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Lord Goff opens 1993 Law Conference

On Tuesday 5 March 1993 the Triennial Law Conference of the New Zealand Law Society was officially opened by the Rt Hon Lord Goff of Chieveley, a member of the Judicial Committee of Her Majesty's Privy Council, and accordingly a member of the Highest Court of the New Zealand judicial system. Those who attended the Conference will agree that the organisers are to be congratulated and thanked most warmly for a very successful event. The work entailed on such occasions is great and too often taken for granted simply because things happen when they should.

The opening ceremony was a colourful and spectacular entertainment following a rather too lengthy Maori welcome. As one who favours the introduction of a Maori element into our developing distinctive New Zealand culture I nevertheless tended to agree with those who felt that the Law Conference (as with many other New Zealand activities these days) went too far in this respect. There was considerable force in the criticism, voiced informally by some, that it was lacking in courtesy to our overseas guests and to the non-Maori speaking New Zealanders present, that the Maori speeches were not translated. If for political or ideological reasons the Maori speakers refuse to translate their own words, as certainly used to be the gracious custom, then the organisers have a duty to provide a professional interpreter — as happened for instance, later in the Conference with the Russian speaker. The predominant culture of New Zealand people is not Maori, and we should not adopt sensitivity to the minority Maori culture by denigrating and being insensitive to the majority culture. A proper balance has to be found. Without belittling in any way the work, and the intentions, and the sincerity of the organisers, many thought the opening ceremony of the Wellington Conference lacked balance.

Indeed the whole format of the Law Conferences now needs reconsideration. The Wellington opening had at least some degree of formality, and the serious Maori component contributed to this; but the concluding afternoon and evening was at best banal and inadequate, and at worst sadly coarse. Indeed most people who were there on the Friday afternoon and evening were embarrassed, bewildered, shocked and disappointed. The debate was generally considered to be a debacle; but it is perhaps best dismissed as unfortunate, and then, if possible, forgotten. To follow this with a "Concluding Ceremony" that was just a late afternoon cabaret performance however, (and whatever one might think of its quality), was to trivialise the whole Conference which otherwise had so much of value and interest.

The legal profession is a learned profession — it has high standards. The law is a serious fundamental element of our society. It is not a form of entertainment. Fun and games properly make up a vital part of a Conference programme, but they are separate from the principal point and purpose of a Conference — and they should be kept separate. Because television news is entertainment-oriented there is no reason for a legal conference to have the same aim. Surely we can do better than the TV news series of 10-second sound bites (with pictures); and 10 minutes for six people to speak to their papers is, after all, our equivalent.

We need more formality in our proceedings. We need a greater intellectual depth in our presentations. We need a better culture balance in our approach.

The opening I personally enjoyed very much, as did all of those present. But again there is the problem of balance. There were some speeches but they seemed to be sandwiched in between the song and dance amusements. This is not the point of a waiata. Indeed the style of some of the songs could be considered to be sending up the very Maori format that they pretended to be following. But we must not be too serious I suppose, and certainly the opening programme had wit and flair.

There were five opening speeches in all. The first was from the Mayor of Wellington, Fran Wilde, who welcomed visitors to the city and assured everyone of the willingness of the city to offer them hospitality. She referred to Wellington as the entertainment heart and the cultural centre of New Zealand. In doing so, of course, she drew the inevitable comparison with that town to the north of the Bombay Hills. The speeches which followed, by the Chief Justice Sir Thomas Eichelbaum, the Attorney-General Hon Paul East, and the President of the New Zealand Law Society Miss Judith Potter, are published in this issue of *The New Zealand Law Journal.*

Lord Goff at the beginning of the ceremony had accepted the wero (the challenge) on behalf of the overseas vistors. Wearing a Maori cloak over his shoulders he cut a ceremonial ribbon stretching from one side of the stage

to the other, with an enormous outsize pair of scissors. In declaring the Conference open His Lordship spoke briefly. He referred appropriately to his pleasure at being in New Zealand and said that he and his wife had already become conscious of the beauty of the country and the friendliness of its people.

As a visitor Lord Goff emphasised that he had come to learn rather than to teach. He referred to the high reputation of the New Zealand judiciary. He mentioned particularly the Court of Appeal, and its President Sir Robin Cooke. He described the New Zealand judiciary as being willing to engage in what he called a controlled creativity of legal principle. With reference to the general theme of the Conference, "Law and Politics", and more particularly the opening plenary session which he noted would be on revolution by lawful means, Lord Goff said he considered this approach showed an extremely hopeful prospect for the future. He considered that this issue could be discussed only because of the continuing spread of freedom across East and West.

In specific terms Lord Goff indicated that he saw constitutional issues in many countries now being able to be settled on a basis other than that simply of power. He said he saw continuing signs of possibilities

> in which the stronger sections of society, whether majorities or minorities, are prepared to recognise and provide for the legitimate interests of the less powerful.

Referring to the Privy Council, Lord Goff declared that its place as the highest Court for New Zealand was at the discretion of New Zealand. It was for New Zealand to determine whether to retain the existing structure and for how long. His Lordship said that he hoped, and expected, that his brief visit to New Zealand would be of some assistance to him in hearing appeals in that he would hope to have a more acute appreciation of New Zealand legal culture, and of the needs and aspirations of New Zealand society.

P J Downey

Later in the year it is hoped to publish a selection of comments and discussions from the Conference. It may be some time however before the tapes are available. The reports will be spread over several issues as a reminder for those who were present; and for the information of those who were unable to be at the Conference, but who of course paid their conference levy during the preceding three years. Two papers that were not distributed prior to the Conference, by Rt Hon Sir Thomas Eichelbaum CJ, and Rt Hon Sir Geoffrey Palmer are published in this issue of The New Zealand Law Journal. *The 1996 Conference is to be held in Dunedin.*

PJD

Recent Admissions

Barristers and Solicitors

Alexander B J	Christchurch	15 December 1992	Rattray C L	Gisborne	8 October 1992
Barrett S J	Christchurch	15 December 1992	Reilly M A	Auckland	2 October 1992
Brownlee J J H	Christchurch	15 December 1992	Riddell R H	Auckland	2 October 1992
Cantillon C M P	Christchurch	15 December 1992	Robinson A E	Christchurch	15 December 1992
Cottrell S R	Christchurch	15 December 1992	Rodger J G	Auckland	2 October 1992
Cribb W B	Christchurch	15 December 1992	Roy W M	Auckland	18 December 1992
Drower N B	Auckland	11 December 1992	Schulte A J	Christchurch	15 December 1992
Edelman J M	Auckland	2 February 1993	Siaw D T C	Auckland	2 October 1992
Edelman N	Auckland	2 February 1993	Soh B C	Auckland	2 October 1992
Godfrey M L	Christchurch	15 December 1992	Spillane M C F	Christchurch	15 December 1992
Fletcher C G	Christchurch	15 December 1992	Steven P A	Christchurch	15 December 1992
Hay M E	Christchurch	15 December 1992	Strimling M S	Auckland	2 February 1993
Hema H K M	Gisborne	19 February 1993	Sutton J A	Auckland	2 October 1992
Hooft G G	Christchurch	15 December 1992	Tan C P K H	Auckland	11 December 1992
Inwood R A	Christchurch	15 December 1992	Thorp P W	Auckland	1 October 1992
Jackson R H	Napier	9 December 1992	Tingey M J	Auckland	5 October 1992
Kay C T	Christchurch	15 December 1992	Tomoana T D	Auckland	2 October 1992
Khiong A S P	Christchurch	15 December 1992	Trombitas E	Auckland	2 October 1992
Kim A O T	Christchurch	15 December 1992	Waldron R J	Christchurch	15 December 1992
La Hood M M	Christchurch	15 December 1992	Walton H J	Christchurch	15 December 1992
McLauchlan R W	Christchurch	15 December 1992	Walker C T	Auckland	2 October 1992
Mason G F W	Christchurch	15 December 1992	Way A J	Auckland	2 October 1992
Mechen S M	Christchurch	15 December 1992	Webster A A	Auckland	2 October 1992
Pilcher J D K	Christchurch	15 December 1992	Whineray M L	Auckland	2 October 1992
Prosser S M C	Christchurch	15 December 1992	Williams G C	Christchurch	15 December 1992
Raea P M	Auckland	2 October 1992	Wilson A R	Christchurch	15 December 1992
Van Wickevoort Crommelin K R C	Auckland	2 October 1992			

New Zealand Law Society Conference 3-5 March, 1993

Remarks at the opening ceremony by the Chief Justice of New Zealand, the Rt Hon Sir Thomas Eichelbaum

Madam President of the New Zealand Law Society, distinguished guests, ladies and gentlemen:

E rau rangatira, kaumatua, people of the great canoes, I am honoured to be part of the powhiri, and acknowledge and thank you for the warmth of your welcome. And what a brilliant welcome it has been. We congratulate all who have taken part, and I should like especially to mention the young people of Ngati Poneke. As it happens the hei tiki I wear has a special link with your marae.

Your presence here is a reminder that the Conference should show our belief in the concepts of tika – justice, pono – integrity, and aroha – love for mankind. Tena koutou, tena koutou, tena koutou katoa.

In earlier days, New Zealand Law Society Conferences tended to focus heavily on the judiciary. Some of you will even recall parades of Judges wearing ceremonial robes. The Conference is primarily a lawyers' meeting and it is entirely appropriate that the spotlight should be on their perspective, whether as practitioners, government or corporate lawyers or academics.

The New Zealand judiciary is pleased that the profession continues to regard Judges as having a contribution to make to their discussions. For ourselves, we value the opportunity to take part. It is valuable that we are kept abreast of developments in the profession, the current trends in practice, the problems and their solutions. Through our joint presence at the papers, the formal functions and the social interchanges, the Conference will afford every scope for that.We are of course delighted to be able to meet and mix with the distinguished overseas Judges attending the Conference.

The Conference theme of law and politics recognises the importance of the rule of law in our society, and, on a less lofty plane, the constant interplay between law and government. Judges and lawyers share a vital role as guardians of the rights and freedoms of the ordinary citizen. Most present take that for granted, indeed tend to regard it as a hackneyed expression; yet it is a perception, I think, that passes by many people in the community today.

I look forward to meeting old friends and new faces, and wish you all a most successful week. Kia ora. □

Address at the opening ceremony by the Attorney-General Hon Paul East

Distinguished guests, ladies and gentlemen:

May I thank the organisers of the conference for this opportunity to speak at the opening ceremony and may I join with other speakers in extending a welcome to those of you who are visitors to New Zealand.

The 1993 Law Conference will be an exciting occasion for all of us and I take the opportunity of congratulating Tim Castle and all those who have worked so hard to prepare for this event.

The theme of the conference, "The Law and Politics", recognises the fact that the conference is being held in our capital city. As the centre for the legislative, executive and judicial functions of government it is fitting that the Law Conference in Wellington should provide an opportunity to look at the law and its relationship with the political world.

At a previous law conference some years ago the words of the great Lord Radcliffe were quoted.

> We take so much for granted in modern society and by so doing, we impose such heavy strains on our good sense. We steam ahead, carefree navigators, as if the conduct of democratic society was an easy art.

This conference answers Lord Radcliffe's challenge. By choosing the theme "The Law and Politics", the legal profession is not taking our democratic society for granted but would rather study and examine the relationship, the connection and, indeed, the tension between the law and government.

In inheriting the Westminster system of government, and the common law, we have a unique constitution. Unlike many countries we do not have a written constitution to guarantee the rights of our citizens.

In many ways an unwritten constitution is very fragile and vulnerable to any excesses that may tip the balance of power. But the fragility of our system is also the source of its strength. I am sure that

if the Westminster system, with its attendant constitutional institutions, were to be devised today from scratch it would probably be rejected as totally unworkable. And yet the system has been able to adapt to the changing needs in society and it can do this as a measured and careful response long before the system comes under such strain that the whole edifice collapses.

It is the law that is at the heart of the relationship between the individual and the State. It is the instrument by which the State provides the protections of government; at the same time the law acts to protect the individual against any undue encroachment by the State. Because the law provides the link between the individual and the State it is vital that the profession be diligent and be constantly aware of any significant developments that may erode the protections offered.

As a politician I am all too aware that governments can easily view the law as an inconvenience, an irritant or an obstacle rather than security and protection for the country and its citizens.

The fabric of New Zealand has changed a great deal since the first European settlements of the late 18th and early 19th century. We have now emerged as a Pacific nation with our own unique identity and values. In the last two decades we have firmly established our own place in the world through art, music, literature, science and many other achievements.

The practice of the law has, as part of all these changes, developed to a point where New Zealand now takes its place in the world as having its own jurisprudence. Our legal writers and jurists are now recognised throughout the Commonwealth as leaders in their field, addressing New Zealand problems by drawing not only on the common law and the laws of other jurisdictions, but also on the laws of New Zealand as they have developed over the last 150 years.

Just a month ago, at our nation's birthday celebrations, a respected Maori elder challenged New Zealanders to crystallise this sense of identity by renaming our country Aotearoa. Although this stirred considerable debate, it is an act of symbolism that is unlikely to have considerable public support and, indeed, unlikely to be implemented.

But as we head towards the 21st century it is time to reflect on some of the matters we have taken for granted for so long.

Many New Zealanders have difficulty in relating to a system of Imperial Honours based on a British Empire which has now faded into history. Lawyers may consider it is time to ask whether, by some mysterious process of selection, certain barristers should be plucked from their ranks and bestowed with the appellation to Queen's Counsel. If we don't turn our mind to the issue of wigs and gowns in Courts we may well be in the ironic situation of watching them being done away with in the place from whence they came.

The Privy Council will no doubt again be the subject of scrutiny at this conference. As we continue to stamp out our own identity as a country, can another Court in another country, in another hemisphere, have a true understanding of New Zealand society? As well, there is a growing feeling that New Zealand is no longer a colony and should not, like some poor relation, look at the judicial system of another country to provide ultimate guidance.

Some of our legal framework has limped behind the rest of New Zealand and has failed to recognise and take account of the sense of nationhood that has emerged.

A Law Conference such as this provides a great opportunity for lawyers to meet and consider the way in which the law is developing and to reflect on the significance of recent legal developments and the implications they have for the future.

It also gives you an opportunity to gain support from one another. The profession has been the subject of a good deal of misguided and unfair criticism. The overwhelming majority of lawyers are able, diligent and honest practitioners. Many of them are the quiet leaders within their community, making a very real contribution to New Zealand. I take this opportunity to express my appreciation to the many, many lawyers in New Zealand who go far beyond their professional obligations in their service to our country.

I hope that the next three days will be both interesting and enjoyable and that all participants in this Conference will gain a greater insight into the issues that face our country in 1990s. □

Address for the opening ceremony by Judith Potter, President of the New Zealand Law Society

You have been welcomed to this Conference and to Wellington in many ways. By the powhiri; by the Mayor; by the Chief Justice; by the Attorney-General. It remains for me to say welcome to our overseas guests from the legal profession of New Zealand – and to all participants on behalf of the New Zealand Law Society: Haere Mai, Haere Mai, Haere Mai, Welcome.

Sir Guy Powles, the first Ombudsman in New Zealand, in an editorial in *The Listener* in 1978 wrote:

> Our grandchildren's great worries may not be economic, but constitutional and political.

But for the constant vigilance of our generation of lawyers, the prophecy of Sir Guy Powles could well become a reality. So it is timely that here in Wellington, the capital of New Zealand, the theme for our Conference is "Politics and the Law".

The law and politics run as two critical threads in the conduct of our democracy, touching, contesting, but each necessarily maintaining its particular place according to the doctrine of the separation of powers. Both threads move and evolve with our changing society, sometimes following change, often leading it. In today's world of rapid change, clarification and understanding of the juxtaposition of law and politics are

perhaps more important than ever before. The role of lawyers in the constantly changing fabric of society demands analysis and careful thought. For this purpose it is necessary for us to take time out from the day to day demands of legal practice. It is valuable to hear and experience the views of a wide range of people from within New Zealand and from other countries. It is timely for us to broaden our horizons, to contemplate the future, and the role of lawyers in it.

The New Zealand Law Conference is a triennial event hosted by the new Zealand Law Society, and this year we are very grateful to the Wellington District Law Society and the practitioners of Wellington for organising what I am sure will be a stimulating and exciting Conference. Here in New Zealand we have a fused profession, and all lawyers, whether they practise at the Bar or as solicitors, are members of the New Zealand Law Society. We are one profession, and as one profession we strive to serve the needs of the public of this country. This necessarily involves change and adaptation as the needs and demands of society change, but in our fused profession we have a structure that is well shaped and developed to anticipate and cope with that change, a structure which offers the flexibility now demanded of the legal profession in other jurisdictions where the barrister and solicitor arms of the profession are divided. The profession in New Zealand is also justifiably a very proud and resilient profession and we are proud hosts of this Conference.

1993 is an important year for a number of reasons. In the first place, it is Conference year. Secondly, it follows 1992 which was a self-confessed "horrible year" for the Queen, and for the lawyers of New Zealand, perhaps most appropriately described in the superlative – a *most* horrible year. So 1993 must be better. Thirdly it marks the centenary of Women's Suffrage in New Zealand.

The first woman lawyer in New Zealand was Ethel Benjamin who commenced her degree in law at Otago University in Dunedin at about the same time as women gained the right to vote. However, when she took up her studies there was no guarantee that she would be able to practise, for under the Law Practitioners Act 1892, only men were permitted to practise law. So they had to pass the Female Law Practitioners Act of 1896 for Ethel Benjamin to be able to practise, and it can have been no easy matter for that little lady to persuade the powers that be that such a radical step should be taken.

It is informative to read from the preamble to the Act, which recites as follows:

> Whereas women are now prevented by statute from exercising their talents in the study and the practice of the law, and it is desirable that such disability shall no longer continue . . .

And so the stage was set. But it is perhaps interesting to note that whereas under the previous Act, men who wished to practise law had to pay their fees and pass the appropriate exams and prove themselves to be persons of good character, there was no similar requirement under the Female Law Practitioners Act of 1896 that women should be of good character. I can only assume that was because it went without saying that women were of good character, or perhaps they thought it was impossible.

Charlotte Whitton, a former Mayor of Ottawa, had this opinion of women:

> Whatever women do, they must do twice as well as men to be thought half as good. Luckily, that is not difficult.

I permitted myself that quote not to be contentious but because I think it delightful.

Now in 1993, lawyers of New Zealand, barristers and solicitors, male and female, join in this Conference with our visitors from overseas, in what really is a celebration of 100 and more years of progress. Let us broaden our horizons, and let us celebrate together during this Conference week. □

Recent Admissions

Barristers and Solicitors

Alcock N S	Auckland	12 February 1993
Amery M T	Auckland	12 February 1993
Barker J P H	Auckland	12 February 1993
Barrett I G	Auckland	12 February 1993
Beveridge M N	Auckland	12 February 1993
Bolot T J	Auckland	12 February 1993
Borich J W	Auckland	12 February 1993
Burns D A	Auckland	12 February 1993
Cave S J	Auckland	12 February 1993
Chan P M J	Auckland	12 February 1993
Chauca Berlanga J A	Auckland	12 February 1993
Clark R J	Auckland	12 February 1993
Cosgrove P H	Auckland	12 February 1993
Crang N C	Auckland	12 February 1993
Culley A M	Auckland	12 February 1993
Daniels L K	Auckland	12 February 1993
Duigan C S	Auckland	12 February 1993
D'Urban-Burgess M M F	Auckland	12 February 1993
Fagg J D	Auckland	12 February 1993
Fenton A M	Auckland	12 February 1993
Fong T F M	Auckland	12 February 1993
Fox D A	Auckland	12 February 1993
Garnett M L	Auckland	12 February 1993
Goodger M J G	Auckland	12 February 1993
Hema H K M	Gisborne	19 February 1993
Horner S M	Auckland	12 February 1993
Jarvis L A	Auckland	12 February 1993
Jew B G	Auckland	12 February 1993
Keall M G	Auckland	12 February 1993
Kennedy Z G	Auckland	12 February 1993
Kersey M	Auckland	12 February 1993
King J M	Auckland	12 February 1993
Kirkpatrick T J	Auckland	12 February 1993
Lamb R J F	Auckland	12 February 1993
Lawrie J R	Auckland	12 February 1993
Leese M C	Auckland	12 February 1993
Lockie J R	Auckland	12 February 1993
Long J	Auckland	12 February 1993
Lubbe A M	Auckland	12 February 1993

Case and Comment

Basic requirements of s 23(1)(b) of the Bill of Rights Act

R v Mallinson [1992] BCL 2097 further defines what is required of police officers in terms of s 23(1)(b) of the Bill of Rights Act 1990. In this case the respondent had been arrested by the police. Before being interviewed the respondent was cautioned that what he said could be used in evidence against him, was advised of his right to consult and instruct a solicitor (though the words "without delay" were not used), and was informed that he was not obliged to make a statement. Upon being asked whether he understood these rights, the respondent had answered in the affirmative. He then made a statement on the basis of which he was charged with three aggravated robberies. At the trial Neazor J found there was an onus on the Crown to prove (a) that it had been conveyed to the accused that he had a right to consult and instruct a solicitor before questioning began, and (b) that the accused had understood not only the substance of his right but also that the exercise of that right would be facilitated. The trial Judge further found that what the police officer had said to the accused prior to the interview did not indicate that these requirements had been satisfied. He therefore excluded the accused's statement and directed the jury to acquit the accused. The Crown appealed against the ruling on admissibility.

In the appeal judgment, Richardson J (who spoke for the Court) stated the following general principles regarding s 23(1)(b) : Although the right to be informed of one's right to contact a lawyer must be accorded on arrest, where s 23(1)(b) uses the term "without delay", this does not mean instantly or immediately but rather "before the legitimate interests of the person who is arrested are jeopardised". This qualification accords with what Richardson J himself held in *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 280. So far as what is required to "inform" a person of their rights is concerned, it was held that no particular formula need be used, and that whether the obligation to inform has been satisfied will depend on the words that are used and what is to be implied from them in the context of the surrounding circumstances. Thus words and context together might make it clear to a suspect that he has a right to consult a lawyer before questioning begins, but the obligation to inform the suspect would not be discharged if he could reasonably have formed the impression that the right to counsel was not exercisable until after he had been questioned by the police. Except in circumstances where a suspect is under the influence of drugs or alcohol or has a mental or physical defect which might affect comprehension of his rights, an affirmative response to a question of whether the suspect understands his rights will be taken at face value and it will be presumed that the obligation to inform has been fulfilled. Only if a suspect lays the evidential basis for an allegation that he was not informed will an onus rest upon the Crown to prove that he was informed – on what standard Richardson J declined to say. (But note the finding in *R v Dobler*, High Court, Auckland, 8 July 1992, 92/1367, unreported, that the Crown will have to prove compliance with the Bill of Rights on a balance of probabilities. This case was commented on in [1992] NZLJ 304). Finally it was held no general obligation rests on the police to say whether and how that they will facilitate the exercise of the right, but that once a suspect indicates that he does wish to exercise the right to contact a lawyer, what is required of the police will depend on the surrounding circumstances.

Applying these general principles, Richardson J answered the first point taken on appeal by saying that because the respondent had been informed that he had the right to consult a lawyer and that he was not obliged to make a statement, the inference could be drawn that he had understood that his s 23(1)(b) rights were exercisable immediately and before being interviewed. So far as the second point was concerned, it was held that there was no obligation on the Crown to prove that the suspect had understood his rights, and there had been no obligation on the police to say that they would facilitate the exercise of those rights. On this basis Richardson J overturned the exclusion of the respondent's statements and ordered a new trial.

There is nothing exceptionable about the Court's finding that a suspect's affirmation that he or she understands his or her rights should be taken at face value, and that the police are not obliged to suggest ways in which the exercise of rights might be facilitated before a suspect has decided to exercise them. But can it be said that as a general principle a suspect who is told of his s 23(1)(b) rights and that he need not make a statement must therefore be assumed to have understood that contact with a lawyer could occur before questioning, even if words such as "without delay" or "now" are omitted? Is there an inexorable logical link between the information about the right and the assumption that it is exercisable immediately? Would it not be equally reasonable for a suspect to think "I know I may contact a lawyer and that I need not say anything while being questioned, but at the moment the police want to ask me questions, so I assume I have to wait until they are finished talking to me before I telephone a lawyer"? And if that is a reasonable way for a suspect to think, then surely on Richardson J's own principles the statements made by the respondent in *Mallinson* should have been excluded? Knowing *when* the right to contact a lawyer is exercisable is as important as knowing the right exists. It is therefore submitted that in the absence of words indicating that the right is exercisable before questioning, it should be held that the suspect has not been informed of his rights in their entirety (or, to use Richardson J's formulation, it should be presumed that the suspect had the impression that the right

was not exercisable until after questioning), and an onus should then rest on the Crown to show from the context of what was said that the suspect nevertheless *did* understand that the rights were exercisable before questioning. It is submitted that placing the onus on the Crown to prove comprehension, rather than on the suspect to prove a reasonable impression that he did not understand that the right was exercisable before questioning, is a far safer way to proceed in cases where no reference to time is made by the detaining authority.

Bede Harris
University of Waikato

Attempting to drive a vehicle with excess breath alcohol

Police v Darby [1992] DCR 646

There are few reported cases on the law of attempt (s 72 of the Crimes Act 1961). Most of the debate concerning this inchoate offence is centred on the vexed question of attempting the impossible, a debate which will change in focus, but perhaps will not disappear, with the enactment of clause 65 of the Crimes Bill 1989. Despite the concern of the drafters of the Crimes Bill and the Crimes Consultative Committee to simplify the law relating to attempt, little local discussion seems to have been directed to the definition of the *actus reus* of attempt, which has, in contrast, been the subject of considerable concern in England. A recent District Court case illustrates the unpredictable application of the proximity test, a test which is unaltered by clause 65.

Mr Darby was found by a police officer sitting alone in a parked car, huddled over the steering wheel. As Darby smelt strongly of alcohol, he was breath screened and later breath tested. With 1264 micrograms of alcohol per litre of breath, he was well over the legal limit and was consequently charged with attempting to drive a motor vehicle in that state, contrary to s 58(1)(b) of the Transport Act 1962.

Darby had admitted to the police office that he was trying to move the car from the side of the road but had not been able to find the keys. Despite this fact, the ignition light of the car was on and this, together with the position of Darby in the car when he was approached, led the officer to believe that he was either trying to put the keys into the ignition or "hot-wire" the car. The keys were not able to be located, however, either in the car or on the defendant.

As Darby was over the limit and intending to drive the car, the only issue was whether his acts were sufficient in law to amount to an attempt. Von Dadelszen DCJ held they were not. "At the very most, the evidence can do no more than establish that he was preparing to attempt to drive . . ." (at 649). In coming to this conclusion, the Judge followed the decision of Casey J in *Hamilton v Police* (unreported, High Court, Auckland Registry M 357/84) finding that the Court

> must be satisfied beyond reasonable doubt that the defendant intended to drive and has undertaken some action for the purpose of putting that intention into effect sufficiently connected with it so as not to be regarded as mere preparation. (at 648).

Von Dadelszen DCJ found that there was insufficient evidence to establish that Darby was trying to hot-wire the car. He therefore held that:

> [W]ithout the ignition keys or any evidence of hot-wiring the plain fact is that, in the position that the defendant was at the time, there could not have been an attempt . . . The facts that the ignition light was on and that he was sitting in the driver's seat, but without any ignition keys, even with an intention to drive, do not establish . . . that there was an attempt (at 649).

The finding that there was no attempt as a matter of law seems to have therefore turned on the fact that the keys could not be found. One would hope that if the keys were in Darby's hand, or close by, this fact, together with his position in the driver's seat with the ignition light on, would have been a sufficiently proximate act. Are his acts not sufficiently proximate merely because the keys could not be found? Surely a person, in the position of Darby, who was carrying out a thorough search of his car, trying to locate the keys in order to drive home, must be guilty of an attempt, especially when, like Darby, he admits his intention. The only acts which remain to be done, after the location of the keys, are putting the key into the ignition and starting the engine, both acts which *must* amount to the *actus reus* of an attempt to drive.

Leaving aside the question of proximity for the moment, it remains worthy of further comment that the fact that led the Judge to conclude that Darby was merely "preparing to attempt drive", was his inability to actually drive, due to the loss of his keys. As counsel for Darby argued, in words which were repeated by the Judge "no matter how hard the defendant here tried, he could not drive the vehicle" (at 647-8). As von Dadelszen DCJ cites the example given by Turner J in *R v Donnelly* [1970] NZLR 980, 990 of "insufficient means" as *not* amounting to an impossible attempt which excuses, (at 648), it appears that he recognised the difficulty with counsel's argument. It is therefore problematic that, in the final paragraph of his judgment, he revisits the argument that the inability of Darby to actually drive, impacts on the question of proximity. The words of s 72(1) clearly exclude such an argument.

It is also interesting that *Darby* was decided without reference to the more recent reported cases on attempts *R v Wilcox* [1982] 1 NZLR 191 and *Drewery v Police* (1988) 3 CRNZ 499, although they also add to the inconsistency that is troubling in this area of the law. The inconsistency is clearly recognised by Judges and commentators alike. For example, compare Williamson J's comment in *Drewery* that the decision of the Court of Appeal in *Wilcox* "is difficult to reconcile with other decisions" (at 503), with the comment in *Adams* that the decision in *Drewery* has been doubted on the ground "that it is difficult to reconcile with other well known cases on attempted fraud" (at CA 72.09.07). Despite such allegations of irreconcilability, no real steps have been taken in the reform of the criminal law to answer these concerns. Clause 65 of the Crimes Bill, unaltered in this regard by the Crimes Consultative

Committee, preserves the proximity test.

Decisions like *Darby, Wilcox* and *Drewery* are all the result of a test which is far from precise in its application, despite the view that it is "the least inexact way of marking the threshold of attempt". (Kevin Dawkins "Parties, Conspiracies and Attempts" (1990) 20 VUWLR Monograph 3 117, 139). One argument put forward in its support is the existence of a body of case law which supposedly "provide[s] a useful source of reference and guidance" (Dawkins at 139); but arguably the case law does not provide consistency. Another argument, that the test is flexible through the ability to place emphasis on what has already been done, (*Adams* at CA 72.09.08) does also not seem particularly compelling. Even if flexibility is viewed as desirable, does placing the emphasis on a "real and practical step" really have result in flexibility? Is it any more flexible than the "substantial step" test, the only real alternative to date, which has been embodied in section 5.01 of the United States Model Penal Code?

In 1973 the English Law Commission (*Inchoate Offences; Conspiracy, Attempt and Incitement* Working Paper No 50, 55-59) also favoured the "substantial step" test. Prior to the enactment of the Criminal Attempts Act 1981, however, this was rejected in favour of a semantic variation of the traditional proximity rule. Professor Glanville Williams has, nevertheless, recently argued that the issue of the *actus reus* of attempts should be revisited in England. ("Wrong Turnings in the Law of Attempt" [1991] Crim LR 416). Perhaps, given more recent New Zealand history, it is time to do the same here.

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Receiver's negligence

Anyone who has followed the development of the law in New Zealand on receiver's liability in negligence must view the decision of the Privy Council in *Downsview Nominees Ltd v First City Corporation* (Lords Templeman, Goff, Lane, Mustill and Slynn, PC 13/91; 19 November 1992 – 17 pp) with some amazement.

In the leading text on receivership in New Zealand, Blanchard (as he then was), writing in 1982, (*The Law of Company Receiverships in New Zealand and Australia* (Butterworths), para [1109] – [1110], pp 151-155), was clearly of the opinion that, based on the decision in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, a receiver could be found liable in negligence to the company and subsequent chargeholders. The learned writer, however, went on to state that s 345B of the Companies Act 1955, as inserted in 1980, codified the *Cuckmere* decision, leaving it unclear as to whether he thought (at that stage) that the receiver's duty extended beyond s 345B.

Since then, several New Zealand and English cases prior to *Downsview* showed a trend towards recognition of liability in negligence. For instance, in *National Westminster Finance New Zealand Ltd v United Finance & Securities Ltd* [1988] 1 NZLR 226 Smellie J said:

> The existence of the duty [owed by a mortgagee to the holders of subsequent encumbrances] rests upon a straightforward application of the neighbour principle, the same approach having been taken on other occasions to mortgagors and guarantors. See Lord Denning MR in *Standard Chartered Bank v Walker* . . . (at 234.)

And in *R A Price Securities Ltd v Henderson* [1989] 2 NZLR 257, Somers J in our Court of Appeal said that a receiver:

> . . . is required to carry out his duties with the interests of the company its creditors and shareholders in mind. So in the exercise of powers of sale he must act as a mortgagee with due care, skill and judgment in obtaining the best results reasonably possible in the circumstances. (at 262.)

These statements and other cases were cited by Gault J in the *Downsview* judgment in the High Court [1989] 3 NZLR 710, so that the learned Judge felt able to say:

> Thus the authorities clearly indicate that on an application of negligence principles, a receiver owes a duty to the debenture holders to take reasonable care in dealing with the assets of the company. Although most of the cases refer to a mortgagee exercising a power of sale, or a receiver realising the assets of a company, a similar duty must apply to a receiver who elects to carry on the business of the company and attempt to trade it out of receivership. It would be absurd if a receiver selling up were bound to take reasonable care, but a receiver trading on were not. (at 744-745.)

In delivering the judgment of the Court of Appeal in *Downsview* [1990] 3 NZLR 265 Richardson J, also citing with approval a passage from the judgment of Somers J in the *R A Price Securities Ltd* case, supra, said:

> It is implicit in those observations that the legal duties resting on the receiver and manager are not owed exclusively to the holder of the debenture under which the receiver was appointed. Inevitably, there are other interests involved. As agent for the company the receiver has some obligations to it. He cannot be oblivious to the interests of the other secured creditors and even unsecured creditors who are directly affected by the commercial decisions he makes in the receivership. ([1990] 3 NZLR 265, 274.)

Richardson J also considered whether there were any policy considerations which might tend to negative or restrict a duty of care in this class of case. In finding that there were not he said:

> . . . the recognition of a duty of care in this class of case serves two important social objectives : to compensate deserving plaintiffs where a receiver has traded with property in which they have a security interest; and to promote professional competence, the sanction of a negligence suit providing an incentive for professionals undertaking receiverships to conform their conduct to a standard of reasonable care. (at 276.)

The Privy Council, in its judgment in the *Downsview* case, was "considerably troubled by the

approach of the Courts below" and granted an adjournment so that both sides could re-argue the question of the duties owed by a debentureholder and its receiver and manager to subsequent encumbrancers.

Some preliminary arguments were advanced for Downsview Nominees Ltd ("Downsview") which were treated by the Privy Council in much the same way as in the New Zealand Courts.

The area in which the Privy Council and the New Zealand Courts parted company was in respect of the question of the nature and extent of the duties owed by a mortgagee and its receiver and manager to subsequent encumbrancers. The Privy Council referred with approval to the judgment of Jenkins LJ in *re B Johnson & Co (Builders) Ltd* [1955] Ch 634 in which the Lord Justice sets out the duties of a receiver and manager as being to act honestly and in good faith and to act for the special purpose of enabling the realisation of the secured assets (at p 661). In the Court of Appeal Richardson J said of this case:

> . . . negligence was not the issue in that case and Jenkins LJ was at pains to emphasise that the "primary" duty of the receiver was to the debenture holders and not to the company, not that there could be no duty to the company or to other persons. ([1990] 3 NZLR 265, 274.)

The Privy Council, on the other hand, said:

> . . . the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins LJ in *re B Johnson & Co (Builders) Ltd* . . . leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in dealing with the assets of the mortgagor company.

Their Lordships went on to say that it was not possible to measure a duty of care in relation to a primary objective (ie recovering the moneys secured by the mortgage or debenture) which is inconsistent with that duty of care and that there was a "great difference between managing a company for the benefit of a debenture holder and managing a company for the benefit of shareholders." And later they said, that if receivers were to be held liable in negligence "the result will be confusion and injustice . . . There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently and fared better."

With respect, it is submitted that the Privy Council has overstated the case and that there is, and has been for some years, a generally accepted view in New Zealand that receivers have liability in negligence to the company and subsequent encumbrancers.

The cases referred to in the High Court and the Court of Appeal have shown a clear trend towards a finding of liability for receiver's negligence. Yet the confusion and injustice that the Privy Council fear does not appear to have arisen. As shown by the lower Court judgments in this case, New Zealand Courts are well aware of the difficult position in which receivers find themselves. Gault J said:

> Of course, in any case, the receiver's duty must be set at a realistic level, bearing in mind the commercial exigencies of the situation. The interests of the appointing debenture holder may well differ from those of subsequent debenture holders, and if there is a clear conflict, the receiver is entitled to favour the interests of the debenture holder who appointed him. ([1989] 3 NZLR 710, 745.)

And Richardson J said:

> In short, while the due performance of the duties to the debenture holder of enforcing the security and for that purpose of exercising powers of sale and of management pending sale must prevail, there may be room in the particular circumstances for the existence of a concomitant duty of care to others affected applying ordinary negligence principles. ([1990] 3 NZLR 265, 274-275.)

In light of these statements it is unlikely that the Courts would impose a standard of care upon receivers which would create injustice.

Section 345B of the Companies Act lays a statutory duty of care on receivers and managers (albeit one which relates to the situation where the receiver is selling assets). Furthermore, the Law Commission, in its Report No 9 "Company Law Reform and Restatement", has proposed an amendment to the Property Law Act which would provide that, while the primary duty of the receiver is to the appointing debenture holder, the receiver would owe a duty of care to others including the grantor of the debenture, subsequent debenture holders and even unsecured creditors. (See Part 6 Receiverships para 772, pp 385-386.) This suggests that the extension of tortious liability to receivers is considered unexceptionable in New Zealand.

Failing legislation change, what will now be the course of case law in this area? With such a strong statement of disapproval coming from the Privy Council the possibility of litigation on the basis of receiver's negligence would seem to be closed off. However, it should be noted that the Privy Council based the liability of Downsview and Mr Russell on breach of the duties of a receiver to act for proper purposes and honestly and in good faith. The Privy Council said:

> There was overwhelming evidence that the receivership of Mr Russell was inspired by him for improper purposes and carried on in bad faith, ultimately verging on fraud.

After a perusal of the facts as set out in the judgment of Gault J, there can be little disagreement with this finding. But it would take a brave soul to argue in a future case that the statements of the Privy Council as to the extent of receiver's liability in negligence were dicta and that an opening still remains.

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Judicial Independence — Fact or fiction?

Address given by Rt Hon Sir Thomas Eichelbaum, Chief Justice of New Zealand.

The independence of the judiciary is a crucial element in any system of government by law rather than by men. In this paper, which is an address given by the Chief Justice at the 1993 New Zealand Law Society Conference in Wellington, His Honour refers specifically to three topics: administration and finance, the need for public confidence, and methods of judicial appointment.

Lord Hailsham in his autobiography maintained that the most important function of the Lord Chancellor in the 20th century was to preserve the integrity and impartiality of the judiciary against all comers. That, he said, was not as easy as it sounds. In theory of course everyone is in favour of judicial independence in the same way as they are in favour of virtue and against vice. But in practice, Lord Hailsham concluded, this is far from the case.[1]

A lawyer friend from an Asian nation once remarked that countries like New Zealand where judicial independence was taken for granted did not really understand its importance. To do that you have to live where judicial independence had gone or never existed.

An audience like this needs no persuasion that judicial independence is an important topic even in countries where there is no reason to believe it is under stress. Potentially it is always under threat and if it is true that we take it for granted I question whether we are right to do that. I venture to say no country can afford to do so. There have been happenings amongst near neighbours of ours which have been or may be regarded as overt challenges to judicial independence.

While we all agree on the significance of judicial independence to the well-being of a democracy, definition of the subject matter is elusive. Something New Zealanders would take for granted, in this instance I hope with justification, is that when the challenge comes, whether major or minor, the judiciary here will stand firm just as it did, or tried to do, elsewhere. That is not the concern. What merits discussion, is how we can best position our Judges to be independent, to face the challenge with strength and confidence when it arrives. As Justice Machacek said in this chamber yesterday the Judges not only must act independently, but be seen to do so. For purposes of this address I take the essentials required to support judicial independence to be as follows. Whether one adopts this or any other analysis, the individual parts necessarily overlap and to some degree merge.

First, independence in judicial decision-making, meaning freedom from Government pressure, independence from the other branches of Government, non-alignment with any group in society, immunity from civil action and harassment by the public.

Second, guaranteed tenure of office for Judges, and adequate remuneration.

Third, an appropriate degree of judicial control over the administration and finances of the judicial system.

Fourth, Government commitment to retaining traditional jurisdiction in the Courts, rather than tribunals.

Fifth, that the legal system, includes an independent legal profession of good standing in the community.

Sixth, public support and understanding.

In the time available I do no more than highlight some aspects of particular significance to New Zealand. A signal feature is that absent a true written constitution our concept of judicial independence is founded largely on convention. Like it or not — like them or not — in a democracy the Judges are a bulwark between individual rights and the power of the Executive. The Malaysian experience[2] demonstrated graphically how tenuous reliance on convention may be. Conversely the tangible value of statutory provisions such as those contained in ss 23 and 24 of our Constitution Act 1986 is clear. In confirmation of safeguards existing since the Act of Settlement in 1701 s 23 provides that a Judge of the High Court shall not be removed from office except upon an address of the House of Representatives on the grounds of misbehaviour or incapacity to discharge judicial functions. Section 24 and like provisions relating to other Courts provide that judicial remuneration is not to be reduced during the Judge's term of office. It will be noted that the section affords no protection against changes in the terms of remuneration of new appointees.

Administration and finance

I propose to address three principal topics. The first is judicial control over administration and finance. In New Zealand, and I think this is true of Australia also, funding is a lively issue. It goes to the heart of the concept because in the end there can be no complete independence without access to an independent source of funding. Lord Oliver made that point during his visit to Australasia last year, saying that in the ultimate analysis everything depends on the Treasury, that is, upon the Executive.[3] Since no Court system can be truly independent in this sense, judicial independence, at least to that extent, will always be an ideal rather than an established fact.

It can however be enhanced by creating the appearance of independence to the maximum possible. In this field Australia has made greater progress than New Zealand in that several Courts have

been given the right of administering their own budget. Judges here are yet to be convinced of the advantages. There is a dilemma that while on the one hand absence of control over the judicial budget detracts significantly from the appearance of independence, on the other such control necessarily carries with it an obligation, direct or indirect, of public accountability in financial matters. Open cross-examination before a Parliamentary Committee might do little to maintain the appearance of the judiciary's independence of the other branches of Government.

As to administration, the obligation of the Executive to provide the Courts with what they need to perform their task and to assist them to act effectively and economically is carried out, broadly speaking, at two levels. The staff at Courts where Judges reside or visit on circuit necessarily have to work closely with them. Judges are well served in this respect or if not are generally in a position to correct shortcomings.

The second aspect is one of which the Chief Justice and Heads of Court are most conscious as are those Judges assisting with administration. Other Judges tend to experience the frustrations vicariously. This is the servicing of the judiciary as a whole — in New Zealand, the responsibility of the Courts Division of the Head Office of the Department of Justice. The Courts Division is one of six within the Department, each headed by a Group Manager reporting to the Secretary for Justice, the latter in turn being responsible to the Minister.

As one would expect the Departmental structure often contains competent officers. Within the constraints imposed by budgets and by the system itself they have achieved a number of advances helpful to litigants and Judges. Officials do not however see servicing the judiciary and responding to judicial perception of public needs as having primacy in their functions. While much of the former civil service in this country has undergone a cataclysmic process of evolution, reconstruction and in some cases annihilation, the Department of Justice retains many features of a paradigm old-style government department.

In this area New Zealand lags far behind. The Lord Chancellor's Department is not popular with everyone but at least is focused on servicing the Courts. In Australia there are precedents for a separate "Courts Division". In New Zealand the judiciary has to compete for attention with the prison service, community corrections, the commercial affairs division and sundry others. The Group Manager answers not to the judiciary but to the Secretary for Justice who in turn rates Courts as but one of a number of onerous responsibilities.

The structure is inimical to judicial independence in two distinct respects. Conceptually, the notion that the Courts are beholden for their servicing on a department of the Executive branch is wrong.[4]. Practically, the Judges have insufficient influence over the nature and quality of the services.

Again, the events in Malaysia illustrated the powerlessness of a judiciary lacking control over staff or premises. I pose the question, should we be moving in the direction of a Courts Division separate from any government department, a distinct entity with its own Chief Executive, both having a single responsibility, namely the servicing of the Court system and its users? That would enhance judicial independence while conversely, independence will be at risk while the present administrative structure remains.

Public support

My second major point I will address under the broad heading of public support. The last two decades have been notable for the erosion of public confidence in institutions. I say at once that increased scrutiny has led to much in the way of transparency and accountability which should be welcomed and commended. I do not advocate that the judiciary should be immune from that process. Nor do I overlook the onus on the judiciary to keep its house in order and to do what it can in the field of public relations. I recognise we may not be doing enough.

Confidence in the Courts is vulnerable. For many members of the public caught up unavoidably in a prosecution, or in litigation, it is an unpleasant experience. Invariably the end result leaves one party dissatisfied. Politicians minded to solicit votes by slagging the judiciary have a ready-made audience.

It has long been recognised that there need to be restraints upon political comment about the Court process. Reciprocal restraints of course are imposed upon the Judges, which in this country have been observed meticulously. Unhappily the same cannot always be said about political comment. Further, the limitations themselves again rest on convention alone and even in that form appear to apply only to Ministers. The most prominent examples of political comment in recent years relate to sentencing where politicians have frequently referred to individual judicial decisions in what I would regard as inappropriate terms. There have been other well publicised instances of politicians denigrating the judiciary.

Like many countries we have a society frustrated by a long recession, shrinking employment prospects and the necessity to face unpleasant economic truths. Linked with these are increases in violent crime and offences against property, and as well a spate of white collar offending. In a country of our size, where a significant proportion of the population watches the same television programme or reads the same item of news, the capture and exploitation of public opinion is always open. The temptation to divert attention from our real ills by blaming some extraneous cause such as perceived inadequacies in sentencing is considerable. The consequences, which may be quite unwitting, can so easily be to diminish the standing of the judicial system in the eyes of the community. Lord Donaldson, then Master of the Rolls, noted in a recent judgment that the day to day relationship between the judiciary and all Governments and Ministers in modern times has been based on trust.[5]. However inadequate it may sound, one can do little more than urge public figures to avoid the unjustified denigration of the judiciary for political purposes. Each such episode chips another irretrievable flake from the fragile cloak of confidence protecting the concept of independence.

Judicial appointments

My third major heading is judicial appointments.

Since it is difficult to open up this delicate subject without raising the inference that there have been specific instances that have given dissatisfaction, let me say at the outset that I am unaware of any example in New Zealand history where an appointment has been criticised as politically motivated. In the only case within memory where a person with a distinct political background was elevated to the bench, the appointment was by a Government of the opposite political persuasion to his.

In New Zealand High Court Judges are appointed by the Attorney-General, District Court Judges by the Minister of Justice, each of whom consults as he thinks appropriate. Having had some experience of the consultative process as President of the Law Society and Chief Justice, and with I think five different Attorneys, I will cause no surprise if I say that the nature of the process varies widely. In his paper[6] Mr Masterman QC has some specific comments about Australian appointments made under a like regime. Recently another Australian counsel of standing has been even more outspoken,[7] predicting a swing to the American practice of seeing that appointees are at least in substantial part committed to the same philosophies and objectives as the Executive. That no such comment has been made in New Zealand – and I say confidently, no justification for any is likely – is a tribute to the independence of present and past Attorneys-General.

Our present approach is modelled on England's, where however it has long been replaced by a more sophisticated one. The question remains whether in the last decade of the 20th century, even in our small country, it is timely to consider a more visible, systematic and accountable appointment process.

The difficulty is to suggest something better. I see no attraction in elected Judges or public hearings of the American kind. On the other hand I foresee pressure for lifting the present shroud of secrecy. Alternatives canvassed elsewhere include the establishment of a formally constituted body with the responsibility of advising the Executive Government of suitable appointees, a set procedure of consultation with named persons and institutions, or selection through a bi-party Parliamentary Select Committee serviced by a high level secretariat charged with gathering information about possible candidates. The minimum – and it may be sufficient – appears to be a set consultative process, the terms of which are publicly known.

Some twelve years ago there was floated the idea of a judicial commission comprising Judges, Law Society nominees and representatives of the public for the purpose of preparing lists of candidates for recommendation to the Attorney-General. The Law Society favoured such a proposal, the Judges were opposed. Some see a risk that a judicial commission would limit itself to safe appointments cast in the same mould, and inhibit an Attorney's occasional flash of innovation. The President of the Court of Appeal, in the course of an address delivered at Oxford last year, revived the concept of a judicial commission. Referring to an "insidious concern" about the impartiality of the appointment process he suggested either limiting political input, or devising a system under which such input was balanced.[8]

In speaking to these points, I am conscious that any perceived problems in this country are on a small scale compared with those experienced by judiciaries elsewhere. If however judicial independence is weakened here in the future, the potential effects on our democracy, on the rights of individual New Zealanders, are just as profound as would be the case anywhere. So no apologies should be required and I make none for taking the opportunity afforded by this session to seek to heighten awareness on the topic. □

1 Lord Hailsham *A Sparrow's Flight*, p 385.
2 See eg Tun Salleh Abas, *Mayday for Justice* 1989.
3 Lord Oliver of Aylmerton, "The Appeal Process"; Fourth Annual Oration, Australian Institute of Judicial Administration, 2 *Journal of Judicial Administration* 63.
4 "The Roles of the Judiciary and the Executive in the Administration of the Courts" – paper presented by the Hon Sir John Young, then Chief Justice of Victoria at the AIJA Higher Courts Administrators' Conference 1990.
5 *M v Home Office* [1992] 4 All ER 97, 122.
6 George Masterman QC, "Political Influences in the Legal Process – Who's Influencing Whom", paper presented at the New Zealand Law Conference March 1993.
7 "Appointment of Judges", D R Meagher QC, 2 *Journal of Judicial Administration* 190.
8 "Empowerment and Accountability – the Quest for Administrative Justice." Paper presented by the Rt Hon Sir Robin Cooke at the Judicial Colloquium, Balliol College, Oxford, September 1992.

Courts and freedom

[Arthur Chaskalson, SC, from South Africa] pointed out that throughout the 50-year history of official apartheid, the courts had, with varying determination, resisted the Government's policies. A famous decision [Didcott J in *Re Rube*, 1979) made a sharp distinction between a rule being in accord with "the law" as opposed to "justice".

"The question is, what do we mean when we characterise our actions as lawful?" he asked his audience.

> Should we as lawyers accept that there should be no limits to the law?
>
> It must surely be better to accept as a principle of government that Parliament is not in all respects supreme, that it ought always to be subject to the fundamental principles of democracy of which it is a product and that where necessary it should be held to such principles by courts with the power to declare laws and actions which are in conflict therewith to be nullities.

A Bill of Rights, independently enforced, outlawing discrimination and guaranteeing all internationally accepted human rights and freedoms, was essential as was an independent Media Commission. But prompted by session chair, Lord Goff, Mr Chaskalson emphasised that even a Bill of Rights could prove oppressive. He gave the example of the present Government seeking to entrench property rights which are largely in white hands. With such entrenchment, this would mean that fundamental land reform could become an impossibility.

Conferentia
4 March 1993

Lawyer as lobbyist:
The role of lawyers in influencing and managing change

Address by Rt Hon Professor Sir Geoffrey Palmer, Professor of Law, Victoria University of Wellington; Professor of Law, University of Iowa.

In this article Professor Palmer emphasises the duty that lawyers have to understand the Parliamentary law-making process to be of help to their clients, and incidentally to help the Parliamentarians make better laws. Lawyers have to act for interest groups and to do so effectively they need to be more understanding of political and economic issues that affect the law-making processes; they need to be policy analysts, and they need to understand better the process of law drafting.

Sir Geoffrey expressly acknowledges gratitude to M S R Palmer and Mai Chen for comments on earlier versions of this paper.

I What is a Lobbyist?

It would be as well at the outset to make sure we know what we are talking about. The etymology of the words "lobby", "to lobby" and "lobbyist" contain interesting features from both sides of the English speaking Atlantic. The term seems to date from 1553. A "lobby", in one of its more specialised usages, the *Shorter Oxford English Dictionary* says, is "[i]n the House of Commons and other houses of legislature, a large entrance hall open to the public, and chiefly used for interviews between members and non-members of the House." That sounds as if a lobby is a useful place to facilitate citizens making their views known to their elected representatives and enhancing democracy. The right to petition for redress of grievances is as old as Magna Carta. The values involved are core democratic values and certainly protected by the New Zealand Bill of Rights Act 1990 (s 14).

The verb "to lobby" in its American usage, has some different connotations. Dating from 1832, the same dictionary says it is to influence members of a house of legislature in the exercise of their functions by frequenting the lobby. That sounds a little more sinister. It conjures up visions of people who peddle influence for a living, who are paid by vested interests to procure results from the democratic process which without their efforts would not be forthcoming. What a citizen can do on his or her own behalf seems different when it is done for a corporation in the political marketplace with the support of company funds. Lobbyists are there in the lobby to influence members of the legislature, to solicit votes.

Yet in the modern context the term is understood as involving something much broader than being physically in the lobby. Thus, the *Collins English Dictionary* suggests the term involves attempting to influence the formulation of policy. The New Zealand dictionary I consulted (*Heinemann New Zealand Dictionary* (1979), H W Orsman, ed) defined a lobby as "a group of persons who try to influence or persuade a law-making body: 'the environmentalists' lobby." (That example chosen by the lexicographer was particularly apt. In my political experience no lobby in New Zealand was as alert, well researched, creative and as unrelenting as the environmentalists.) It is in this wider sense that we should understand the term for the purposes of this paper. For an activity to be lobbying it must involve some communication, made by an intermediary, motivated by a desire to influence government decisions. So stated lobbying comprises a very broad canvas, but it stops short of the whole process of politics itself. The distinction is important because pressure group analysis always risks being understood as encompassing all political activity, that is to say that politics is merely the "clash and adjustment of interests and groups."[1] Group activity is not all politics but it is a big chunk of it. The issue for analysis in this forum is to what extent, if any, is the influencing of public policy an appropriate professional activity for the legal profession in New Zealand. How can it be undertaken and within what legal framework?

II What is wrong with lawyers as lobbyists?

The difficulty with the conception of lawyers as lobbyists is that it comes with some undesirable baggage. It is important to try and isolate what that is and to deal with it. The trouble with the term is that it has good and bad connotations. Lobbying can be educative, informative and can improve the quality of decisions in a thoroughly democratic manner. Or it can be malign and corrupting.

Lobbying involves an attempt to exert influence, but this can either be "proper" or "improper" according to the point of view of the person examining the conduct. I think in New Zealand, as in other countries, there would be substantial disagreement about what is appropriate and what is not.[2]

As Will Rogers put it "A lobbyist is a person that is supposed to help a Politician to make up his mind, not only help him but pay him." (*The Autobiography of Will Rogers* 14, 1949). Or if it is not money, then blandishments of some other description, using even "the lever of lust."[3] Many lobbyists, like diplomats, assist their craft by the provision of good dinners. Indeed, the law in the state of Wisconsin used to forbid any lobbyist to buy or give any legislator anything, a meal, a drink or even a cigar. (William H Young, *Ogg and Ray's Introduction to American Government* 742 (12th ed, 1962.) It is that popular part of the folk lore which causes lawyers to be cautious about the area. At best lobbying looks like political work, at its worst it looks like bribery.

The type of lobbying is of crucial importance when considered from the point of view of legal propriety. A lobbyist may make clear and logical policy arguments based on solid information. Or the lobbyist may engage in political threats or inducements. In the latter case the lobbyist may resemble a politician more than an advocate. The express or implied threats are a sort of political bargaining. The support or opposition of a large organisation which may translate into gain or loss of electoral support is the leverage. These threats can be given credibility in a number of ways well known to New Zealand MPs — telegrams, letters to MPs and Ministers, a campaign of letters to the editor, phone calls, visits to the electorate office, the mounting of a petition to be presented to Parliament and so on. I believe MPs in New Zealand take seriously the views of the individual citizen when carefully expressed by that person; they tend to be a bit more cynical when they receive 50 identically worded letters. Lawyers are no great use as manipulators of raw political power in this type of lobbying. For professional reasons they are best to keep out of it. In any event, whatever things used to be like the techniques of persuasion these days are a good deal more subtle than the threat of telling the members of the pressure group to vote for the other lot, something on which pressure group leaders have a doubtful capacity to deliver.

The legendary Boss Tweed of Tammany Hall who died in 1924 when machine politics still dominated the United States made a distinction between "honest and dishonest graft." (William L Riordon, *Plunkitt of Tammany Hall — A Series of Very Plain Talks on very practical Politics* 3, 1963.) Honest graft was taking advantage of inside knowledge to enrich oneself whereas dishonest graft was taking money directly for favours. Some of the modern public choice theory in the United states argues that citizens selling their votes is not a bad thing, indeed it may be the most economically optimal thing. This was quite plausibly argued by Gordon Tullock and James Buchanan some years ago in their book *The Calculus of Consent.* This book explores in a serious way the sale and purchase of votes among citizens.[4] An analysis of lobbying and pressure group activities from an economic standpoint suggest to these authors the following:

> . . . interest-group activity, measured in terms of organisational costs, is a direct function of the "profits" expected from the political process by functional groups. In an era when the whole of governmental activity was sharply limited and when the activities that were collectivised exerted a general impact over substantially all individuals and groups, the relative absence of organised special interests is readily explainable. However, as the importance of the public sector has increased relative to the private sector, and this expansion has taken the form of an increasingly differential or discriminatory impact on the separate and identifiable groups of the population, the increased investment in organisation aimed at securing differential gains by political means is a predictable result. (at pp 286-87.)

The voter is the same person as the consumer in the free market. Thus, the authors argue, the individual who seeks pleasures through consumption of items sold in the market is the same person who will seek partisan advantage through political action. This understanding of the importance of the hip-pocket nerve in politics is familiar enough to New Zealanders. People vote to make themselves better off, they hope. But the manner in which that motivation intersects with the formation of public policy is intricate. Mostly what the system says is that there are many points of view out there — we need to know about them all and listen to them before we make up our minds. Despite its current unpopularity, there is a great amount of consultation in the New Zealand political decision-making system, much more I often think than in much bigger countries. (The size of electorates in New Zealand, about 32,000 total population, makes individual politics vital and important in New Zealand.)

The second point which troubles lawyers is that influencing policy involves making some judgments about public opinion. That does not appear to be within the province and function of a legal adviser. Such an adviser can say what the law is, but his or her opinion on what it ought to be may tend to be regarded as no better than anyone else's. Not only does public policy involve public opinion, what is worse it may involve the black arts of influencing it by means of media pronouncements and public relations techniques. This really does seem to be a long way from the practice of law as that process is conventionally understood. So lawyers tend to retreat from it. The inability of so many of them to communicate in plain English reinforces the tendency to shy away from it. They tend to think they have no skills relevant to the task.

A third difficulty with involving lawyers in public policy formation is their traditional perception of it. There is a tendency to regard the processes involved as unprofessional or even sinister. Lawyers in the New Zealand political culture do not see themselves as lobbyists. They tend to regard that activity as a branch of politics. They are not quick to see the relationship between law and politics, neither do they perceive,

generally speaking, the way in which their professional skills can or should interact with the making of public policy. Many New Zealand lawyers regard public policy as an "unruly horse" best not ridden.[5]

III Should New Zealand regulate lobbyists?

Because of the clear abuses which can be attendant upon lobbying, attempts have been made to regulate it. The paradigm case is the United States where it has been regulated by law since 1946. (Federal Regulation of Lobbying Act 2 United States Code Annotated sections 261-270.) Given the nature of democracy and the constitutional guarantees of freedom of expression, such regulation was never going to be easy. The justification for such action was that expressed in the nineteenth century by James Buchanan, later to become President.

> The host of contractors, speculators, stockjobbers and lobby members which haunt the halls of congress, all desirous . . . and . . . [using] every pretext to get their arms into the public treasury are sufficient to alarm every friend of his country. Their progress must be arrested. (Karl Schriftgiesser, *The Lobbyists* 7, 1951.)

The amount of contention before regulation proved to be possible was substantial. When regulation came in 1946 by an Act of Congress it was criticised for being too soft and ambiguous. (Improving the Legislative Process: Federal Regulation of Lobbying 56 Yale LJ 304, 1947.) It had been preceded by legislation, the Foreign Agents Registration Act, in 1938 which required every agent of a foreign interest to file a statement of activities.[6] The Act was based on the principle of public disclosure. The law required any individual who received monetary compensation from any person or group for the purpose of exerting pressure on Congress to register with the Clerk of the House and Secretary of the Senate. Lobbyists were required to identify their employees and state their general legislative objectives. Quarterly returns had to be filed disclosing lobbying expenses. Criminal penalties were imposed for violation of the disclosure provisions. The constitutionality of the legislation was upheld by the Supreme Court in 1953, although in a manner which kept the interpretation of the legislation very narrow.[7]

There were plenty of holes in the Act and they have not been plugged. The Act did not restrict the activities of interest groups, whether those activities were political or financial or both. It was based on the theory that sunlight was the best disinfectant. People could spend their own money lobbying without having to register. Reporting requirements were loose, money spent for public education did not have to be returned as a lobbying expense. Neither was it clear what short of contact with Congress amounted to lobbying. And it did not apply to lobbying the executive agenices. There was not a great deal of active enforcement. Despite well advertised defects efforts to improve the law were strongly resisted and extremely difficult to pass.[8] One of President Clinton's earliest official acts was to sign an Executive Order implementing a series of tough new restrictions governing members of his administration and their lobbying activities after they leave the administration. A permanent ban on former executive officials lobbying for foreign governments is imposed. Otherwise, former officials are prohibited from lobbying their former agency for five years.

It is misleading to concentrate on lobbying *simpliciter* in Washington now. It is a complex scene with the issues discussed here spilling over into political campaign financing, especially the formation of the controversial Political Action Committees which hand out large campaign funds on the basis of a candidate's attitude to single issues. This has been in some ways the development of lobbying to fill a space left by the weakness of the political parties. (Hendrick Smith, *The Power Game — How Washington Works* 259-269, 1988.) There have been formidable legal problems in the United States over campaign finance regulation. (S M Taylor, "*Austin v Michigan Chamber of Commerce:* Addressing a "New Corruption" in Campaign Financing" 69 North Carolina L Rev 1065, 1991.) An important source of lobbyists' power in the United States is the provision of campaign finance.

The Canadians have had a rapidly expanding lobbying industry which they have seen fit to regulate. (John Sawatsky, *The Insiders — Power, Money and Secrets in Ottawa* 322-335, 1989.) A Select Committee Inquiry was held in 1986 on the need to register lobbyists and it generated fierce controversy which this legislation appears to cause everywhere. The Committee travelled to the United States and looked at the lax registration system in Washington and then contrasted that with the onerous and detailed requirements in California. The Bill that the government finally introduced was mild—advocates who lobbied directly on behalf of a third party would have to list their clients and the issues being lobbied. The second category, staff people lobbying for their employer, would have to list only their names and companies or associations. (Sawatsky, supra, at 337.)

In the House of Commons at Westminster, it has long been the case that MPs take on positions as "consultants" or agents for particular interests and are remunerated. This ought not to be misunderstood. Bribery of an MP is a breach of privilege and there are a number of rules requiring interests to be declared. Strict control over members' conduct and over lobbying can be exerted through the rules of parliamentary privilege. But is clear that MPs at Westminster provide advice on parliamentary relations and they are remunerated for it. This system plainly amounts to lobbying from the inside. This can be found from the Register of Members' Interests. (A G Jordan and J J Richardson, *Government and Pressure Groups in Britain* 265-273; 1987.) In other words the MPs themselves are lobbyists. Indeed, lobbying in the House of Commons appears to be unregulated except by the rather ill-defined protections offered by parliamentary privilege. The same is true of New Zealand.

The British practice of having MPs as lobbyists has never been adopted in the New Zealand Parliament so far as I know and it would be most undesirable in such a small Parliament with important powers residing in Select

Committees that it should. Obviously MPs have preferences and loyalties to some groups more than others, but to turn that into some formal relationship of the type which occurs among backbenchers in the United Kingdom would be both undesirable, and I would judge unacceptable to public opinion here.

The Australians have ventured in regulation of lobbying, voluntary regulation. The scheme is administered by the Department of Administrative Services. There is no legal compulsion backing the scheme. But failure to register means that access to the person to be lobbied will be denied. In other words, there will not be any appointments. When the scheme was established in 1984 Ministers were advised not to deal with lobbyists not fulfilling the registration requirements. (Peter Sekuless, *Lobbying in Canberra in the Nineties — the Government Relations Game* 81, 1991.) The Guidelines for Registration of Lobbyists are quite explicit: "Lobbyist means a person (or company) who, for financial or other advantage, represents a client in dealing with Commonwealth Government Ministers and officials." (Sekuless, supra, at 85. The full guidelines are set out.) In other words the application is to the executive branch and not to Parliament. It is worthy of note that the solicitors' firm of Sly and Weigall is registered. (Sekuless, at 100.) There is a special register for lobbyists whose clients are foreign governments or agencies and a general register for the rest. Each client has to be registered. But only government ministers and officials can see the register. it would be interesting to see an analysis of the consequences of the Australian scheme.

Looking at the nature of the law in other jurisdictions it may seem to be desirable for possible excesses to be curbed in New Zealand by some light regulation. There is a very small amount now. Strangers are not permitted in the lobbies while a division is in progress and strangers generally are not permitted in them. (New Zealand House of Representatives, Speakers' Rulings 1867-1980 136 (1982); David McGee, *Parliamentary Practice in New Zealand* 32, 1985.)

The real problem is that it is hard to make such regulation effective and there are a great many practical problems with it. Gross abuses such as bribery of public officials are dealt with by the Crimes Act 1961 (ss 102-105). Vital as the existence of such provisions are, the application of such laws does not extend to donations to political parties, campaign financing or the regulation of lobbying.

A Register of Members' Interests is a reform I have long advocated for the New Zealand Parliament. (Geoffrey Palmer, *Unbridled Power* 129, 2nd ed, 1987.) It would simply require MPs to disclose their pecuniary interests. I actually managed to apply it to Ministers by Cabinet decision and it has been extended somewhat by the current government. The rules are to be found in the Cabinet Manual. The same rules should be applied to all Members of Parliament. Furthermore, there could be a register of lobbyists adopted dealing with those who would influence both Ministers and MPs, as well as members of the public service. Both these measures could be adopted by resolution of the House if there was a will to do it. The contents of both registers should be publicly available. There is quite enough authority to give such a regime the necessary teeth within the Standing Orders and powers of parliamentary privilege. To adopt those measures would add transparency to some of what goes on at present, but it could not be argued to provide great protection against undesirable practices.

Moderate as these suggestions are it will be difficult to get them adopted until there is some public incident which stirs public dissatisfaction and creates a demand for action. In all frankness it is not likely such rules will achieve much. They do not seem to have done so in other jurisdictions. New Zealand has been remarkably free of the sort of abuse which has given lobbying a bad name overseas. But it might be prudent to act in advance of demand. It may help to restore the reputation of the political process. So far we have dealt with the negatives of influencing government policy, let us now turn to what positive contribution lawyers can make in the New Zealand system. Before we do so it is necessary to examine the nature of the system it is desired to influence.

IV Differences between New Zealand and the United States

In the context of an American legislature with its weak party discipline, the presence of lobbyists is not simply symbolic it can be intensely practical. Lobbyists can be used to provide information. guidance and help that a New Zealand MP would often obtain from caucus or the Whips. I vividly remember on one occasion after addressing a joint sitting of the Iowa state legislature being with a house member when a vote came up. He did not know how to vote, since he had not been listening to the debate when the question was called, so he watched for the vote of one of his colleagues and voted the same way not even knowing what the issue was. The vote was recorded electronically. In legislatures which do not have disciplined voting of the sort we are accustomed to in New Zealand, legislators are frequently in need of help right up to the time they vote. So the classical work of lobbyists has not disappeared.

At the beginning it was observed that the term "lobbying" drew strength from both British and American political institutions. Yet the differences between the style of decision making in the Westminster system compared with the Congressional system is profound. It would be as well, to say a word about the differences and how it affects the manner in which lawyers may seek to influence public policy. Having taught Comparative Constitutional Law in the United States only last year, I was struck with how important those differences are. The United States Constitution sets up a system of checks and balances and separation of powers which makes the fashioning of public policy a much more complex matter than it is in New Zealand's stripped version of the Westminster model. In the United States when the Presidency and the Congress are controlled by different political parties the opportunities for "gridlock" can make it hard to produce legislation.

The nature of the political party system in the United States is very different from that of New Zealand. One recent law and economics analysis argues the true role of the

Democratic and Republican Parties is as organisers of shadow interest groups. The costs of organising into interest groups will outweigh the benefits for some people. Parties enable such people to find expression in the political process at low cost. Professor Jonathan Macey of the University of Chicago argues:

> .... [T]he political parties' ability to serve organised interest groups has been declining steadily over time because such groups have gained direct access to politicians and no longer need political parties to serve as intermediaries. To survive, political parties have had to expand their traditional constituency to include shadow interest groups. (Jonathan R Macey, "The Role of the Democratic and Republican Parties as Organisers of Shadow Interest Groups" 89 Michigan L Rev 1, 3, 1990.)

It is this phenomenon he argues which explains the loyalty of certain groups to each of the parties despite the lack of any meaningful ideological divide. He looks at political parties not so much as organisations in the United States which attempt to influence government but as organisations which serve the interests of individual clients. While there may be the beginning of such a process in New Zealand, we are about 20 years behind I would say and the role of parties here is very different.

Discipline in the Parliament here is still strong. Outcomes can be managed through the combined strength of Cabinet and Caucus. All these factors go to produce a situation in the United States much more open to lobbying and diverse influences. In the United States a lobbyist can attempt to persuade the executive branch, and then start all over again with the legislative branch which will often not be remotely persuaded by the decisions the various departments in the Executive branch reached. The legislative branch has two Houses and an intricate system of committees and subcommittees in each. It may even become a question of garnering the votes one by one in the Congress since each representative and Senator has the power of independent decision on how to vote on issues.

In the New Zealand version of the Westminster system Cabinet runs the system – the caucus delivers the votes in Parliament and the lobbyist or pressure group confronts a much greater problem. To influence the policy in New Zealand it is necessary to convince the executive. That done, the system will deliver. Fewer people have to be convinced than in the United States; but collective responsibility means it is hard to change the policy in New Zealand. Legislative scrutiny of the executive's legislation by parliamentary select committees is important and ought not to be neglected, but most of the time only changes agreed to by the executive will be made. Such is the nature of parliamentary democracy in New Zealand. I do not agree with the constitutional policy which allows such a situation to exist and have made proposals to change it. (*New Zealand's Constitution in Crisis* supra.)

Dramatic changes are likely to flow from the adoption of the Mixed-Member proportional electoral system recommended by the 1986 Royal Commission on the Electoral systems and adopted by the voters in a referendum in September 1992 and to be voted on again in conjunction with the 1993 general election. It is devoutly to be wished that the referendum passes, because it will reduce the yoke of executive dictatorship in New Zealand. Many of the present strains in the political system are attributable to that feature of the system. The dynamics of the system will be greatly altered by MMP. (For our analysis of the possible effects see M Chen, "Remedying New Zealand's Constitution in Crisis: Is MMP part of the answer" [1993] NZLJ 22.)

It is necessary when dealing with power to recognise the realities. The reality at present, as an Australian constitutional lawyer so beautifully put it, is that New Zealand is an "executive paradise." (L Zines, *Constitutional Change in the Commonwealth* 47, 1991.) The existing New Zealand Westminster system, although perhaps moving towards a "Washminster" system, makes the task of the lawyer who wishes to influence policy much harder. If successful in convincing the executive of the worth of a particular cause of action then the success rate in having it implemented will be high. Furthermore, the policy will not be so susceptible in its passage through Parliament to alteration by other lobbyists at work there as it would be in the United States. In short, in the New Zealand system it is much more difficult for pressure groups and lobbyists to change the nature of the policy or its features. But if they do manage to prevail, their victories will be bigger than in the United States. Cabinet government and collective responsibility produce that outcome. In terms of the marginal effect of lobbying, it would clearly be greater in the United States than in New Zealand. But when it is effective in New Zealand, the results will be more dramatic.

Despite these differences with the United States the New Zealand system has been changing. We have lifted the veil of secrecy which used to permeate the executive branch through passage of the Official Information Act 1982, a monument which stands to the credit of the Hon James McLay, when he was Minister of Justice. The Select Committees of Parliament make many alterations to Bills after hearing submissions. The nature of the public law system and the advice system has changed – the system is not as rigid as it used to be. As diversity and uncertainty increase, we will move further towards the American model.

V What can lawyers contribute in New Zealand?

The blunt truth is that "lobbies", "lobbyists" and pressure groups play an important role in all forms of government, even dictatorships. The process of politics may be different in democracies, but as Nikita Khruschev once observed "Politicians are the same all over. They promise to build bridges, even where there are no rivers." (H Rawson and M Miner, *The New International Dictionary of Quotations,* 274, 1988.)

What can lawyers offer on behalf of clients in the area of policy formation? The first point to bear in mind is for the lawyer to realise he or she is not a politician or a political adviser, but a policy analyst and implementer. There is a distinction between politics and

government. The star-shells of sensation which light up the political landscape and feed the media's voracious appetite for action are not the matters those who want seriously to influence government policy should dwell upon. Much better the marshalling of all the relevant information, an analysis of the available options, the refinement of careful arguments concerning the merits of each, the writing of a cogent presentation and the backing of the proposal with a carefully drafted bill. The policy proposal which survives best is the one which has been carefully thought through. It has to be able to stand up to the experts in the public service as well as the politicians.

Lobbyists should also be able to point out the pitfalls in proposals from the publicity and public opinion point of view. Indeed, the best quality of a good lobbyist is to know how to prevent the politician looking a fool. Any government and any legislature has to interact with a vast number of groups which represent diverse interests in society. Establishing priorities and testing the policy options requires a lot of debate and thought. Much of that can be carried out within the groups themselves quite often. The pressure groups and the politicians interact with each other in a never ending minuet of policy development. They certainly need each other. The lawyer can be a helpful facilitator.

An effective lobbyist can give to a legislative or decision-making body some of the help that a good lawyer gives to a Court.[9] Such people should have a closer knowledge of the facts than the legislator, a greater familiarity with the issues and the arguments surrounding them, access to specialised data and technical information. Lobbyists can save legislators from making laws which will not work or which overlook details which are important. Accurate and reasonable arguments will be their most important weapon.

The important thing with any profession is always to have a clear idea of those areas in which a real contribution can be made. It is never sound to claim competence in a territory where others can really do better. There are some aspects of public policy development where legal skills are pre-eminent. Many policy proposals have to be translated into legislation in order to become operative. The legislative process itself is a natural part of the lawyer's domain. Indeed, I have recently finished work with a colleague Mai Chen from the Victoria University of Wellington on a book designed to re-orient public law in New Zealand. The book (Mai Chen and Geoffrey Palmer, *Public Law in New Zealand — Cases, Materials, Comments and Questions,* Oxford University Press, 1993) has a large segment on "Parliament: Procedure, Process and Legislation." The chapter headings will give some understanding of the issues covered:

- What is Parliament for?
- Legislation.
- Reform of Parliament.
- Parliamentary Privilege.
- Select Committees.

There is a lot about process — creating good law, the Standing Orders of Parliament, the Legislation Advisory Committee, the classification of bills, and how to make submissions to a Select Committee. Another segment of the book deals with how to use various public instruments for clients: the Ombudsmen, the Official Information Act, the Regulations Review Committee and the media. The constitutions of the main political parties are included.

Any serious policy proposal has to be accompanied by a bill expressing how the policy looks translated into legislative form. Quite sensible people turn to jelly when confronted with a properly drafted bill; they do not think they can understand, even if they can. Bills are the enemies of sloppy thinking. There is a rigour required in thinking through detail of policy proposals which is often overlooked until the stage of producing a draft bill is reached. Legislative drafting is a legal specialty of which there is an acute shortage in New Zealand but it is with that lawyers must become familiar if they are to make effective contribution to policy development. It is the job of lawyers to ask the hard questions, pose the unpleasant hypothetical and think of the unintended consequences. The history of legislation is littered with unintended consequences. The bill which can withstand microscopic examination unscathed has yet to be drafted.

Too often the drafting starts too late — the earlier it starts the better. Often when confronted with the principles they advocate translated into legislation the authors seek to rethink their proposal. One of the best services lawyers can perform for their clients is to provide rigorous analysis of bills introduced to Parliament for their clients bringing to their attention difficulties, and help with submissions to Select Committees to put those defects right. But any serious contribution to the policy needs to start earlier, when the ideas for the bill are being designed in the Executive.

Where a new policy is seriously proposed to a government, if it is accompanied by a bill it is likely to be survive the policy consideration process much better and be implemented much quicker. Parliamentary Counsel Office is seriously and chronically overloaded. Do not leave the drafting of proposals to the government. Get them professionally done and present a properly worked out package to the government. Obviously not every client will want to go to this trouble, but ones with a lot at stake will see the sense in it. And always remember the oldest maxim of all in this area. It is still apposite: "Bills are made to pass." (Geoffrey Palmer, "The New Zealand Legislative Machine" 17 VUWLR 285, 1987.) The possibilities involved in exploiting the provisions in Standing Orders by means of private bills, private members' bills and local bills ought not to be neglected either. There are many helpful provisions to be found in the new standing orders which can be used to help clients.

But reform is not accomplished by legislation alone. Any change of size and importance requires an authoritative document setting out in detail the quality of the changes and reasons why they are necessary. The document must be simply and lucidly expressed. It must try to answer all the arguments that might be raised against the position advanced. Logic is important but some inspiration will help. This document is a task of advocacy — it must persuade![10] Policy making is

"an extremely complex analytical and political process to which there is no beginning or end, and the boundaries of which are most uncertain". (Brian Smith, *Policy Making and British Government: An Analysis of Power and Rationality* 54, 1976.) Principle is most important and the changes should be firmly anchored and related to principle, but there is always an element of pragmatism. The trick is to get the most rational policy that can be accepted by government and enacted. Sounding out the responsible minister in advance is always wise; ministers have to endure a lot to get to their positions. They tend not to advance proposals with which they do not agree. They regard that as being one of the prerogatives of being a minister. The proximity of public service policy advisers to ministers is what gives those advisers much of their influence, that and the time they have which ministers do not have. So the other wise counsel is to check the ideas out with the relevant public service policy advisers. Their opposition will not assist the proposal. If the policy area is sensitive it may be necessary to involve the media as well.

It is as well to set out with a carefully planned strategy at the beginning and decide in what order things will be approached. Co-ordination of policy is one of the most difficult of all tasks for governments to achieve and proposals even of a minor kind involve co-ordination problems of their own. Policy change has to be managed and the management is very demanding.

Lawyers who are involved in policy development for clients need to understand the need for co-ordination. Most proposals of any complexity require input from several sources — financial and economic analysis, social implications, delivery systems — the list is endless. Someone has to be in charge of melding all the disparate experts together, making sense of it all and distilling from the work a coherent whole. Legal analytical skills are highly suitable for such work. Lawyers should drive and co-ordinate the work. That does not mean that lawyers should ride roughshod over experts in areas where the lawyers have no training. But lawyers are the last of the generalists. They make good policy development managers. They are also experts in the development of clear, sensible arguments and applying standards of reasonableness to issues. That is the main source of their utility in influencing policy. While constraints of power and politics do operate, in my experience rationality is the most important single element in the development and acceptance of policy.

The biggest policy reform I ever managed was the process which resulted in the Resource Management Act 1991, an effort to streamline New Zealand's environmental laws and to develop clear principles of sustainable development and fair participatory processes in the making of resource management decisions.[11] The primary method by which the reform was advanced was by massive and prolonged public consultation. It was an expensive process, in the end the reform cost more than $8.5 million and the production of newsletters, consultative documents, working papers and drafts was massive. The consultations went through phases which had been structured in at the beginning:

(a) Clarify the issues and objectives of the reform—
(b) Develop the framework of proposals for reform and consult on them.
(c) Make the decisions and introduce legislation.
(d) Select Committee scrutiny.

In this instance a change of government intervened after the bill had had its second reading and after a review the National government decided to continue with the legislation. It made some changes in detail, but the framework was retained.

The careful and open pattern of policy development helped the proposal to survive. The work had been properly done; it could not be knocked over. There are lessons in this which are easy to overlook. Public participation in the policy development process is not merely a political need in a democracy. It is a policy need. Widespread consultation removes the rough edges of proposals, tests their acceptability and practicality. It can also create a demand for their enactment. While lawyers advising clients may not be involved in such wide ranging policies as the one I am discussing the point holds generally. It would be applicable to the solicitor advising a local authority. Consult, allow for public participation, do not be secretive. One of the statutory purposes of the Official Information Act 1982 is to enable the people of New Zealand to have "more effective participation in the making and administration of laws and policies." (s 4.) The principle is a sound one and it actually works. Furthermore if an open policy development pattern is followed every view gets a fair go — the policy will work better and be more acceptable. A closed model of decision-making only encourages the unacceptable sort of lobbying described earlier in this paper. And since there are no final victories in policy development any more than there are in politics, the consultative mode will produce more enduring results.

As I have argued elsewhere the intellectual focus lawyers in New Zealand bring to public law is flawed. (Geoffrey Palmer, "The New Public Law: Its Province and Function", 22 VUWLR 1 (1992); *New Zealand's Constitution in Crisis*, supra, 20-41.) It is my opinion that a proper understanding of the nature of public law in New Zealand now should cause the legal profession to take a wider view of its role and be enthusiastic about becoming essential advisers in the policy making process. It must be conceded that sometimes that process will involve lobbying, but if there is a proper conception of what the process is and the lawyer's role in it then it should involve none of the odium and sinister elements outlined above. The New Zealand legal profession is a long way from maximising its contribution in this regard. My experience inside the system suggested to me New Zealand lawyers are neophytes in the world of government and their failure to be up to speed means that they serve their clients less competently than they should.

This characterisation of New Zealand lawyers may be unfair, since lawyers carry out a great array of tasks in New Zealand society. Some of them do become involved in influencing the development of

policy. Certainly government lawyers do and their influence upon policy is prodigious. But the judgment I have made after having been involved in the fashioning of not an inconsiderable amount of public policy is that the private legal profession is a very long way indeed from playing the role it could play.

There is a related point. Unless the legal profession understands the range of activity in which its skills are relevant then it will simply fail to make the contribution to society that it ought to be making. Everything is in a constant state of evolution and the traditions of the legal profession are not easy to change, a posture reinforced by the protected position the profession has in society. (Law Practitioners Act 1982, ss 54, 64, 65.) Lawyers are not as eager as some others to look for new opportunities and fresh fields. I recall some years ago the failure of the profession to take advice in the area of taxation as seriously as it should have. That has been rectified now but in my view the profession runs the same sort of risk if it neglects the new public law. In the nature of the New Zealand political system now there is a greater need for the sort of service that good lawyers can provide than there used to be. If they do not provide it nothing is surer than that other groups of professionals and quasi-professionals will. In my view the New Zealand legal profession needs to embrace the new public law and practise it. Practice groups should be set up in the firms to ensure these services are available to clients.

VI What is the new public law?

At the most general level public law involves the activities of the state — not only what those activities are but issues about what they ought to be and how they should be carried out. Lawyers are accustomed to dealing with disputes. But many disputes arise because of the implementation of policy. Had the policy been fashioned differently in the first place, the client may never have had the dispute.

The open texture of the New Zealand decision-making process is remarkable. It has changed dramatically within a generation and I date the start of that process with the establishment of the office of the Ombudsman, 1962. There followed the establishment of the Waitangi Tribunal in 1975, the passage of the Official Information Act 1982 and the reform of the Parliamentary Select Committee system in 1985, the spinning off from the departmental structure of the state owned enterprises in 1986, the slimming down of the public service and the altered principles of its operation contained in the State Sector Act 1988 and the Public Finance Act 1989.

The result of these changes has been to alter dramatically and permanently the framework for the giving of policy advice within the New Zealand government. The world of policy advice is infinitely contestable. The shape of the New Zealand government system of decision-making is difficult to compare now with that which existed then. It is a world we have lost and it will never return. The new system is more open, more contestable as to policy content and less coherent as to the values which underpin that policy. The political culture and the political process has changed dramatically over the same period due to a number of factors such as the development of the electronic media, relative economic decline, and unemployment among other factors.

The constitutional position is that a minister may seek advice from whomsoever he or she chooses. It is often the case that the official sources of advice within the executive government do not have all the information or all the expertise necessary to fashion advice in particular areas. A client with a long developed background in a particular activity may well know more than the officers in the public service about the pitfalls in policy development. The policy will turn out better for everyone if all the variables are weighed before it is settled. Effective representation by lawyers on policy can and should enhance the quality of the outcomes.

The traditional world of constitutional law, which New Zealand inherited from the English, made a serious attempt to draw boundaries between law and politics. Such appears to have been an important purpose of the Vinerian Professor of English Laws at Oxford, Albert Venn Dicey in his classic work *Introduction to the Study of the Law of the Constitution* (1959). (The first edition appeared in 1885.) Law should be neutral, it should be based on a coherent set of fundamental principles. Where the subject was one of politics and not of law it was of no concern to the constitutional lawyer according the dictate of Dicey. The idea that such immutable principles exist in public law has always seemed to me to be false. The view is based on a set of distinctions which do not hold up. Law is a political instrument, using the word "political" in its broadest sense. The English, at a certain juncture of their history may have been successful in obscuring that reality, but it is not a view which can withstand scrutiny in a democratic age.

Public law is the mainspring from which all the other law flows. Public law sets out the ground rules on which the whole of the society and the whole of the legal system works. Public law is, from a practical point of view, extremely important. Public law is about the legislative process. Public law involves international obligations which play an increasingly important part in shaping our domestic legislation. When I was a law student Public International law was a compulsory subject for a law degree in New Zealand universities. Alas it is no more. I say that because I can think of no subject which was of greater value to me as a minister. Whether it was an issue about international human rights, or the environment, or how to deal with the Australians, international obligations permeate every facet of government activity now — it is one facet of the new public law.

My contention is that no one can be an adequate public lawyer without understanding not only the laws of the constitution, but also the practice of it, how it works. If one restricts oneself to the rules recognised by Courts, one will understand very little about how we are governed, or how public power in New Zealand is distributed. From the lawyer's point of view, there is a further deficiency in the traditional approach — it yields little about how to produce outcomes for clients. If New Zealand public lawyers borrow the approach of the American realists they may at least be able to locate

themselves at the ground upon which the match will be played.

The most appropriate insight is Karl Llewellyn's (in *The Bramble Bush* 12, 1951):

> This doing of something about disputes, this doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.* (Italics in original).

That aphorism has equal application to our constitutional framework and what goes on within it. What MPs, ministers and civil servants do about disputes and policy issues is to my mind public law itself. It seemed to me as a politician that most of the legal profession did not deal in, or have any developed capacity for dealing in, disputes or issues where MPs, ministers and civil servants had decision-making capacity or the ability to influence outcomes.

In making this point, I do not mean to be understood as denigrating modern administrative law. The edifice erected by the Judges since *Ridge v Baldwin* [1964] AC 40 was decided is an important and enduring contribution to our constitutional framework, because it is a much needed check against the executive. (See K J Keith *"Ridge v Baldwin* — Twenty Years On" 13 VUWLR 239.) But it is Court-oriented jurisprudence. The remedies are expensive. The outcomes remain uncertain and exceedingly difficult to predict whatever claims are made on the need for simplicity. (Rt Hon Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s,* 1. Furthermore, there are many outcomes administrative law cannot reach which can be reached by other legal techniques. Cheap and quick results are usually preferable to more expensive ones which are long and drawn out. Prevention of the dispute arising in the first place is in normal circumstances the most prized goal for any legal adviser and client.

The truth is that public law in New Zealand has to deal with the sprawling mass of reality about how public decisions are made in New Zealand. Who makes those decisions? What rules do they have to follow in making them? How can those decision-makers be influenced in the content of those decisions? At its broadest, public law in New Zealand is about policy outcomes. The subject needs a new angle of approach — one which is relevant to the law practitioner in the real world. (Judges sometimes complain about failure in broad thinking by New Zealand lawyers: see Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" 15 VUWLR 46, 50 (1985):

> And unfortunately in my view many counsel still seem somewhat reluctant to explore wider social and economic concerns; to delve into social and legal history; to canvass law reform committee materials; to undertake a review of the general legislative approach in New Zealand to particular questions; to consider the possible impact of various international conventions which New Zealand has ratified; and so on.)

It is important not to confuse the place where the argument is made with the way in which it is made. The approach being developed here proceeds on the basis that lawyers are expert at clear, logical thinking; that they can analyse and dissect propositions, and develop policy schemes based on carefully defined principles. The traditional intellectual techniques of the law have a significant contribution to make to policy development, both in terms of rigour and in terms of practicality. The world we have now is one of almost infinitely contestable policy advice. Lawyers need to understand the unique contributions they can make to this field.

The exercise of public power frequently impacts on the welfare of citizens directly. Decisions by ministers, civil servants, the content of Acts of Parliament, the content of regulations, and decisions made by local government all have a great effect on individuals. The question posed for public law is what can lawyers do about it? Well, they can learn where representations should be made to influence the decisions. Advocacy is not restricted to the Courts. Taking cases to Court is one of the least effective ways of influencing decisions and one of the most expensive. To ask for Court decisions about public law is like closing the stable door after the horse has bolted.

The effective lawyer wants to influence the decision for the client at the beginning, not overturn it at the end. I suspect that many practitioners think that the Court of Appeal of New Zealand is the main bulwark against the arbitrary exercise of power by government. The feeling is natural enough. Courts are part of the core legal business. I wish lawyers would wake up to the fact that there are many more avenues available for a client needing help to shape a policy or decision. Some of them have opened up only recently. Knowing where to apply those arguments and how to apply them in the most effective fashion is what public law should be about.

The new focus for lawyers and public law should be on policy outcomes. It comprises the making of carefully crafted arguments which can alter policies while they are in the gestation period, adding to the effectiveness of Parliamentary scrutiny of those policies, altering the application of the policies to specific cases within the executive branch of government, providing input to the legislative process to increase the quality of legislation and ensuring clients' interests are fully taken into account within the process. Further, my experience suggests there are some existing areas of public law which lawyers have tended to neglect in representing clients. Some may object to such an ambitious sweep for public law as the one I am advocating. It is not however, a case of whether lawyers are Pericles or the plumber. (W Twining "Pericles and the Plumber" 83 LQR 396, 1967.) They must be both. There are many needs for lawyer-like plumbing in constructing even the most holistic Periclean schemes.

While categories can give an artificial sense of order, the situation in which the opportunities occur can be categorised. The categories are:

1 Defining issues for policy attention prior to decision by government.

2 Bringing argument to bear on policies and decisions of executive government before they are adopted or made.
3 Assisting in the process of Parliamentary scrutiny of executive action and utilising Parliamentary remedies for clients. (This has particular application to the legislative process, but is not restricted to that.)
4 Ensuring existing features of public law are not neglected in advising clients.

Elsewhere I have attempted to isolate the questions which arise for New Zealand lawyers under the foregoing typology. (*New Zealand's Constitution in Crisis,* supra, 20-41.) I will not repeat the attempt here. One point needs to be stressed above all others. Of all the things that can happen to clients, government can cause them more trouble than any other entity. And the range of remedies available against government is greater than against any other opponent. The most potent of those remedies will not be found in Courts, important as the Courts are. □

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1 Bernard Crick, *The American Science of Politics* 127 (1959). Compare this approach with that adopted in the classic work, V O Key Jr, *Politics, Parties and Pressure Groups* (5th ed, 1964).

2 Lester W Milbrath, *The Washington Lobbyists* 7 (1963). Congressional Quarterly Inc, *The Washington Lobby* 1, 3 (4th ed, 1982).

3 Norman J Ornstein and Shirley Elder, *Interest Groups, Lobbying and Policymaking* 97 (1978). Gambling halls and hotels filled with women lobbyists were apparently common in Washington in the mid-nineteenth century.

4 James M Buchanan and Gordon Tullock, *The Calculus of Consent-Logical Foundations of Constitutional Democracy* 270 (1965). Before the reader dismisses these views as absurd remember one of the authors won a Nobel Prize in Economics. Indeed public choice theory as it has been developed in recent years in the United States offers a whole new way of looking at decision-making in the public sector.

5 Hobart CJ said "Public Policy is an unruly horse." He became Chief Justice of the Common Pleas in 1613. Burrough J said in 1854 that no judge should ever mount it lest it run away with him. Lord Denning MR said "I disagree. With a good man in the saddle, the unruly horse can be kept in control." See *Enderby Town Football Club v Football Association Ltd* [1971] 1 Ch 591, 606-7.

6 Foreign Agents Registration Act of 1938 22 United States Code Annotated sections 611 et seq, the legislation has been substantially amended and added to as a result of public concern over such matters as the allocation of quotas to import sugar to the United States.

7 *United States v Harris* 347 US 612 (1953). A serious argument was run that the statute was void for vagueness. In dissent Justice Jackson said that the Act was "so mischievously vague that the Government charged with its enforcement does not understand it . . ." 347 US 633.

8 *Interest Groups, Lobbying and Policymaking* supra note 3, at 106-114. The most recent efforts at reform have been aimed at regulating congressional ethics by prohibiting former legislative branch people from lobbying Congress for one year following their employment with Congress: J I Hochman, "Post Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government" 65 Washington L Rev 883 (1990).

9 D W Brogan, *An Introduction to American Politics* 353 (1954). Indeed, James Bryce in *The American Commonwealth* 557-8 (1888) wrote "Just as a plaintiff in a law suit may properly employ an attorney and barrister, so a promoter [of a cause] may properly employ a lobbyist."

10 Much of the material about the importance of bills and the need for an authoritative document concerning the reform was learned in the decade I spent in accident compensation reform, see Geoffrey Palmer, *Compensation for Incapacity—A Study of Law and Social Change in New Zealand and Australia* 197-213 (1979).

11 Geoffrey Palmer, "Sustainability—New Zealand's Resource Management Legislation" in M Ross and J O Saunders (eds) *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* 408-428 (1992).

12 This view is hardly new, see H Lasswell and M McDougal "Legal Education and Public Policy: Professional Training in the Public Interest" 52 Yale L J 203 (1963). The authors made the following statement at 208-209:

> It should need no emphasis that the lawyer is today, even when not himself a maker of policy, the one indispensable adviser of every responsible policy-maker of our society — whether we speak of the head of a government department or agency, of the executive of a corporate or labour union, of the secretary of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when informing his policy-maker of what he can or cannot *legally* do, is, as policy-makers often complain, in an unassailably strategic position to influence, if not create, policy.

Correspondence

Dear Sir,

re Bill of Rights — Call Out Rosters

We take very great issue with Mr Turkington's article — "Questioning the proposed questioning regime — does New Zealand need it?" — [1993] NZLJ 7 — in which it says . . . "experience with rosters to date has shown that invariably the young and inexperienced little known practitioners are involved . . ."

This office has organised the roster for South Auckland since its inception. We understand from the New Zealand Law Society that this was the first official roster to be established. The area includes the whole of Manukau City, New Zealand's largest city, and includes the Otahuhu, Papakura and Pukekohe Courts.

In establishing this roster the persons invited to join the roster were drawn from the Law Society's Approved Legal Aid list, and only those at Category 2 or Category 3 (the two higher categories) were invited to take part. So the issue of experience was carefully addressed.

Many of those in the roster would be considerably insulted to suggest that they were "invariably the young and inexperienced and little known practitioners".

The names of many of those are well known, and certainly are experienced, mature and not necessarily young. A copy of the latest roster is enclosed. [This is available for perusal. Ed.]

B V Fitzpatrick
Copeland Fitzpatrick & Co

Correspondence

Dear Sir,

re "Films Videos and Publications Classification Bill" [1993] NZLJ 16

Mr Dugdale's brief note on this Bill is long on emotion and somewhat short on legal analysis. He worries that those appointed to the Board of Review of the proposed regime will not be required to have any special qualifications. It is a matter of some concern to him that the Minister of Women's Affairs is to have some input into appointment of the Censor and the members of the Board of Review, together with the Minister of Justice, in concurrence with the Minister of Internal Affairs. His reasoning appears to be that contemporary feminism (with a big "F") has settled on reciprocal visual exploitation of men as its approach to equality, implying that there is no longer any concern with depictions of females as treating women as sex objects. As authority for this proposition, Mr Dugdale refers to an ironic statement made by poetess, Bub Bridger. Yet, having thus "proved" there are no longer any feminist zealots, Mr Dugdale suggests that it is necessary to leave the Ministry of Women's Affairs out of the process to remove such a (non-existent) influence. Heavens, Mr Dugdale is possessed of an intimate and coherent understanding of the women's movement (with a capital "WM") and a profound knowledge of its entire membership! He must therefore, be aware that there is a strong anti-censorship movement supported by a significant number of women. It is to be expected that the Ministry of Women's Affairs is also in touch with those views.

In his point 4, Mr Dugdale worries that the Bill presently gives weight in the classification process to whether a publication "degrades or dehumanises any person". He states that "old-fashioned" feminists tended to the sincere belief that depictions of human nudity and sexual intercourse do degrade and dehumanise, and concludes that this "feminist" agenda displayed in the Bill will remove any and all such depictions from the public arena. I am not sure who these "old-fashioned" feminists might be, or what era is being referred to, but again Mr Dugdale would find if he drew on his considerable knowledge of the "movement" that the feminist writings on pornography which began to appear in the United States in the 1970s (the "second wave") moved the focus of the debate about sexually explicit materials and censorship, from obscenity (tied to notions of morality – depiction of sex and nudity is bad per se as an expression of lust and uncontrollable urges, destructive of the family and of social mores), to pornography (focusing on the effects on women). These writings carefully differentiated between sexually explicit material which is degrading to women (and sometimes to children or men), depicting the sexual subordination of women, perpetuating myths about women's sexuality and objectifying women for the pleasure of men, and erotica, which is sexually explicit material depicted in terms of equality and dignity of the individuals involved and in realistic contexts. It may be said that there is a strong element within the "WM" uniting around the view that the latter is quite acceptable while the former is not. The view which Mr Dugdale mistakenly attributes to "feminism" is in fact that of the conservative "moral majority". Some women undoubtedly hold these views. So do many men – indeed, Mr Dugdale implies the present Minister of Internal Affairs holds such views.

The wording "degrades and dehumanises" used in the Bill is quite selective and intended as neutral. In fact, the Morris Committee of Inquiry into Pornography in its 1988 report, which openly acknowledged a definition of pornography derived from feminist writings and could be said to be the genesis of this Bill, suggested the word "demeaning" instead of "degrades or dehumanises". That suggestion was not taken up by the Government in its response.

What Mr Dugdale is really complaining about is the possibility that the Bill will allow the censorship regime to be hijacked by a fuzzy group of conservative reactionaries, led in some illiberal jack-booted way by a bunch of fictional feminists from the school of political correctness. Unfortunately his analysis ignores the true heart of the feminist debate, which is about equality, not licentiousness.

In any event, as a liberal, Mr Dugdale should know that the neutral empty legislative vessels with which liberals attempt to regulate human behaviour are apt to be filled with the ideas of the strongest lobby of the day. So long as New Zealand's censorship regime is a splendid neutral pastiche of interests (conservative, and liberal with a dab of feminism), it will please no-one, and there will continue to be an unfortunate focus on the characters of those who administer the system.

Ursula Cheer LLB (Hons) LLM Cantab.

Mr Dugdale replies:

I would like to comment on Miss Cheer's letter as follows:

It is unfortunate that Miss Cheer did not consult the *Hansard* Report of the introductory debate before writing her letter. No doubt, as she points out, different women hold different beliefs on censorship. But there is only one Minister of Women's Affairs, who under the Bill is given a right of veto of (not just "some input into") appointments. There can be little doubt where the present incumbent stands.

> Some will argue that this is a matter of personal rights or freedom. That is not my view, nor is it the view of many thinking New Zealanders, for it is women and children who are almost always the victim of such indulgence ... In future the imposition of strict liability will require customers to think very carefully about the material they are purchasing or that they may have in their possession. It is my view that that is a good thing ... I was not prepared to leave words such as "demeaning" and "degrading" in the hands of the courts and of those people who would make mischief with language. I think the word "objectionable" will overcome many of the problems ... I think that 1992, going into 1993, which is women's suffrage year, is a very appropriate time in which we should move. ([1992] *NZPD* 12761, 12778, 12779).

D F Dugdale

Professions at risk

By Rt Hon Mr Justice McKay, Judge of the Court of Appeal of New Zealand

This article was originally given as the annual Presidential address to members of the Wellington Medico-Legal Society on 10 February 1993. Mr Justice McKay considers the wider issues of professional status and standards. His Honour expresses some disquiet at recent trends within the professions and more particularly at the political and economic pressures on the very concept of a profession. He considers these pressures arise from a general ignorance of the way professional bodies operate and the false belief that the motivation of members is merely one of self-interest. His Honour emphasises that integrity and service as the hallmarks of our professional lives must be maintained.

It is traditional for the President of this Society to give a Presidential address. Sometimes this is focused on purely technical matters of law and medicine, much as are the other papers which are presented to us in the course of the year's activities. I have chosen a more fundamental topic. It goes to the very existence of our respective disciplines as professions, and whether this is something which can or should endure. The very concept of a profession, as it has been traditionally understood, is currently under pressure. Some of that pressure comes from within, from the attitudes and conduct of many of our own members. Some of it comes from outside, from the public, the media, advisers to Government and politicians.

My theme relates to all the professions, not merely to those of law and medicine. It applies to accountants, engineers and architects, and to other occupational groups who claim or aspire to be considered as professions. If I tend to use legal practice for most of my illustrations, that is because I am most familiar with it, but the medical members will readily identify examples from their own disciplines.

Many people outside the professions, and regrettably some within them, regard professional status as a privilege, as an advantage for the benefit of the professional person consisting of a monopoly of an area of work to be exploited for his or her own benefit. If that view is correct, then one would require strong evidence of some countervailing public benefit to justify such a monopoly. I believe, however, that it is a false view. I think it is timely for us to reconsider what is truly meant by the word "profession", to examine the present day need for truly professional attitudes, and to ensure that professional ideals are the basis of our approach to our work and are understood and appreciated by the community at large.

What a profession is:

What then do we mean by a profession? The report of the American Bar Association's Commission on Professionalism identified it with the placing of the interests of others ahead of one's own. In the case of the lawyer, the interests of the client must be placed ahead of those of the lawyer. The lawyer must also give precedence to the interests of the Courts and of the justice system, as well as to those of third parties and of society as a whole. All of these must take precedence over the lawyer's own personal interests.

I think the hallmarks of a profession can be summed up in two words – integrity and service. Integrity includes absolute honesty and complete trustworthiness. If we are members of a profession we must do our job competently and conscientiously in the interests of our client or patient, rather than in our own interests. We must be able to be relied upon to do just that. Integrity also requires us to be our own man or woman, exercising our own professional skill and judgment in the interests of our client or patient, and not merely doing what they ask us to do. The lawyer should not be a mere "hired gun" carrying out his client's instructions. Of course the client is entitled to define what he wishes to achieve, but how it is to be achieved and whether it can be achieved are matters for the lawyer's own skill and judgment, consistently with what is ethical and with his professional obligations. The patient cannot tell the surgeon how to go about an operation, nor can the client direct a barrister what questions he is to put to a witness, or the solicitor what arguments he must use in a letter. The client and the patient must either accept that certain matters are the province of the professional, or else take their problem elsewhere.

A member of a profession must also regard service as a primary objective, with reward being relegated to second place. This does not mean that one can ignore the financial side of professional practice, but it should be kept in its proper place. It is not the primary purpose of professional work. A barrister is not bound to accept a brief without payment of an appropriate fee, but most barristers do accept that there are clients who should have representation even if they cannot afford to pay an appropriate fee, just as doctors will treat people in similar situations. Indeed, in a recent judgment Mr Justice Williams has said in *Darvell v Auckland Legal Services Subcommittee* [1993] 1 NZLR 111 at 120, that rendering legal assistance to impecunious criminal defendants is a professional duty, from which no segment of the profession is excluded. This is

achieved on a swings and roundabouts basis. The professional is entitled to a reasonable reward for his services over the year, but should be able to achieve this while still providing unpaid or underpaid services where they are needed. So too, once one accepts a client or patient one cannot lower one's standards merely because one perceives that the service will prove unremunerative.

Public service

There should always be a public service element in the work of a professional. This includes what lawyers call "pro bono" work, that is services to people in need who cannot afford a proper fee, but it may also take the form of service on one's professional body, help to younger members of the profession, time given to preparing and delivering papers, seminars or lectures. It also includes wider areas of public service where the knowledge and experience of professional persons equip them to be of service to the community.

A professional body is not a mere self-interest group such as a trade association or a trade union. I am indebted to Mr Pat Downey for drawing my attention to an excellent statement of the difference by Professor C Northcote Parkinson, (of Parkinson's Law fame), in his book *Left Luggage* published in 1967. He said:

> Seekers of professional status have voluntarily limited the area of competition. Whereas the fishmonger might conceivably wish to drive all other fishmongers out of business, the dentist has accepted the idea that the other dentists are almost equally useful to the community. He joins with them in asserting the respectability of his calling and theirs, as also in barring from practice all those not properly qualified. Grocers or tailors may war with each other until half of them are bankrupt, but there is no comparable rivalry among chartered accountants or veterinary surgeons.
>
> One might expect to find that the aim of these quasi-professional associations is to raise or maintain their members' income. The fact is, however, that their discussions centre more often upon entrance qualifications, educational programmes, examinations and prizes for excellence and current research into the arts or sciences with which they are concerned. With their interest in professional status goes a sense of responsibility towards the public and towards the pursuit of knowledge. . . . There are many actions which a professional etiquette must make impossible and these are broadly the deeds which seem ungentlemanly. The member of a professional association has a respect for the public and a still greater respect for himself.

These concepts are no doubt familiar to you, but they have been significantly eroded over recent years. Seth Rosner, a New York corporate lawyer, wrote in the *New York State Bar Journal* in 1991:

> While it is certain that 40 or 50 years ago some people became lawyers to make money, I suggest that most who were attracted to the study and practice of law were motivated by the intellectual challenge and the varied opportunities it offers to serve clients, to help people, and to do good.

He went on to point out that during the last 15 to 20 years materialism has been the predominant motivation in American society. This was reflected, said Rosner, in the explosive spiral of starting salaries in the United States for top law school graduates, and the accent placed in law firms on achieving a certain number of billable hours in a year, a notion which virtually assures that some clients will be over billed. The client and the lawyer become adversaries, the lawyer's interest being to maximise the dollar return and hence to expand the work produced and the time billed. The client's interest is in getting the job done as efficiently and economically as possible. Rosner pleads for lawyers, especially those just beginning their careers, to restore to its previous status the notion that serving clients is the first goal of the lawyer.

Professional services involve skill, judgment and time. The importance and value of the service to the client is also relevant. Skill and judgment and value to the client can only be assessed, but time can be recorded and measured. The typical lawyer of an earlier period of our history used to keep a meticulous diary. Too many modern lawyers keep no more than a computer record of time spent. Time has become the dominant factor in costing, instead of being merely one of the relevant elements. The result is a premium for inefficiency, and in many cases excessive fees and a loss of respect for the profession. An article in the *American Bar Journal* of December 1991 on "The Future of the Practice" quotes a former Seattle attorney, Deborah Arron, as saying:

> In the 50s or 60s during some time and motion studies somebody noticed that if you kept track of your time you ended up billing more and people still paid. Suddenly firms started billing just by the hour.

She condemned the practice.

> It discourages pro bono work. It discourages contributions to the community, creativity and any kind of risk taking on a case you might not get paid for. . . .
>
> All that lawyers have to give up to get more meaning in their lives is some money.

We in New Zealand need to be aware of these risks. Mr Justice Holland in a judgment delivered on 20 August 1982 in the *JBL* litigation referred to the English practice where it is unethical for a barrister to accept instructions in ordinary litigation without a fee being marked on his brief. The fact that the solicitor accepted personal responsibility for the fee ensured that his client was protected, and that the fee was proportionate to the work to be done and the skill and reputation of the barrister. The fee reflected the responsibility of the brief, the complexity of the facts and the reputation and the skill of counsel, but was not determined on an hourly rate. If the practice had developed in New Zealand for fees of counsel to be based on a fixed fee per hour, then his Honour considered that practice to be an undesirable one. The incompetent would be encouraged to be prolix

and dilatory, and the efficient and truly skilled would be inadequately rewarded.

There are, happily, many members of our professions who continue to maintain the highest standards of professional service. Despite the many much publicised scandals of recent years, I believe that by and large our professions still enjoy a considerable measure of trust and respect within the community. Inevitably, however, the very concept of professions has come under scrutiny and criticism, and in some cases attack.

Professional discipline

One aspect concerns professional discipline. The traditional view has been that a member of a profession was not only subject to the general law in the same way as any other citizen, but was also subject to the additional requirements imposed by the ethics of the profession. In addition to suffering the ordinary legal sanctions which apply to any citizen who breaks the law, the member of a profession can be disciplined and punished by the professional body. Because this latter requirement is an additional sanction arising from breach of professional standards, it is appropriately dealt with by the judgment of professional peers, as being those in the best position to judge what is to be expected. Such hearings were traditionally held in private.

In recent years pressure has built up for disciplinary hearings to be open to the media, and for disciplinary tribunals to include lay members. Much of this pressure has been based on specious arguments, and in particular on the belief that members of a profession will naturally be "soft" in dealing with their own members. As most of us here well know, nothing could be further from the truth. Disciplinary tribunals generally comprise senior members of the profession who apply high standards in their own practice, and who certainly do not take an indulgent view of those who bring the profession into disrepute by departing from proper standards. Any one who has served on a complaints committee will know that when one has to plough through a number of complaint files at about 10 o'clock in the evening one is far from being in an indulgent frame of mind towards those practitioners whose lack of diligence or care, or whose unethical practices, have given rise to legitimate complaint.

Nevertheless, I believe the community has an interest in seeing that professional standards are maintained, and that those who are unfit to practise should be deprived of the right to do so. I know it has been the experience of the Law Society that the addition of non-lawyers as members of the disciplinary tribunals has been very successful both in the direct contribution the lay members have made in particular cases, and from the point of view of assisting client and public confidence. Also successful in a general way has been the opening of such hearings to the media, subject to the right of the tribunal to suppress evidence where client confidentiality makes this appropriate. It has meant an end to uninformed media criticism of closed hearings. While reports may be no more balanced or accurate than the prepared handouts of an earlier period, the responsibility for accurate reporting lies squarely on the media itself, as it does in the case of Court reporting.

Occupational licensing

Unfortunately the public perception of professions has been blurred by confusion with other groups which are the subject of "occupational licensing". A number of such groups were the subject of a discussion paper prepared by Dr Donald Stevens and launched by the then Minister of Justice, the Hon Geoffrey Palmer, at a reception given by the Economic Development Commission on 3 March 1988. He described the paper as an in depth study of seven industries with a focus on qualitative licensing. The industries concerned comprised auctioneers, second-hand dealers, real estate agents, motor vehicle dealers, massage parlour operators, private investigators and security guards. The paper was put forward as a basis for evaluation of the economic purposes of the existing industry regulation and an evaluation of the effectiveness of the legal instruments chosen.

Report on Occupational Regulation

In due course the Economic Development Commission issued a Report on Occupational Regulation. It listed 64 occupations at present subject to statutory control. Of these, 18, including doctors and lawyers, were considered appropriate for statutory registration. The report identified seven occupations, including accountants and engineers, where it considered that a sunset clause would be appropriate. In the remaining 39 occupations, including architects and patent attorneys, it considered statutory controls were unnecessary in the public interest.

Because this report became for a time the basis of Government policy, it deserves critical study. Its authors were two former University lecturers. One is described as an economic analyst and the other as a legal adviser, both then with the Economic Development Commission. The economic analyst had apparently been employed at one time in the Town Planning Department of a provincial city. So far as I am aware, neither had had any practical experience in the field of professional organisation and professional discipline. Neither of them appears to have held office in a professional body or served on or appeared before a disciplinary tribunal. This may explain, even if it does not excuse, the misconceptions which the report contains.

The basis of their approach is set out in the report in a series of statements of which the following extracts give the essence:

> A critical necessity in examining the need for occupational regulation is the need to review the problem as one concerning information. There are differing levels of quality offered by doctors, car dealers, music teachers, dentists and all the other occupations which are regulated. . . .
>
> The immediate problem for a consumer faced with this reality is not how to ensure that a minimum standard of performance is guaranteed, but rather how to distinguish an appropriate level and quality of service to match his or her needs. . . . .

> Information is therefore the essence of the problem which occupational regulation seeks to address. Occupational regulation is called for as a response to the consumers' problems in distinguishing appropriate levels and qualities of service provision.

The report is thus based on the simplistic approach of assuming that the only need for occupational regulation is to provide information. This is stated as if it were a self-evident truth, nothing being put forward to support it. Having thus adopted this as their premise, the authors reduce the whole issue to one of minimising the cost of obtaining information:

> The major question to be addressed in reforming occupational regulation . . . is "which kind of arrangements reduce search costs most without imposing other costs?" The choice of arrangements normally fall into two main categories:
>
> - government imposed arrangements such as occupational licensing, and
>
> - voluntary private arrangements such as trade associations.
>
> In reforming occupational regulation the two questions to be asked of a proposed arrangement are:
>
> 1 How effective is the proposed arrangement in reducing search costs, ie will it make it easier for consumers to make informed choices?
> 2 What costs does the proposed arrangement impose in reducing search costs, ie what other costs arise for consumers as a result of the arrangment?

The report proceeds on this narrow basis. It next stresses the efficiency of "brand names" for transmitting information as to the level or quality of products and services. In the case of professions, however, "such as doctors and valuers", it says:

> . . . the brand name is established by the state through use of the term "registered", rather than through membership of a trade or professional association.
>
> . . .
>
> The brand name in such cases becomes the name of the trade or the professional association.

The word "registered", or the description "solicitor", or "doctor", does assure the public of a certain minimum of qualifications or experience. There remains, however, a wide choice of individuals within these descriptions, and the true "brand name" is the name of the firm or practice or individual practitioner to which a person's reputation attaches. The report ignores this.

The report contains the bold statement "occupational regulation by licensing is anti-competitive because it has the effect of artificially reducing the number of operating practitioners". This occurs through the imposition of standards of entry and the granting of the right to practise only to certain individuals or firms. The net result "is to create an artificial scarcity of practitioners compared with what could otherwise be the case". I cannot speak for doctors, but I am sure that lawyers will be surprised to learn that there is an artificial scarcity of practitioners, and that the practice of their profession is uncompetitive. If unqualified persons could practise as lawyers and doctors, I think it unlikely that there would be any significant impact on competition. There might indeed be an increase in work, because of the need to repair the damage caused by unqualified persons.

The report condemns compulsory membership of professions:

> With compulsory membership individuals have a reduced incentive to create their own brand name and instead tend to rely upon the statutory body. Moreover, compulsory membership means that the associations consist, by definition, of the competent, the incompetent, the honest and the dishonest and so on. Consequently, the good provider, as a member, is tainted by association.

This is typical of the unsupported, dogmatic statements of this report. Doctors and lawyers do not attract business merely because, in common with their colleagues, they are described as "doctors or lawyers". They depend on their individual good name and on that of their firm, on their reputation for service, the location of their practice, and on word of mouth recommendation from colleagues and from patients or clients.

The report goes on to say:

> A final problem with occupational regulation is that in many cases it does not achieve the desired objectives of consumer protection and of helping the consumer distinguish the good from the bad.
>
> Regulation which mainly occurs at the time people enter a given occupation is neither a guarantee of good performance nor, more importantly, of continuing good performance. This is not the case with brand names where continual good performance is required to protect the name.

This wrongly assumes registration cannot co-exist with reputation attaching to a personal or firm name, serving the same function in regard to services as a brand name serves in regard to goods.

One would be inclined not to take seriously a report which adopts such an extraordinarily narrow approach and relies on such naive, dogmatic and unsupported assumptions. It nevertheless became the basis for a time of an attack on the traditional organisations of the professions, and an attempt to substitute a new system of Government control over them.

New approaches to professional organisation

The strongest professional bodies from which opposition might have been expected, namely the doctors, lawyers and accountants, were left to a later stage. The first group chosen for this new approach to professional organisation was the dentists, but the new approach had yet to reach its later dimension. The new Dental Act was passed on 16

November 1988. Under the 1963 Act, five of the seven members of the Dental Council, including the Dean of the Faculty of Dentistry at the University of Otago, were dentists, although two were appointed by the Governor-General on the recommendation of the Minister. Under the new Act only four of the eight members are required to be dentists. The Minister's appointees must now be non-dentists. The disciplinary powers, which under the old Act were exercised by the Council, are now given to a tribunal of five members, of whom only three are required to be dentists. The other two must not be dentists and are appointed on the recommendation of the Minister, although after consultation with the Council.

The next to be targeted were the pharmacists. The "Working Group on Occupational Regulation" reported to the Deputy Prime Minister in July 1989. I am not aware of the membership or qualifications of this group, but understand that it did not invite comment on a draft report, and did not communicate its final report until September 1989, when it advised that all but one of its 20 recommendations had already been agreed by the then Cabinet. In the areas of professional control, that is registration of qualified persons and discipline, the report followed the recommendations of the earlier Economic Development Commission Report without providing any further reasons. Among the proposals were the following:

> Entry to and expulsion from the profession, and the establishment of rules relating to professional conduct, were to be vested in a Licensing Board. The members of this Board, including the chairperson, would all be appointed by the Minister of Health. The members of the profession and their professional body would thus have no right to appoint even a single member of this Board, nor to be consulted by the Minister in making appointments.
>
> Of the seven members, three were required to have experience in the practice of pharmacy, and three were required to be non-pharmacists. Thus the functions which for over 100 years had been exercised by the professional body were to be taken from it, and given to a board which could have a minority of pharmacists, and which would be appointed solely by the Minister.
>
> Professional misconduct was to be limited to honesty and competence-related matters. Convictions for violence, sexual offending and presumably drug offences not related to the pharmacy would no longer make a person unfit to be a member of the profession. The existing professional body, of over 100 years standing, would cease to exist and any future professional organisation would not have statutory recognition.

The only reasons given for these recommendations in the report are naive and dogmatic assumptions, such as could only come from persons unacquainted with the way in which professions operate.

A bill to implement these recommendations was introduced into Parliament on 28 November 1989, with the requirement for submissions to be provided by the end of January and heard by the Select Committee early in February. This may have indicated a certain lack of confidence in the radical changes intended to be imposed. At all events, the Commerce and Marketing Committee heard submissions but did not report back to the House. The bill was shelved for the time being. It is not yet dead. It includes other provisions which are commendable, by way of a much needed revision of the existing 1970 Act. Last October it was referred to the Social Services Committee.

Cause for concern

The point of concern is that advisers to Government could propose such drastic changes to the organisation of a profession on the basis of such naive and simplistic advice, could gain acceptance of that advice as the basis for radical changes to the structure eventually of all professions, and could be able to take the matter as far as they did, namely to securing Cabinet approval and having legislation introduced into Parliament. If such ideas were to be carried into effect, then professions as the self-governing bodies we know today would cease to exist. Professional rules and ethics and their enforcement would cease to be the concern of professional bodies. They would become simply another form of Government control, being the prerogative of a board appointed by the Minister, the majority of whom need not even be members of the profession. Professions would become mere voluntary associations no longer having responsibility for admission standards, ethical standards and professional discipline. Past experience would be jettisoned in favour of the opinions of the ignorant and inexperienced, based on the assumption that the only objective should be to maximise competition and to introduce brand names, and that Government appointees must be best.

It would be wrong to think such things cannot happen. They very nearly did in the case of pharmacists. The bill introduced during the previous Government is still before the House, and has been referred to another committee which has yet to report. If it were to survive in its present form, one can expect other professions to be targeted. Once legislative precedents have been established for other professions, doctors and lawyers might be hard put to distinguish their own position.

I think it is important that we recognise the perceptions that led to these proposals – the obsession with economics and the free market, the general ignorance of the way in which professional bodies operate, and the false belief that self interest has been their motivation. As members of the two major professions who value the traditions of integrity and service, we need to ensure that the true value of professional bodies is widely communicated, and their benefits to the public widely understood. There is a role for our respective professional bodies in vigilance and in communication. At the personal level, we must ensure that integrity and service are the hallmarks of our own professional lives, and that we are worthy of the respect which our professions have traditionally enjoyed. □

Part performance: Back to classical theory

By R D Mulholland, Faculty of Business Studies, Massey University

The recent decision of Tipping J in Dellaca Ltd v PDL Industries *is the starting point of the discussion in this article on the doctrine of part performance. It is suggested that there is now such a large body of precedent that almost any application of the doctrine can be justified in a particular code. In* Dellaca *the Court decided not to grant either specific performance or damages. It is suggested that the case illustrates the continuing utility of classical theory on this issue, and that the Courts are understandably reluctant to abandon it.*

Introduction

Who said the doctrine of part performance was dead?

Those with a sentimental longing for legal positivism, or the seductive symmetry of nineteenth century classical contract theory, will find much of interest in the judgment of Tipping J in *T A Dellaca Ltd v P D L Industries Ltd* [1992] 3 NZLR 88.

But it has been conceded in some quarters that the much revered equitable doctrine of part performance was dead, having fallen a victim of the ubiquitous judicial talisman, estoppel: Nicholson, K G "Riches v Hogben: Part Performance and the Doctrines of Equitable and Proprietary Estoppel" (1986) 60 *Australian Law Journal* 345.

The judgment in *Dellaca* is significant in apparently going contrary to current trends in the judicial application of legal concepts, generally, and in particular, the current application of the doctrine of part performance. Indeed seldom in the New Zealand jurisdiction has that doctrine received such an extended judicial consideration.

This article reviews the history of the doctrine and focuses upon its application in *Dellaca*. Emphasis is upon the reasons which induced the Court to revisit the classical nineteenth century application of the doctrine.

Historical development of the doctrine

The so-styled "doctrine of part performance" which incidentally, was never limited to circumstances where the contract had been partially performed, arose as an exception to the Statute of Frauds which required certain contracts for the sale or other disposition of land to be evidenced in writing. The doctrine has been accorded statutory recognition in New Zealand in the Contracts Enforcement Act 1956.

The doctrine was administered exclusively within the equitable jurisdiction, which was prone to ride roughshod over early statutes. Thus if the doctrine was successfully pleaded only an equitable remedy was available. Specific performance of the verbal contract was the remedy usually decreed.

In the pre-nineteenth century administration of the doctrine the Courts took a highly subjective and pragmatic assessment of any equities which may have arisen from the factual situation of a particular case, and were not too concerned with whether or not a binding contract had been concluded. As with most equitable principles, the doctrine was applied directly with little reference to predetermined rules.

Many early cases which have long been categorised as falling within the ambit of the doctrine can now be seen as falling under the head of estoppel: *Lester v Foxcroft* (1701) Coles PC 108; 1 ER 205.

The development of nineteenth century classical contract theory, with its rigid requirements of bargain based consensus, brought about a complete reorientation of the doctrine. Emphasis was placed upon the existence of a clearly concluded verbal contract which the acts of part performance, which were relied upon, had to fit with a very high degree of precision, if they were to be effective in leading to the enforcement of the contract. Throughout the nineteenth century the Courts moved towards a clear formulation of this requirement and it reached a climax in the decision of the House of Lords in *Maddison v Alderson* (1883) 8 App Cas 467, 479, where, according to the Earl of Selborne:

> All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.

Thus the equitable element was virtually eliminated from the doctrine and with equity went the direct application of the doctrine. Emphasis was upon the existence of a contract rather than the substance of the transaction. The existence of equities in favour of one of the parties was relevant only after the primary issue of the existence of a contract had been determined.

The decision in *Maddison* retained its position as orthodoxy until the further decision of the House of Lords in *Steadman v Steadman* [1976] AC 536, 541-542, where Lord Reid restated the test as follows:

> You take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shewn to be more probable than not.

This test mitigated the technical rigour which had beset the doctrine since *Maddison*, and allowed a Court to take a more holistic approach to

the conduct of the parties. Monetary payments, which had not been admitted as acts of part performance since *Maddison*, because it was believed that such a payment could never be unequivocally referable to a contract, were restored as available acts of part performance.

Despite its undoubted attractions in allowing a Court to strike more at the substance of transaction, and thereby preventing just claims from failing through acts not conforming to precise rules, the decision in *Steadman* never found ready acceptance. In Australia its application ran into the problem of two High Court decisions, handed down early this century which had entrenched the *Maddison* test; *McBride v Sandland* (1918) 25 CLR 69, *Cooney v Burns* (1922) 30 CLR 216. In New Zealand it was only grudgingly accepted; *Boutique Balmoral Ltd v Retail Holdings Ltd* [1976] 2 NZLR 222.

But in the United Kingdom dissatisfaction as to the uncertainty which the decision in *Steadman* had given rise to led to the passing of the Law of Property (Miscellaneous Provisions) Act 1989 (UK), s 2 of which reads as follows:

> A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or where contracts are exchanged in each . . .

This provision replaced s 40 of the Law of Property Act 1925 (UK) which like the New Zealand Contracts Enforcement Act, specifically preserved the doctrine of part performance.

The 1989 Act made no reference to the doctrine and the apparent intention of the United Kingdom Law Commission (Report Law Com No 164 "Formalities for Contracts for Sale etc of Land") was that the doctrine should be abolished. It had been anticipated that developments in other areas of the law, for example, restitution, quantum meruit, and in particular estoppel, would provide adequate remedies where a loss had been sustained as a result of non-compliance with the statutory provisions. The effect of non-compliance with the 1989 Act is to render the "contract" void, not unenforceable, as was the case under the Property Law Act 1925 (UK) Thus there would be no contract upon which the doctrine of part performance could operate.

But a point for conjecture is the remedy which would be available to a party who has sustained loss through the fraudulent reliance upon the statutory formalities by the other party. It must be remembered that the old doctrine of part performance did not derive from the Statute of Frauds, it was a creation of equity in response to parties attempting to use the Statute as an instrument of fraud. It is difficult to see the Courts permitting the 1989 Act to be an instrument of fraud. Also there could be instances where a plaintiff would be satisfied only with the specific performance of the actual contract and other remedies would be inadequate. Thus it is possible, despite the unequivocal tone of the 1989 Act, that a doctrine of part performance, of some description or other, could be resurrected upon the new Act. The subsequent judicial interpretation of this United Kingdom statute will, no doubt, be watched with great interest in this country. In the meantime the New Zealand Courts are still operating under the pre-existing common law.

Application of the doctrine in *T A Dellaca Ltd*

Dellaca presented a traditional part performance situation. D negotiated a deferred payment verbal contract for the purchase of a warehouse building, in Westport, with the local property manager of PDL Industries Ltd. The agreed price was $55,000. D was then allowed into possession as a lessee, and spent $10,000 on rendering the building suitable for its purposes. PDL then sought to escape the contract after receiving a valuation of the property which was substantially above the sale price. PDL sought to treat the formal agreement submitted by D as merely an offer.

The Court found that a verbal contract had in fact, been concluded between D and the property manager of PDL. But there was no qualifying note or memorandum to satisfy the requirements of the Contracts Enforcement Act. The enforcement of the contract thus depended upon the successful pleading of the doctrine of part performance by the plaintiff.

Having been litigated for some three hundred years the doctrine is now overburdened with precedent. If a broad historical perspective is taken it is possible to uncover authority for a vast array of conflicting principles. The doctrine also exhibits a very high degree of particularisation.

Tipping J was thus faced with a wide array of options in applying the doctrine. Specific performance could have been decreed because, in accordance with *Steadman*, it was obvious that a contract had been concluded. There was nothing to prevent the Court from revisiting *Maddison* and assessing the acts in terms of whether or not they were "unequivocally referable" to some contract.

Instead the issue was resolved on the grounds that the acts relied upon were not in actual performance of the alleged contract, nor in exercise of a contractual right under that contract. As the acts relied upon did not fit this rubric the plea of part performance failed. The Court noted that no deposit had been paid (p 111) and a claim for damages was rejected because "in this situation damages cannot be awarded because there is no enforceable contract" (p 111).

The rationale for such an approach, it is submitted, can be found in the factual situation. The parties were both business entities, and could be regarded as of equal bargaining capacity. It could be argued that the expenditure incurred by the plaintiff was entirely at its own risk. Presumably, for these reasons, the case was not seen as lending itself to being resolved in estoppel in its capacity as a distinct head of liability entirely separate from the contract. In this respect the decision in *Dellaca* should be contrasted with that of Fisher J in *Ward v Metcalfe* & Ors (High Court, Hamilton, A 176/84, 11 April 1990, Fisher J) where the common law remedy of damages was awarded, on a successful plea of the doctrine, to recompense an elderly widow in respect to lost property rights. The awarding of the common law remedy of damages to the successful pleading of a doctrine previously known in equity represented a dramatic expansion of

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On the limited applicability of section 4, Bill of Rights Act

By Professor J B Elkind, Associate Professor of Law, Auckland University

The Bill of Rights Act 1990 is one of those pieces of legislation of which the long-term effect yet remains to be determined. Professor Elkind notes the provisions of s 6 requiring the Courts to interpret statutes as far as may be in a manner consistent with the general thrust of the Bill of Rights Act. He argues this could mean in practice that the restriction in s 4, of other enactments not being affected, may be largely irrelevant.

The Bill of Rights Act 1990 is in its early days. So far there has not been a great deal of academic discussion of this significant piece of legislation[1]. As to my own contribution to any discussion of the Bill of Rights, my earlier work[2] was about the entrenched Bill of Rights proposed in the New Zealand Government White Paper of 1985 and does not really concern the current Bill of Rights Act 1990 which is a much more limited piece of legislation.

The Bill of Rights Act is a more limited piece of legislation because, unlike the Bill of Rights proposed in the White Paper, it is not entrenched. It does not prevail over other inconsistent statute law. In fact s 4 provides:

> **Other enactments not affected** – No Court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),–
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment– by reason only that the provision is inconsistent with any provision of this Bill of Rights.

However s 6 says:

> **Interpretation consistent with Bill of Rights to be preferred**— Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

It is my thesis that if s 6 is applied as it ought to be then questions of application of s 4 should hardly ever arise.

To a constitutional lawyer, the purport of s 4 is clear. The principle of Parliamentary supremacy means that Courts will follow the latest Acts of Parliament. Of course a subsequent Act of Parliament may repeal an earlier Act. This repeal usually occurs explicitly when Parliament intends to repeal the earlier statute. But the problem arises when there is no clear intent to repeal an earlier Act. The rule is that Acts of Parliament must be read as consistent if at all possible. It is only when it is impossible to read the later and the earlier Acts as consistent with each other that difficulties arise. On that rare occasion, the earlier Act is said to be impliedly repealed by the later one and it is the later Act which is applied by the Courts even if that means that they must treat the earlier Act as invalid or ineffective.

It is these rare occasions which s 4 was passed to deal with, occasions on which the Bill of Rights is clearly inconsistent with *earlier* legislation. In the absence of ss 4 and 6, legislation passed after the Bill of Rights has come into force would impliedly repeal the Bill of Rights. But again, these occasions are rare and s 6 clearly enacts the other constitutional rule of interpretation to the effect that an interpretation consistent with the Bill of Rights must be preferred. It is a clear indication that the task of the Judge is to give effect to the Bill of Rights. Given the nature of this judicial task s 4 should be used only very rarely.

Sections 4 and 6 are part of a package of three sections. The third section in that package is what is known as the limitation clause. Section 5 says:

> **Justified limitations**— Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits

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continued from p 110

the doctrine and a shift away from its nineteenth century application.

The decision in *Dellaca* clearly illustrates the continuing utility of classical theory and the apparent reluctance of the Courts to abandon it. Its retention, no doubt, provides the Courts with a further option with which to approach a decision. In particular classical theory could continue to be applied in situations where a Court deems it appropriate to limit its resolution purely to the contract, that is the actual exchange between the parties. This could be the case, for example, where; there is equality of bargaining power as between the parties; no equities have arisen in favour of any party; no party has been guilty of unconscionable conduct; where it is not regarded as appropriate to apply an extra contractual remedy, such as estoppel; where a Court does not regard it as necessary or appropriate to redistribute a loss but instead prefers to let a loss lie where it has fallen. These situations will generally be found in predominantly commercial transactions. □

> prescribed by law as can be demonstrably justified in a free and democratic society.

Academic commentary on the Bill of Rights seems transfixed by s 4. It is accorded far more authority than it ought to be. Section 4 is interpreted as meaning that a statute that is inconsistent with the Bill of Rights ought to prevail over the Bill of Rights. This is wrong. the few cases that have purported to apply s 4 are wrong in principle and at least two have been overturned in the Court of Appeal.

Two leading lower Court cases are the blood alcohol cases, *Curran v Police* (1991) 7 CRNZ 323 and *Noort v MOT* [1992] 1 NZLR 743. In *Curran* the appellant was convicted of driving a motor vehicle in a manner which might have been dangerous to the public contrary to the provisions of s 57C Transport Act 1952 and refusing to permit a blood specimen to be taken, having been required by an enforcement officer to permit the same, contrary to s 58E(1)(a) of the Act. The appellant allegedly refused to take a blood test until his lawyer was present. At the trial, the Judge made much of the fact that the constable was not cross-examined as to whether the appellant was given any opportunity to speak to a lawyer or whether facilities were made available to him to do so. The appellant did speak to his father who advised him to take the test and he offered to do so but was then told it was too late.

Section 23(1) of the Bill of Rights Act says:

> Everyone who is arrested or who is detained under any enactment:
>
> (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right;
> . . . .

In the *Curran* case Doogue J said:

> Section 58A(1) of the Act provides that where an enforcement officer has good cause to suspect, as set out in the section, the officer, "may require that driver or person to undergo forthwith a breath screening test". Section 58B (4) provides in similar language for evidential breath testing. Where under s 58C(1)(b) of the Act a person has a right to elect a blood test such election is to be exercised within ten minutes of the statutory advice. Section 58C(2) of the Act uses the word "forthwith" in respect of the taking of a blood sample by a registered medical practitioner. It would be quite impossible for compliance with these provisions of the Act if there were to be delays which would inevitably arise in enabling access to a lawyer in accordance with s 23(1)(b) Bill of Rights Act (*Curran v Police* supra, at 329-30.)

Doogue J ruled that ss 58A, 58B and 58C were inconsistent with the Bill of Rights and, under s 4 were to prevail over the Bill of Rights.

He said that:

> there is an inconsistency between the purpose of those sections which is to ensure the safety of persons and vehicles on the roads of New Zealand and the provisions of s 23(1)(b) Bill of Rights Act enabling a lawyer to be consulted in every instance where a person is detained in respect of the steps to be taken under the Act in relation to breath . . . . (at 330.)

The case of *Noort v MOT,* supra, involved another defendant who was suspected of driving with excess blood alcohol. Through counsel, he contended that the evidential breath test upon which prosecution was based was inadmissible because it was obtained in violation of s 23(1)(b) of the Bill of Rights Act. The question whether he was detained or arrested was not in issue. The Court accepted that he was. Gallen J quoted Doogue J in *Curran v Police.* He accepted that:

> . . . no part of the Transport Act 1962 has been impliedly repealed or revoked or is invalid or ineffective as a result of the passing of the Bill of Rights Act so that the provisions in particular of s 58B(1) of the Act remain in full force and effect. (at 748.)

That should bring the matter to an end. If no part of the Transport Act is impliedly repealed or revoked or rendered invalid or ineffective, the logical next step would seem to be the application of s 6. But this is not what Gallen J did. Instead he said that he was satisfied that:

> . . . looked at overall the scheme and purpose of the legislation is such that the section [s 58B (1)] could be frustrated if the evidential aspect were to be dependent upon the availability of legal advice. (at 748.)

These decisions are wrong for the following reasons. In the first place there seems to be an unstated assumption that s 23(1)(b) of the Bill of Rights requires the physical presence of a lawyer. This is not so. A lawyer can be consulted and instructed over the phone. For some reason members of the Court of Appeal seemed to feel that the right to consult a lawyer over the phone amounted to only partial compliance with s 23(1)(b).[3] But on a reading of s 23(1)(b) all that is required is the opportunity to consult and instruct a lawyer. This would seem to be satisfied in most cases by the opportunity to consult a lawyer over the phone. The delay that this would entail is hardly significant. Secondly, s 58B (1) requires that the breath screening test be conducted "forthwith". But then the defendant is asked to accompany the constable to a police station for an evidential test. Here the term "forthwith" does not apply and there is no reason why a defendant accompanying a constable to a police station cannot be informed of his right to consult and instruct counsel. If there is a phone in the car, counsel can be called then and there. If there is no phone in the car, the call can be made at the police station. Thirdly, if s 58B of the Transport Act is not impliedly repealed or revoked or rendered invalid or ineffective by any provision of the Bill of Rights Act, then s 4 is inapplicable and should not be applied. If it is not applicable, then the Courts are required to apply ss 5 and 6. Since it is entirely possible for the Transport Act to be interpreted consistently with the Bill of Rights Act and for a defendant to be informed of his or her right to consult and instruct counsel and to be given an opportunity to do so, s 23(1)(b) of the Bill of Rights is applicable in these cases.

The correct approach was taken by Temm J in *Littlejohn v MOT* [1992] BCL 354. In that case, the defendant was charged with refusing to take a blood alcohol test. He was

arrested on suspicion of driving with excess blood alcohol. After repeatedly attempting and failing to supply a breath specimen, he was required to accompany the constable to his Auckland Harbour Bridge office for a blood test under s 58C(1) of the Transport Act.

There was some difference in the evidence over whether he had asked to consult with counsel. But the lower Court was of the opinion that he had done so. Temm J's attention was drawn to the *Noort* and *Curran* cases. He said:

> The argument on this appeal does not involve an assertion that the Transport Act 1952 or any of its provisions are repealed, revoked, or in any way invalid or effective (sic). Not does it involve a submission that the Court should decline to apply any provision of that Statute. Furthermore, since it is argued by the appellant that the provisions of the Bill of Rights Act are not inconsistent with the Transport Act, the whole of s 4 seems to me to have no direct relevance to this argument (at p 19 of the judgment.)

He then turned to s 5 and s 6. He said:

> . . . argument for the respondent necessarily involves a submission that s 5 permits a conclusion that the right to legal advice, being excluded by the blood alcohol section of the Transport Act, is a limitation that is "demonstrably justified". (at p 20 of the judgment.)

Criticising the *Curran* case he said:

> The learned Judge, Gallen J does not seem to have had it brought to his attention that the peremptory instruction "forthwith" applies to the breath screening test, but does not apply to the next stage in the process covered by s 58B (1), the request to accompany for an evidential breath test.

Regarding s 6 he said:

> That provision seems to me to indicate that Parliament intends the Court to give such a meaning to an enactment that enables the rights and freedoms contained in the Bill of Rights Act to be exercised or enjoyed as the case may be and that if such a meaning is possible it is to be preferred (to an alternative meaning which does not do so).
>
> The question therefore is whether a meaning can be given to the blood alcohol provisions of the Transport Act which is consistent with the rights conferred by the Bill of Rights Act (at p 20).

Clearly the appellant was detained under the Transport Act from the time the traffic officer decided that he detected the smell of alcohol on the appellant's breath and required him to undergo a breath screening test. Since he was a detained person, the Bill of Rights conferred on him the right to consult and instruct a lawyer. This right was not complied with by the traffic officer. In fact he was positively prevented even from making a telephone call to his lawyer.

Expressing doubts as to the conclusion in the *Noort* case, Temm J cited appellant's counsel with agreement:

> Counsel for the appellant in the case before me argued that there was no need to disturb the provisions of the blood alcohol legislation. He submitted that it was possible for the Bill of Rights Act to be complied with by a traffic officer informing a driver, after a positive breath screening test had been conducted, that he had the right to get in touch with a lawyer and if the driver wished to do so, to make arrangements for that to be done by a radio or telephone message while travelling to the place where the evidential breath test was to be carried out. (at p 30.)

Further criticising *Noort* and *Curran* he said:

> Notwithstanding the views expressed by the learned Judges in *Noort v MOT* and *Curran v Police*, it seems to me that counsel for the appellant had justification for submitting that the reasoning in those cases ought not to be followed because it is possible to give meaning to s 53B (1) and (2) which "is consistent with the rights and freedoms contained in this Bill of Rights" (s 6) and as such, which should be preferred. That meaning is that after a positive screening test, the suspect driver should be informed of his right to take legal advice and given the opportunity to make a telephone call in order to get it. (at pp 32-33.)

Unfortunately, much of what Temm J said about the Bill of Rights is obiter since he allowed the appeal against conviction on other grounds. But his conclusion relating to s 4 is significant.

Predictably, the Court of Appeal reversed both *Noort* and *Curran*. Cooke P said:

> Most countries with which New Zealand has affinity, probably all, have both laws of some kind protecting human rights and laws against drunken driving. The two have to be reconciled. Under the New Zealand system, which does not give rights the primacy given by some other systems, in the end the question is fairly simple. It reduces to whether the right to have a reasonable opportunity of obtaining legal advice by telephone is inconsistent with the scheme of the Transport Act regarding evidential breath tests and blood tests.
>
> On the evidence and other material before the Court, I do not think that inconsistency has been shown. There is no solid ground for inferring that the administration of the Transport Act will be substantially impaired or the road toll substantially reduced by the time required to give drivers who have been duly brought in for further tests, usually after a positive breath screening test, a limited opportunity of making telephone contact with a lawyer and taking advice. In relation to evidential breath tests and blood tests the two Acts can reasonably stand together. That is to say, I respectfully find the view taken by the High Court Judge in *Littlejohn* more convincing than that which prevailed with the other High Court Judges in the judgments under appeal. This result would follow even without s 6 of the Bill of Rights Act. Section 6 reinforces it (at 274.)

With regard to the initial breath test which must be administered "forthwith", this would seem to be adequately covered by s 5 of the Bill of Rights Act. It is a reasonable limitation prescribed by law which can be adequately justified in a free and democratic society. Cooke P however takes a different approach.

> In the present cases I do not think that any question for the Court arises under s 5. It is not disputed that as regards breath screening tests the Transport Act is inconsistent with and so overrides the right to legal advice. If the same inconsistency applies as regards evidential breath tests and blood tests, as has been held in the High Court judgments under appeal and is argued for the Crown, the same result follows. There would then be no point in consideration by the Court of s 5 (at 271-272).

This argument would give s 4 more authority than it ought to have. Of course Cooke P, in this passage, was responding to argument of counsel for the Crown. But Cooke P takes a rather original view of the relationship between s 4 and s 5:

> Section 5, as to justifiable limitations on the rights and freedoms contained in the Bill of Rights, is subject to s 4. So, if an enactment is inconsistent with any provision of the Bill of Rights, that enactment prevails and the Courts are not concerned with s 5. The Courts may be concerned with s 5 in common law issues, an aspect which need not be explored in the present cases. The Attorney-General is likely to be concerned with s 5 in performing his function under s 7. If he considers that any provision of a Bill appears to be inconsistent with any of the rights and freedoms affirmed in the Bill of Rights, in drawing it to the attention of the House he may well wish to draw attention also to s 5 and to the question whether the Bill, although apparently inconsistent with one or more of the rights and freedoms, nonetheless prescribes a reasonable limit demonstrably justifiable in a free and democratic society.

This is an extremely limited and primarily negative role for s 5. It is certainly not beyond the realm of the imagination that some future Crown Counsel, in seeking to uphold a particular statute in the face of a Bill of Rights challenge might ask the Court to find that it is demonstrably justifiable in a free and democratic society the Attorney-General having overlooked the matter.

Perhaps a better view as taken by Richardson J and Hardie Boys J:

> Finally s 4 falls for consideration only where following the application of s 5 and s 6 there is a necessary inconsistency between the other statute and the particular provisions of the Bill of Rights even as modified in its application by s 5 and after seeking to apply s 5, in which case the other statute prevails over the Bill of Rights to the extent of the remaining inconsistencies. (Richardson J, at 284.)

> The Part I sections, particularly ss 4, 5 and 6, must be read as a whole. Only then, I think, is the true significance of s 5, otherwise a difficult provision, apparent. It is plainly Parliament's intention that the rights and freedoms affirmed by the Bill should be upheld unless there is clear legislative intention to the contrary. The direction given by s 6 may not always be sufficient for this purpose. Section 6 is directed to the meaning of the other enactment, and does not permit any limitation or qualification of the Bill's rights and freedoms. It rather treats them as absolutes, and so, on its own, could allow quite wide scope for the application of s 4. Yet there must be many a statute which can be read consistently with the Bill's rights and freedoms if it is accepted that the statute has imposed some limit or qualification upon them; in other words, that although the statute cannot be given a meaning consistent with the Bill's rights and freedoms in their entirety, it can be given a meaning consistent with them in a limited or abridged form. It is obviously consistent with the spirit and purpose of the Bill of Rights Act that such a meaning should be adopted rather than that s 4 should apply so that the rights and freedoms are excluded altogether. (Hardie Boys J, at 287.)

In *R v Waddel* [1992] BCL 139, Thomas J held that s 18(2) and (3) of the Misuse of Drugs Act 1975 prevailed over s 23(1)(b) of the Bill of Rights Act. He said of ss 4, 5 and 6 of the Bill of Rights Act:

> I do not propose in this judgment to pursue the ultimate meaning of these three sections. They will fall for consideration in other more direct circumstances. Suffice to say that I consider that ss 4, 5 and 6, read collectively manifest Parliament's intention to provide the Bill of Rights with paramount effect unless it is clear that to do so would be inconsistent with the provisions of the enactment under consideration. In this respect I regard the rights contained in s 23(1)(b), fundamental though it may be, to be inconsistent with the provisions of s 18 of the Misuse of Drugs Act. It is not possible to confer that right and still give effect to Parliament's intention in enacting the Misuse of Drugs Act, and thus give s 18 its true meaning. (at p 22 of the judgment.)

He did not recognise the inconsistency in his own reasoning. If the guarantees of the Bill of Rights are fundamental then s 4 should only rarely be used to negate the rights granted in the Bill of Rights.

With respect I can find nothing in s 23(1)(b) of the Bill of Rights Act which impliedly repeals or revokes s 18(2) or (3) of the Misuse of Drugs Act or which renders it invalid or ineffective. That being the case, the proper approach would be to apply ss 5 or 6. Section 5 allows limitations which can be demonstrably justified in a free and democratic society. The limitation in s 18 of the Misuse of Drugs Act can be said to be such a limitation. Section 6 requires that s 18 (2) and (3) of the Misuse of Drugs Act be interpreted consistently with the Bill of Rights Act.

Another case which in which s 4 was used improperly was *New Zealand Underwater Association Incorporated v The Auckland Regional Council* [1992] BCL 237. In that case, the Planning Tribunal, Judge Sheppard presiding, considered two appeals brought under s 25 of the Water and Soil Conservation Act 1967 against a regional Water Board's decision granting the right to discharge dredgings from the port of Auckland into the Hauraki Gulf. Counsel for the Hauraki Maori Trust Board submitted that the nature of the Maori interest was of profound significance and would be seriously affected in an injurious way if the right to discharge dredgings were granted. Counsel cited s 20 of the Bill of Rights Act:

> **Rights of minorities** — A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion or to use the language, of that minority.

The Tribunal said that the Long Title of the Water Act contemplates a range of matters of community value which must be taken into consideration. Application of s 20 of the Bill of Rights Act would, they felt, negate consideration of those other matters. They cited s 4 of the Bill of Rights Act which they said has the effect that the provisions of the Water Act are not to be treated as ineffective by reason of being inconsistent with any provision of the Bill of Rights Act. Thus they held that the Long Title of the Water and Soil Conservation Act prevailed over s 20 of the Bill of Rights Act. The case has been withdrawn by the Maori objectors. So it will not proceed further in the Courts. But in this author's view the decision of the Tribunal is in error.

These cases simply do not apply ss 4, 5 and 6 in the correct way. As Rishworth says:

> In *Noort*, for example, Gallen J commenced his analysis with ss 4 and 5. Section 6 is mentioned only in passing, and in a part of the judgment which comes after his conclusion has been reached. In *Curran*, Doogue J quoted s 6 but noted that no submissions were made upon it by counsel; his judgment focuses on s 4 and mentions s 5 only to say that its "relevance . . . for the case . . . is not immediately apparent". (Rishworth, fn 1, below, at 339.)

A Judge must apply the law regardless of what submissions are made by counsel. The fact that no submissions were made by counsel on s 6 does not excuse the Judge from applying s 6 where appropriate.

The Long Title to the Bill of Rights Act says in part:

> **An Act**
>
> . . .
>
> (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (999 UNTS 171; 6 ILM 368 (1967).)

Richardson J recognised this relationship. After citing the Long Title he said; "[t]hat philosophical underpinning has to be taken into account when construing and applying the Bill of Rights Act provisions".

New Zealand is also a party to the Optional Protocol to the Covenant on Civil and Political Rights. (999 UNTS 302, 6 ILM 383 (1967). Entered into force for New Zealand 26 August 1989.) This Protocol gives individuals who claim to be aggrieved by a violation of the Covenant by New Zealand the right to petition the United Nations Human Rights Committee which sits in New York. The Committee then has the right to receive representations from the New Zealand Government and arrive at a decision as to whether New Zealand has violated the Covenant and to publish its decision. The one obstacle to the invocation of rights under the Covenant is the requirement in Article 2 that complainants first exhaust all available domestic remedies.

In considering applications, the United Nations Human Rights Committee is considering the Covenant and not the New Zealand Bill of Rights Act. Therefore there is no s 4 for the Human Rights Committee to take into account. The Human Rights Committee is fully capable of finding that a *statute* violates the Covenant and therefore ought to be repealed. It is also capable of awarding a complainant who has been damaged by a violation of the Covenant compensation for that damage.

What the Tribunal did not appear to realise in the *New Zealand Underwater Association Incorporated* case is that s 20 of the Bill of Rights Act is virtually identical to Article 27 of the Covenant which says:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Plaintiffs in that case could well have petitioned the United Nations Human Rights Committee which could have held that New Zealand is violating Article 27 of the Covenant with respect to them.

Another case in which s 4 was applied was the case of *R v Hoy*. In that case the defendant was charged with certain offences relating to Customs but under the Crimes Act 1961. The Court of Appeal per Mr Justice Hardie Boys referred to s 218(2) of the Customs Act 1966 which allows the Collector of Customs or other specified officer of the Customs Department to require any person to appear before him and to answer all questions put to him concerning any goods which are the subject of a Customs investigation. He pleaded s 23(4) of the Bill of Rights Act to the effect that he had a right to refrain from making any statement and to be informed of that right. Citing s 4 of the Bill of Rights Act Hardie Boys J said: "[t]hat section is a complete answer to counsel's submissions". (Court of Appeal, CA 315/91, 6 December 1991, p 7.)

It is not clear whether Mr Hoy was advised by his counsel of his right to petition the United Nations Human Rights Committee regarding a breach of the International Covenant on Civil and Political Rights (999 UNTS 171, 6

ILM 368 (1967).) Article 14 (3) of the Covenant says:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> . . .
>
> (g) Not to be compelled to be a witness against himself or to confess guilt.

This is another case that illustrates the danger that s 4 could leave New Zealand in violation of its obligations under the International Covenant on Civil and Political Rights.

It is the view of this author that the New Zealand judiciary is anxious to avoid being embarrassed by the United Nations Human Rights Committee and they are unlikely to use s 4 in such a way as to instigate petitions to the United Nations Human Rights Committee. □

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1 See Rishworth, "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" (Paper given to the Auckland District Law Society and published by them. 1992) : Rishworth, "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" (1991) *Recent Law Review* 337. The Bill of Rights Act is also mentioned in Harrison, "Judicial Review of Administrative Action: Some Recent Developments and Trends" (Paper given to the Auckland District Law Society and published by them, 1992). pp 36-40. Also relevant to the Bill of Rights is Elkind, "The Optional Protocol: A Bill of Rights for New Zealand" [1990] NZLJ 96; Elkind, "Interpreting the Bill of Rights" [1991] NZLJ 15; Elkind, "The Optional Protocol and the Covenant on Civil and Political Rights" [1991] NZLJ 410. The relevance of the Covenant and the Optional Protocol to the Bill of Rights will shortly emerge.

2 *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (Oxford University Press 1986): Elkind, "The Challenge of a Bill of Rights in Boston and Holland", *Radical Politics: The Lange Government* (Oxford University Press 1987).

3 *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 285-288 (per Hardie Boys J); 288-297 (per Gault J). In the words of Cooke, P "In the present cases it is conceded for the appellants that before evidential breath tests or blood tests under the Transport Act a reasonable opportunity of consultation with a lawyer by telephone is enough. Telephone consultation would not always be enough for a person held on a charge of murder, for instance".

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Correction

In the article "*R v Goodwin*: The meaning of arrest, unlawful arrest and arbitrary detention" by Janet November, published at [1993] NZLJ 54, there was unfortunately a printing error at p 55 where the word "not" was mistakenly printed as "now". The error is regretted and apologies made to the author. The corrected paragraph, with an additional amendment to the text by the author (made prior to publication), is published below.

"Cooke P, however, does not finally conclude that a deprivation of liberty per se is an arrest. He says:

> If a police officer makes it clear to a suspect that he is not free to go and is to be interrogated by the officer on suspicion of a crime, that person is arrested within the meaning of s 23(1)(b) of the New Zealand Bill of Rights Act. Under the present law of New Zealand the arrest is not lawful. (p 32).

This is a wider view than those espoused earlier in the judgment (p 23-24) in that it leaves out the necessity for an arrest to be pursuant to an enactment or an exercise of statutory authority. Presumably it is for this reason that Cooke P says "the arrest is not lawful". This phrase will be discussed later. The other problem with the above view is that his Honour ascribes it to Casey and Hardie Boys JJ as well. For reasons given below, it is submitted that while Hardie Boys J may well concur, Casey J would probably not."

Other printing errors in the same article were –

p 56, 3rd column, final para "p 554" should read "p 55".
p 59, 1st column, second quotation should read . . . "and procedural standards involved. An arrest . . ." "Not doubt" . . . (1st column, fourth para) should read "No doubt" . . . Footnote 9 should read "a better deal than the co-operative one. The Hon Mr Justice E W Thomas . . ."