Stephen Robb (Barrister); Hayden Kelly (Barrister) and Carol Foreman (Solicitor). It is anticipated that a number of papers will also be given by a number of practitioners in Hong Kong. □