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A WRITTEN CONSTITUTION?

In 1787 a remarkable event occurred. A group of educated men of letters, imbued with the classical Liberal tradition, got together and drafted a constitution for the former colonies in America. They knew that for their draft to work it would have to be acceptable to the whole range of states and voters. A document favouring some groups at the expense of others would have been ratified by some states and not by others, which would have undermined the whole point of the creation of the USA.

Since then constitutional drafting has usually taken place in one of two fora. One is the Lancaster House model in which a liberating power draws up a new constitution for a former colony in collaboration with the people who are about to seize power in it. Experience has demonstrated that the greatest pessimism about these people really consenting to and subsequently living with limitations to their power was amply justified.

The other model is some sort of elected constitutional convention. But in the end the same pessimism applies. The members of the convention will inevitably be political types, and even worse, may have been elected on party lines. The prospect of such people agreeing to real constraints on the power they either hold or aspire to is remote. This is like involving dingoes in the design of the dingo fence.

But if one asks "what is a constitution for?", the only possible answer is that constitutions are to limit the power of government. If one believes that the job of government is to deliver outcomes, to deliver happiness, then one will not be bothered with constitutions. Rules binding the government to particular processes or institutional design are bound one day to get in the way of achieving some desired goal.

Mr Moore has now proposed a Constitutional Convention of the latter sort for New Zealand. Its purpose would be to consider a "written constitution" in the sense of a comprehensive and systematically considered document. All former Prime Ministers would have a voice in this Convention and a key role would be played by a Leadership Council consisting of the leaders of all the political parties.

The next question is "do we want a comprehensive systematically devised constitution?" The answer "no" seems so contrary to the conventional wisdom these days that it requires explanation. Even then one still has to confront the point that over the last fifty years politicians have shown themselves so incapable of sticking to the rules that perhaps we are driven to having a written constitution even if it is not the first best position.

The least understood of Dicey's three principles of the Rule of Law is that our rights stem from the common law and not from legislation. Few constitutional lawyers understand the point of this these days and with modern eyes it is hard to understand. This is because we have come to assume that Parliament makes law and imposes it on us and that Judges do the same thing. What then is the difference?

But this is a demonstrably incorrect picture of the development of the common law. The common law arose out of the practices and values of the people. The task of the common law Judge was to decide disputes on the narrowest possible ground and on the basis of accepted best practice. There was indeed a "law" which existed independently of the Judges and their job was to declare it publicly.

This meant two things. First it meant that our rights are not "allowed" to us by politicians, or for that matter by Judges. They arose from us, from our own dealings and values, and were merely implemented in particular cases by Judges.

Secondly, because Judges were deciding disputes on narrow grounds on the basis of limited information, they could not predict the effects of their decisions on particular individuals or classes of people in future. The result was that they stuck to rules that applied equally to all, as required by the rule of law.

Today we have the idea that the job of both Parliament and Judges is to make "law" that will have particular effects and help to create the "kind of society we want" (a phrase which appears in Mr Moore's Explanatory Note to his Bill). Inevitably, the process becomes captured by interest groups who want the playing field tilted in their direction, aided by the conventional wisdom of the media.

An example of this thinking occurs in *Quilter and Pearl v Attorney-General*. Thomas J explicitly regards marriage as a status conferred by the state and the remainder of the Court seem to agree. Thomas J also regards marriage as having been designed for some purpose that individuals have sufficient wisdom to discern. Now it is true that when something is designed deliberately, it will usually be for some discernible purpose. But marriage was not designed by any individual, committee or Court. As an institution, marriage pre-dates modern conceptions of the state, and certainly pre-dates Parliament and our current judicial system. It is an institution which evolved and was subsequently ratified by law; any statements as to its purpose are ex post facto rationalisations which, like most such, will doubtless fail to capture the full subtlety of its role. Modern thinking has created the fallacy of believing that the Judges (in Thomas J's view) or Parliament (in the majority's view) have the right to change what we mean by this institution. Neither can do

so. All they can do is create their own institution which apes and even takes the same name as, that which evolved.

This fallacy would doubtless pervade Mr Moore's constitutional convention. The convention would then become an exercise in redesigning institutions that had never been designed in the first place for the benefit or supposed benefit of some interest group. Even if it is meant to reach decisions by unanimity or near unanimity, some group will emerge that will dominate the proceedings. This might be the largest group or it might be some other group whose importance was determined by the mathematics, or it might be a group whose importance was created by their own determination to play hard for everything they could get. It appears to be accepted, for example, that the job of Maori MPs is to obtain benefits for Maori and there is no reason why this attitude should not carry over into the constitutional convention. A few years ago it would probably have been the trades unions that would have been in the key position.

So a constitutional convention of this sort will become a device for imposing the wishes of some power group or coalition on the rest of us – the very thing that a constitution is supposed to prevent.

On the other hand it is equally evident that our current arrangements have failed to prevent this happening. But a survey of the scene abroad does not give cause for optimism that conventional constitutional arrangements provide any answer.

The fundamental problem of recent years has been the massive and routine breaches of the separation of powers. This problem is, however, commonly misdescribed. MMP and the formal separation of powers in the US Constitution were both designed to prevent the Executive from dominating the Legislature. But they have not succeeded.

The reason they have not succeeded is that the real problem is not the government's dominance of Parliament, but Parliament's involvement in government. Today, Parliament has two completely different roles. These are to supervise government and to pass laws. This conflict was not foreseen by the authors of the US Constitution because at the time the British Parliament did not involve itself in the private law and it would not have occurred to them that the US Congress would come to do so.

The results of Parliament's involvement in these two different roles can be seen in the conceptual confusion between administration and law and in practice in measures such as the Subordinate Legislation (Confirmation and Validation) Act 1997. This retrospectively legalises various illegal actions taken by the Crown. The Regulations Review Committee shed some crocodile tears over the measure but believed that the practical implications for the Crown of failure to validate the regulations in question would be so great that the measure should proceed.

In other words, the body which is supposed to pass laws applying equally to all has made itself an instrument of government and decided that it will use its law-making power to bail the Crown out of illegality whenever required.

The lesson of the last two centuries' experience is that if the same body is involved both in supervising government and in passing law, the latter activity will become subordinated to the former. This is not a function of the executive dominating the legislature as this observation is as true of the US Congress as it is of the New Zealand Parliament.

This implies that even the debate about the separation of powers has up until now been misconceived. The proponents of MMP argued that a Parliament with no clear majority would be one in which the government had to tread carefully for fear of having its programme upset. But this itself emphasises Parliament's governmental role. In practice, as with the separation of powers in the USA, it leads only to greater confusion about what the government is actually going to do. It does not lead to greater legal control of government because MPs, like most other people, can always be persuaded by a barrage of statistics that the particular problem justifies a departure from general principle.

The solution is that the two roles should be split. There should be two separate assemblies (not two chambers of the one assembly). The role of one should be to pass laws. These laws would apply to government and people alike. It would not need to sit for many days a year. The role of the other would be to supervise the activities of government, approve the budget and so forth. This assembly would be unable to make or approve decisions which conflicted with the general laws passed by the first assembly.

We need to ask ourselves what the authors of the US Constitution would have written if they had known what we know now. This would range from details such as specifying the number of Supreme Court Judges so that the President could not threaten to pack the Court, to taking measures to prevent the growth of the institutions which more than anything else have warped our perception of the role of government and Parliament, namely political parties. ❑

LETTER

RE BATTERED WOMAN'S SYNDROME [1997] NZLJ 436-438

I have grave concerns regarding "battered woman's syndrome" (BWS) entering New Zealand legislation. My objections are on both scientific and ethical grounds.

SCIENTIFIC OBJECTIONS

Although Elisabeth McDonald classifies BWS as a sub-type of post-traumatic stress disorder, this "syndrome" has no medical legitimacy, and does not even receive a mention in the Diagnostic & Statistical Manual of Mental Disorders (DSM-IV). The concept of "BWS" was invented by Lenore Walker in 1979(*"The Battered Woman"*, Harper-Collins, New York; and (1984) *"The Battered Woman Syndrome"*).

She hypothesised that women living in violent relationships suffer a cycle of violence and experienced "learned helplessness" which prevents them from leaving the relationship. The theory is based on the observations of this sole researcher and subsequent research has not found any empirical basis for her claim. "BWS" is a poorly substantiated hypothesis which has not been corroborated by serious rigorous scientific testing. (Faigman D & Wright A (Spring 1997). "The Battered Woman Syndrome in the Age of Science", *Arizona Law Review*, 39(1): 67-115.)

"BWS" does not meet the *Daubert* test for scientific reliability in the United States law Courts. It fails to pass the four criteria for *Daubert* validity:

1 **Scientific testability:** there has not been adequate testing of this syndrome;
2 **Error criteria:** criteria under which women suffer a violent relationship but do not develop the syndrome have not been established;
3 **Peer review journal publication:** the principal research projects on which battered woman syndrome expert testimony is based has only been published in the popular press, not in peer reviewed journals;
4 **General acceptance test:** while battered woman syndrome might be considered valid by clinical psychologists who work in the field of domestic violence (and hence with a financial vested interest), there would be few experimental psychologists who would consider it a valid entity.

ETHICAL OBJECTIONS

Walker claims that the syndrome is not a form of insanity, but a normal response of women in violent relationships. (Weiss M & Young C (19 June 1996.) "Feminist jurisprudence: equal rights or neo-paternalism?", *Cato Policy Analysis*, 256.) A woman is said to be suffering from the syndrome if she undergoes at least two cycles in her relationship of being repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do. Hence a woman can be considered battered even if there is no physical violence.

Entering and endorsing the theory of "BWS" in our legislation undermines the principles of the neutrality of justice, equality before the law and individual autonomy. It might be used as defence for women who physically harm or kill their partners. Certainly in cases of spouse homicide, it may be relevant for a woman to use a history of past violence, especially if her life has been threatened, as grounds for self-defence. However there is no reason why this needs to be labelled "battered woman syndrome".

The women's liberation movement of the 1960s fought for women's emancipation, to achieve equal opportunity for both men and women, and for equality before the law regardless of gender. However the radical feminist legal theory which emerged in the 1980s (and which has brought us "BWS") rejects the time-honoured principles of equal rights, justice and autonomy on the basis that these are patriarchal concepts. Ironically, "BWS" is a paternalistic theory which portrays women as weak, helpless and needing special privileges and protection. It denies women status as autonomous adults who are responsible for their actions.

The "syndrome" appears to be primarily an advocacy-driven construct designed to support justification claims by women who have killed their spouses, the product of political ideology rather than science.

All adults should have equal rights and responsibilities and women, or any other adult group, should not be assigned special status in our jurisprudence.

The endorsement of the unsubstantial concept of "BWS" in NZ legislation does the women of New Zealand a disservice. Given its lack of scientific basis, it appears to be an ill-conceived concept that is likely to be increasingly rejected by North American law Courts, where it first emerged. Eminent legal commentators are predicting that the syndrome will soon pass from the American legal scene. (Faigman D & Wright A (Spring 1997). "The Battered Woman Syndrome in the Age of Science", *Arizona Law Review*, 39(1): 67-115.) Rather than learn retrospectively from their mistakes, it is to be hoped that NZ law-makers act as vanguard in this instance.

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SAME-SEX MARRIAGES IN THE COURT OF APPEAL

Mark Henaghan, University of Otago

asks what Quilter and Pearl *reveals about Judges' attitudes to their role*

Three couples in long-term lesbian relationships asked the Court of Appeal to allow them to marry their same sex partners. (CA 200/96, 17 December 1997.) The case arose because the Registrar of Marriages refused to accept their notices of intended marriage under s 23 Marriage Act 1955. Kerr J in the High Court in *Quilter v AG* [1996] NZFLR 481 endorsed the Registrar's decision. No doubt there are infinite debates on whether same sex partners should be allowed to marry. The issue for the Court of Appeal is whether the Marriage Act as passed by Parliament in 1955 allows for same sex marriages.

THE MARRIAGE ACT 1955

The five Judges wrote separate judgments. They unanimously agreed that the scheme and language of the 1955 Act clearly and unambiguously confines marriage to a union between men and women. Richardson P says "the 1955 statute is so clear"; Tipping J says "marriage in the Marriage Act is regarded as so well understood that it does not need definition everyone proceeded on the basis that the word marriage signified the traditional concept of marriage". Thomas J concurs that the word marriage in the Marriage Act is to be given its common usage, and that meaning is "plain" on its face. So, while there is no express prohibition on same sex marriages in the Marriage Act 1955 (as there is no express prohibition on bigamy), the Court of Appeal had no doubt that the clear intent of the Act is that marriage is by definition a union between a man and a woman. This conclusion was bolstered by the use of the words "husband" and "wife" in s 31 of the Act, the words "man" and "woman" in the second schedule to the Act, and the words "his" or "her" in s 15(2) of the Act. Later legislation, in particular the Birth, Deaths and Marriages Registration Act 1995 was used by the Court of Appeal to show that Parliament's intent on marriage had not changed. Section 55 of the 1995 Act uses the terms "husband" and "wife". Section 77(6)(c) of the 1995 Act allows the Registrar to permit a marriage celebrant to inspect any document if the celebrant wishes to inspect that document for the purpose of investigating whether or not the parties to a marriage are a man *and* a woman. This was held to clearly imply that marriage is a status available only to a man and a woman. (Readers interested in a counter thesis to the Court of Appeal's approach should read Gillian Ferguson's LLB (Hon) thesis, "And the Brides Wore Purple? The Legality of Same-Sex Marriage in New Zealand", available from the Law Library, University of Otago, PO Box 56, Dunedin.)

THE CLEAR INTENTION OF PARLIAMENT

The Court of Appeal unanimously agreed that once the intent of Parliament is clear, then it is not for the Courts to override that intent. While New Zealand has a Bill of Rights Act, that Act does not override Parliament's sovereignty, it is not in the words of Tipping J a "concealed legislative tool". For same sex couples to marry in New Zealand requires fresh legislation. It requires Parliament to change its mind on who is allowed to marry.

THE ROLE OF THE JUDGE INTERPRETING LEGISLATION

Thus far the Court of Appeal followed the accepted role of Courts in our system of law, interpreting legislation in terms of the plain meaning and intent of an Act having regard to the general scheme of the Act. Because the meaning of marriage in the Marriage Act is found to be clear, s 6 New Zealand Bill of Rights Act prevents a Court from changing or colouring that meaning. At that point the Judges should end their analysis. Both Richardson P and Gault J know the limits of the judicial function. They dealt with the matter in hand, and gave reasons for their conclusions. If all Judges had taken this approach the decision would have been a lot shorter, about 90 pages shorter in fact. Instead three Judges, Tipping, Thomas and Keith JJ, choose to delve into an issue which had no impact on the result at all, namely whether not allowing same sex couples to marry was discrimination on the basis of sexual orientation. Tipping and Thomas JJ emphasise the impact legislation has on a particular individual or group to conclude that same sex couples are discriminated against by the laws of marriage because of their sexual orientation. Keith J (with whom Richardson P and Gault J record they concur) takes the view that non-discrimination rights are to be looked at in a "pragmatic functional way". This means that all differences of treatment are not necessarily discriminatory. Keith J relies on article 23(2) of the International Covenant on Civil and Political Rights which specifies the right of *men* and *women* to marry to conclude that s 19 of the Bill of Rights Act (discrimination on the basis of sexual orientation) does not reach the law of marriage. Section 19 can not be used to remove what is a central element of marriage, that the parties be of the opposite sex. So, not only have Tipping, Thomas and Keith JJ ventured into issues that were totally irrelevant to the outcome they have created uncertainty in the law by showing there is no consensus in the Court of Appeal on what the meaning of discrimination is.

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THE INTERNET AND INTELLECTUAL PROPERTY

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goes to the far end of the earth to find a decision on the use of the web

The power of the Internet to propel the more isolated regions of the world into the forefront of modern technology is well illustrated by the interim interdict of Lord Hamilton in *The Shetland Times Ltd v Wills* [1997] EMLR 277.

The facts of the case were that the pursuer reproduced certain news items from its own published newspaper, *The Shetland Times*, on its web site. Access to any particular news item was gained by clicking on the appropriate headline on the home page of the web site. To use the jargon of the Internet, the headlines thus comprised the "hypertext links" to individual pages of the web site.

The defender was the managing director of a news reporting service, Zetland News Ltd, (the second defender). Zetland also provided a news reporting service from its own web site. On the home page of its web site, Zetland included a number of headlines from the pursuer's home page. These headlines performed the function of hypertext links to the individual news items appearing on the pursuer's web site. Users of Zetland's web site were invited to click on the headlines and thereby obtain direct access to the news items appearing on the pursuer's web site.

The pursuer objected to such direct access for a commercial reason: its home page was designed to include advertising. If access to news items could be made by circumventing access to the pursuer's home page, as Zetland was promulgating for its users, then the pursuer's home page would lose much of its attraction for potential advertisers and would thereby sustain a loss of advertising revenue.

The pursuer brought an action claiming that its headlines constituted a cable programme and that their inclusion by Zetland in a cable programme service constituted primary infringement of copyright under s 20 of the Copyright, Designs and Patents Act 1988 (UK). In the alternative, the pursuer claimed that its headlines were literary works and that in storing the headlines by electronic means Zetland was infringing copyright by "copying" as provided in s 17 of the Act.

The wording of the relevant sections of the Copyright, Designs and Patents Act 1988 (ss 7, 17 and 20) is followed closely by the Copyright Act 1994 ss 4, 30 and 33. The findings of Lord Hamilton in the Court of Session are therefore of some significance for New Zealand users of the Internet.

Section 7(1) of the Copyright, Designs and Patents Act 1988 (cf s 4 Copyright Act 1994), provides that a cable programme means "any item included in a cable programme service", and that a cable programme service means a service:

> which consists wholly or mainly in sending visual images, sounds, or other information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception:
>
> (a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users), or
>
> (b) for presentation to members of the public, and which is not, or so far as it is not, excepted by or under the following provisions of this section.

Subsection (2) is designed to exempt interactive transmission services, such as the telephone system, from the above definition. It provides:

> The following are excepted from the definition of "cable programme service" (a) a service or part of a service of which it is an essential feature that while visual images, sounds or other information are being conveyed by the person providing the service there will or may be sent from each place of reception, by means of the same system or (as the case may be) the same part of it, information (other than signals sent for the operation or control of the service) for reception by the person providing the service or other persons receiving it ....

Lord Hamilton observing, no doubt with some relief, that "... no detailed technical information was put before me in relation to the electronic mechanisms involved ...," concluded that, *prima facie*, the process of allowing Zetland's customers to access the pursuer's web site involved the "sending of information" by the pursuer. His Lordship dismissed Zetland's suggestion that the subs (2) exception applied because the Internet is an interactive service. In the particular circumstances of this case, the primary function of the pursuer's web site was to send information. Indeed, this function of the pursuer's web site could be said to comprise "... a severable part of the pursuer's cable programme service".

Accordingly, Lord Hamilton affirmed that a *prima facie* case had been established for finding, first, that the pursuer's web site on the Internet is a cable programme service within the meaning prescribed by s 7 of the Act; and, secondly, that a hypertext link, such as a headline, contained within that web site, is a cable programme within the meaning prescribed by s 7. Furthermore, the unauthorised inclusion of a cable programme within a cable programme service is an infringement of copyright under s 20 of the Act (cf. s 33 Copyright Act 1994). Although not specifically stated in the reported decision, the necessary inference is a finding by his Lordship that Zetland's web site also comprises a cable

programme service within the meaning prescribed by s 7 of the Act. Accordingly, an infringement of s 20 was committed by inclusion within that web site of cable programmes belonging to the pursuer.

So far as the alternative claim under s 17 of the Act was concerned, it was common ground that in certain instances a headline can be a literary work. Lord Hamilton concluded that it was arguable that at least some of the pursuers' headlines were eligible for protection from infringement by copying under s 17.

On the balance of convenience, the interim interdict requested by the pursuer was granted.

For the educational institutions in particular, these findings are significant. Within academia debate continues over whether the inclusion of hypertext links to other web sites within academic or teaching-text web sites on the Internet, is permissible as being the equivalent of, say, a footnoted reference to another text within traditional published texts. Alternatively, it has been argued that any such hypertext link, by effectively allowing the incorporation of another author's original work within the first work, thereby constitutes an infringement of copyright. However, the question of copyright in a hypertext reference itself, either as a literary work or as a cable programme, had not arisen.

Following *Shetland* a further string may be added to the academic debate. For it is evident that many "academic" web sites would satisfy the *Shetland* test of cable programme service, the primary function of an academic web site being, in general, to send information. This part of a web site could be said to comprise "... a severable part of the cable programme service".

Furthermore, the question now arises as to whether any hypertext link is capable of being an "original literary work" within the meaning accepted by copyright legislation so as to thereby be afforded protection? If the particular hypertext link consists of a headline or a title then Lord Hamilton affirmed that it could indeed be such. If the hypertext link consists (as is more usual) of a coded "address" or sequence of information, then the position is more tenuous. The Court in *D P Anderson & Co Ltd v The Lieber Code Company* [1917] 2 KB 469 found that a code which was made up for the purpose of telegraphy was an original literary work and capable of protection. However the requirements of "sufficient skill, labour and judgment in its creation" (see *Independent Television Publications Ltd v Time Out Ltd* [1984] FSR 64), might prevent the more commonplace hypertext link from being considered to be worthy of copyright protection as an original literary work.

Because it raises several issues of importance to Internet users, a full hearing of the *Shetland Times* case would have been welcomed. However, the parties settled before the date set down for the full hearing.

In any event, it should be noted that s 4(3) of the Copyright Act 1994 confers generous powers on the Governor-General to make amending regulations. In recognition of the fact that modern technological developments were overtaking the legislature, the intention of the drafters of the Copyright Bill was "... to provide a flexible means by which account can be taken of both technological developments and difficulties of interpretation or application" (*Departmental Report on the Copyright Bill* (Department of Justice, Wellington, 1994)). It is hoped that any subsequent judicial finding which would seek to limit or prohibit the use of *any* hypertext links within "non-interactive" web sites would be viewed as an opportunity for appropriate use to be made of the amending powers of the Governor-General under s 4(3). ❑

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If New Zealand had an overriding Bill of Rights such as the United States, and Judges were the sovereign deciders of major political issues, the current Court of Appeal would have decided 3-2 that same sex couples were not discriminated against on the basis of sexual orientation by their exclusion from the status of marriage.

Politics and personal views

The whole of the second part of Thomas J's long judgment is a response to reading the draft judgment of Keith J. Thomas J asserts that Keith J becomes involved in "political" policy which should be a matter for Parliament. But later in his judgment Thomas J concedes that "a finding by this Court that the exclusion of gays and lesbians from the status of marriage constitutes discrimination on the grounds of sex or sexual orientation could result in pressure on Parliament to change the law". So who is playing politics? That is why there was a diversion into discrimination, this was the chance for three Judges to express their personal views on what they think Parliament should do.

Thomas J goes further and says he would make no award for costs because in his view the appellants had established they are subject to discrimination contrary to s 19 of the Bill of Rights Act. This gives the Bill of Rights Act more status than is justifiable. Thomas J acknowledges earlier in his judgment that the "Bill of Rights is not a supreme law .... This Court has an interpretative role." The interpretative role only comes into place where the wording of another statute is unclear. Here it was clear, therefore, that the Bill of Rights Act is irrelevant to the issue and can not be a justifiable basis for deciding on costs. Thomas J, by using the Bill of Rights Act in this way, is signalling to litigants who feel that a right has been breached even though the governing statute is crystal clear, and the Court can give no remedy, to air their grievance in the Court of Appeal. What such litigants should be doing is going directly to Parliament to lobby for a change of law.

Most concerning of all is Thomas J's assertion that Keith J's approach to s 19 discrimination rights is "ungenerous". It is not the function of Judges to be generous. The function is to focus on the issue in hand and interpret and apply the law to it in a fair and justified manner.

CONCLUSION

The strength of our system is that the Judges' primary task is to interpret and apply the law to the particular issue before them. Major changes of direction in legal policy are to be made by Parliament which is democratically accountable and more practically equipped to decide. Judgments which traverse international documents and legislative rights which have no effect on the outcome can only be explained in terms of the need for some Judges to see themselves as part of the policy debate. A judgment is not an academic article, it is a decision based on relevance and reason. The succinct judgment of Richardson P in this case is a model I hope other Judges follow. Not only will this make the law more accessible, it will also show that no matter what personal views or prejudices Judges may have, their key function is to apply the law in a disinterested manner. ❑

PRIVACY AND PAYROLL

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discusses the effects of the Privacy Act on payroll functions

The impact of the Privacy Act 1993 (the "Act") is particularly great in the employment relationship. Employers necessarily have a great deal of personal information on their employees. This paper examines the role of the Act in the payroll function and considers:

- how the Act's principles impact on the payroll function, with specific emphasis on the release of information;
- the interaction of the Act with other legislation – the compulsory release of information;
- the implications of non-compliance with the Act.

The Act aims to regulate and control the use of information generally, rather than specifically dealing with either the employment relationship, or the payroll function. For this reason, the Information Privacy Principles (IPP) contained in the Act, are necessarily general in nature and must be applied to the specific situation at hand. I have not canvassed the Act's principles in detail, but instead discussed those IPP which are directly relevant to the issues above.

It should also be noted, that in the context of the employment relationship, the Act does not operate in isolation. Employers must also take into account an increasing amount of legislation which impacts on the use of information in the employment context. For this reason, this paper is not merely confined to the Act, but deals generally with the legal requirements of handling payroll information. Where necessary, I have gone on to deal with other legislation where that legislation impacts on information likely to be held by an employer as part of its payroll function.

THE ACT AND THE PAYROLL FUNCTION

The Act's general principles

The Act principles can be broadly grouped into the five following categories, each of which is have discussed below:

- the collection of personal information;
- the use of personal information;
- the storage and security of personal information;
- the access to information by the person to whom that personal information relates;
- the disclosure of personal information to third parties.

The collection of information

An employer is required by statute to hold a great deal of the information that is necessary for its payroll function. These statutory requirements are imposed on an employer, so that various government agencies, such as the Department of Labour, can check records to ensure that employers are complying with minimum statutory standards. The following are the major examples of statutory requirements:

- **Section 47 Employment Contracts Act 1991 and s 8A Minimum Wage Act 1983** – require employers to keep records showing such things as the time worked by an employee and the wages paid to that employee.
- **Section 31 Holidays Act 1981** – requires employers to keep a holiday book showing various information about employees' holidays.
- **Section 24(2) Tax Administration Act 1994** – requires employers to retain PAYE records containing various details including the employee's tax code, their IRD number and their full name.

As an employer is obliged by law to hold the above information, it is entitled to ask for that information regardless of the provisions of the Act. Further, an employee is not entitled to decline to provide that information, or refuse to allow their employer to hold that information, based on any rights which are contained in the Act.

In addition to the information an employer is statutorily required to obtain, there will often be details which an employer requires in order to effectively operate a payroll system. Such information is likely to include the following:

- details of employee's bank accounts into which payments of salary or wages are made by direct credit;
- details of authorised deductions from salary or wages, for such things as medical insurance or superannuation, (as the Wages Protection Act 1983 prohibits most deductions from salary without the employee's consent).

Under the Act, the collection of this information is subject to the following broad requirements:

- **The information must be necessary for the payroll purpose** – Although this requirement seems only logical, it requires employers to make a conscious decision as to the specific information necessary for payroll purposes and not to ask questions that go beyond that. It is surprising how often employers ask a number of questions which they themselves cannot explain, but have simply asked for a number of years. (IPP 1.)
- **The information should where possible be collected directly from the employee concerned** – In practice, this requirement is likely to be complied with, because the employee is likely to be the best source of information regarding themselves. (IPP 2.)
- **The employee should be made aware of what is occurring** – The employer must fully explain to the employee: the fact that the information is being collected, the purpose for which it is being collected, the intended recipients of the information; and that they have the right to request access to the information and seek correction of any errors. (IPP 3). These requirements are often best met by simply providing a standard form to employees which sets out these details.

The use of personal information

IPP 10 restricts an employer's ability to use information for a purpose, other than the purpose for which it was collected. Payroll information is generally held in a centralised bank of information, such as a computer system. The advantage of holding information in this way is that it can be readily accessed and used for different purposes. For instance, the same information which tells an employer how much to pay an employee, can also be used to present projections and financial breakdowns of various proposals for restructuring or reorganisation of that employer's business.

However, such a practice can potentially breach the Act, if the purpose for which the information comes to be used, is not the same as the purpose or purposes for which that information was collected. For this reason, it is important to explain all of the purposes of collecting information at the time it is collected. If it is intended that information will be used for more than one purpose, those purposes should be specifically explained to the employee at the time of the information is collected.

It should also be remembered, that IPP 10 does not apply if the information is used in a form in which the individual concerned is not identified. For this reason, a great deal of general statistical information provided in regard to an employer's business will not breach the Act, because it will not identify individuals specifically.

The storage and security of information

IPP 5 requires an employer to ensure that information is protected by security safeguards that are reasonable in the circumstances to prevent loss, unauthorised use, modification or disclosure.

In the context of payroll information, a commonsense approach is suggested. Personnel files should normally be kept in controlled areas, where employees are not able to view the information contained within them. Similarly, payroll information contained in computer systems should not be accessible other than to a limited number of employees working in the employer's payroll function. Measures such as computer passwords, locked filing cabinets and restricted access to information areas, normally resolve security issues relatively simply.

Once information has been obtained, an obvious issue is how long should this information be retained. Employers should avoid the desire to simply hoard information just in case it might be needed. IPP 9 requires that information should not be kept for any longer than is required for the purposes for which the information may lawfully be used. Obviously, this wording begs the simple question of how long is it necessary to keep information. Again, legislation other than the Act, provides some indications of the length of time for which information should be retained. The following are examples:

- **The Holidays Act 1981, Employment Contracts Act 1991 and the Minimum Wage Act 1983** – require that holiday books and wage and time records are maintained for the past six years.
- **The Tax Administration Act 1994** – requires that PAYE records are maintained for seven years after the making of the payment.

It is unclear for how long other information should be kept. However, a recent investigation by the Privacy Commissioner (Case Note 5532), provides some useful guidelines. This concerned a complaint from an employee that their employment records were held by their employer after the termination of their employment. The employer's policy was to hold all records for a period of five years, because of the potential for legal action. The Privacy Commissioner accepted that this practice did not breach IPP 9.

Employees' access to personal information about themselves

One of the principles underlying the Act, is that a person is entitled to have access to personal information which concerns them. (IPP 6.) This means, that employees will usually be entitled to receive payroll information which relates to them. There are a number of exceptions regarding an employee's right to obtain information held about themselves. The most likely exceptions for an employer to rely on are:

- that the information is "evaluative material", in terms of s 29(3) of the Act, meaning that it was given in confidence, such as is usually the case with a reference;
- that disclosing the information would also lead to unwarranted disclosure of the affairs of another person in terms of s 29 (1)(a) of the Act;
- that the information is not available, is not held by the agency, or does not exist in terms of s 29(2) of the Act.

However, much of what an employee might seek from any payroll system is information which they are specifically entitled to receive. Section 47(2) Employment Contracts Act 1991, s 8A Minimum Wage Act 1983 and s 31(3) Holidays Act 1981 entitle employees to receive their own wage and time records and holiday records.

Disclosure to third parties

One of the basic principles that under-pin the Act, is that information concerning an individual should not generally be disclosed to other parties, without that individual's consent. Obviously, this principle is particularly relevant in the context of a payroll system, where an employer will have a vast array of information available which directly concerns that employee. Obvious examples are such sensitive information as, how much an employee earns, or that they pay child support. As a general rule, information held in a payroll system should not be disclosed to anyone unless one of a number of grounds set out in IPP 11 are satisfied. Of those grounds, the following are those grounds most likely to be relevant to the payroll function:

- the person you disclose the information to is the employee whom that information concerns;
- the employee whom that information concerns consents to its disclosure to the person who receives it;
- disclosure is necessary to facilitate the sale of a business;
- that disclosure is necessary for law enforcement/public revenue/Court proceedings;
- that the information is used in a form in which the employee is not identified.

THE ACT AND OTHER LEGISLATION

Official information

Requests for disclosure of certain information may be made under either the Official Information Act 1982 (for public sector agencies) or the Local Government Official Information and Meetings Act 1987 (for local authorities).

The underlying principle behind these two Acts, is that public information should be available to any member of the public, including those not in any way involved with, or directly affected by, that information, unless there are good

reasons against doing so. In this sense, these pieces of legislation take the opposite approach to the Act, which focuses on the person whom that information concerns having a right to privacy. This conflict is particularly acute, where a request is made for payroll information, such as the earnings of public servants, (s 9(2)(a) of the 1982 Act and s 7(2)(a) of the 1987 Act).

The Official Information Act and the Local Government Official Information and Meetings Act do not provide an automatic right to receive information. Rather, they require a balance to be struck between the public interest of disclosing that information and the reasons which exist against disclosing that information. Among the reasons for withholding information in Acts, is that the withholding of the information is necessary to "*protect the privacy of natural persons, including that of deceased natural persons*".

When a request is received by a public sector employer for release of an employee's remuneration details, that employer must assess whether withholding the information sought is necessary to protect the privacy of the employee in question, and, if so, whether the public interest in disclosure outweighs the need to protect the privacy of that employee. In the event that the information is not provided, the person who sought the information may lodge a complaint with the Ombudsman, who will then review the agency's decision and may order the release of the information.

It is critical that each case is assessed on its own merits. The following principles discussed by the Ombudsman, Sir Brian Elwood, in his paper entitled "*How Private is Your Name and the Salary you Receive?*" (speech notes for the Privacy Issues Forum, 29 June 1995), provide general guidance in determining how the balance between public accountability and individual privacy will be reached:

> The general approach having regard to the accountability purposes of the Official Information legislation can be summarised as follows:
>
> The salary of the chief executive or other head of a public sector organisation should be known, according greater weight to accountability than to privacy;
>
> Subject to consideration of the individual factors involved, salaries of second tier management, especially where that management has responsibility for the provision of services to the public and interfaces with the public, disclosure of the salary package, in financial bands, would generally meet accountability requirements whilst preserving a significant degree of privacy. Generally salaries up to and including $60,000 could be released in bands of ten thousand dollars. Salaries above $60,000 could be released in bands of 20 thousand dollars. Given the differing circumstances that are likely to arise when making decisions in respect of this group of individuals, some flexibility within the bands is possible where that is necessary in order to give reasonable weight to privacy issues; and
>
> Generally all other salaries where applicable to individuals should remain private, according privacy interests higher weighting than accountability interests. The accountability at this level may best be achieved by the identification of the costs of a particular service provision, which is clearly an accountability issue. Again, there may be exceptions where for instance identification of a service cost might likely identify the salaries of those directly responsible for the service.

Specific statutory requirements to disclose information

Section 7 of the Act provides that IPP 11 must be read subject to any other statutory provisions. Not surprisingly, there are a huge number of statutory provisions which require disclosure to government agencies, and I do not propose to go through all of these. However, some of the more common requests could be based on the following provisions:

- **Section 144 Employment Contracts Act 1991** – Labour Inspectors may request wage and time records, holiday records and any other document which records the remuneration of any employees.
- **Section 211 Companies Act 1993** – All companies registered under this Act, must, in their annual reports, provide the remuneration and the value of other benefits received by all company directors and the number of employees who earn $100,000 or more, including the number of these employees in brackets of $10,000;
- **Section 9A Companies Act 1955 (as amended in 1993), and s 266 Companies Act 1993** – The Registrar of Companies has wide powers of inspection under these provisions, including the power to "*require a company or any officer ... to produce for inspection any registers, records, accounts, books or papers that are kept by the company*".
- **Section 16(1) Tax Administration Act 1994** – The Commissioner of Inland Revenue or an authorised officer "*have full and free access to all land, buildings and places and all books and documents*".
- **Section 26(1)(b) Public Finance Act 1977** – The Audit Office has the power to "*require any person to supply any information or answer any question relating to books and accounts, money, or stores subject to its audit*", and s 28(1) provides that, for the purpose of fulfilling any lawful function or duty, the Auditor-General can require any person to give evidence, and produce all books and accounts in that person's custody or control.
- **Section 11 Social Security Act 1964** (As amended in 1993) – empowers the Director-General to require any person to provide the Department with such information as the Director-General requires for any of the purposes specified in s 11(2), such as: an assessment of whether any person is entitled to receive a benefit or payment, the rate of that benefit or payment, and eligibility for the issue of an entitlement card.

NON-COMPLIANCE WITH THE ACT

Liability for employees' actions

Under the Act, employers are responsible for the actions of their employees. An action by an employee is treated as being done by the employer, if it occurs in the performance of the employees's duties (s 4). Similarly, an employee's actions are treated as being the actions of the employer, even if they occur without the employer's knowledge (s 126(1)). However, an employer has a defence if it can show that it took such steps as were reasonably practicable to prevent the employee's actions which breached the Act (s 126(4)).

In view of these provisions, it is essential that an employer ensures its employees are fully aware of, and comply with, the restrictions on collecting, using and disclosing payroll information imposed on them by the Act.

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VICTIMS OF CRIME: THE WOMEN'S SAFETY SURVEY

Allison Morris, Victoria University of Wellington

continues the discussion of the National Survey of Crime Victims by looking specifically at female victims.

INTRODUCTION

The National Survey of Crime Victims explored the experience of victimisation of 5000 randomly selected New Zealanders. The Women's Safety Survey aimed more specifically to explore violence against women by their male partners. Its principal objectives were: to provide an alternative measure to police statistics of the extent of violence against women by their partners; to provide an alternative measure to the National Survey of Crime Victims of the extent of violence against women by their partners; to describe the context and circumstances of violence against women by their partners; to describe the consequences and effects of violence by women's partners on women and their children; and to identify the people and agencies women who experience violence by their partners talk to or approach for help and describe the women's assessment of that help.

Thus women who had already participated in the National Survey of Crime Victims and who were currently living with a male partner or who had been living with a male partner within the last two years but who were no longer living with him were invited to become part of a pool from which a sample of 500 women was then randomly selected. This eventual sample was made up of 438 women with current partners and 71 women with recent partners (nine women were included in both of these sub-samples as they had both current and recent partners). 351 of the 500 women were non Maori and 149 were Maori. Women were interviewed either by telephone or face to face, depending on their preference. This article summarises some of the survey's key findings with respect to violence against women by their current partners. Prevalence figures for violence against women at the hands of their recent partners are much higher but because of the small sample size they are a less reliable basis from which to generalise and so are excluded from discussion in this paper.

KEY FINDINGS

The prevalence of physical abuse

There is no reliable estimate of the extent of violence against women by their male partners in New Zealand (or elsewhere for that matter). It has been widely accepted for a long time that this violence is more common than the number of incidents reflected in police statistics even though this number has increased considerably over recent years, largely because of changes in police practice. It is also widely accepted that surveys of crime victims do not capture the extent of women's experience of violence from those known well to them: for example, women may not consider their experience of violence at the hands of their partner as "crime" within its conventional sense. Both men and women who participated in the National Survey of Crime Victims were invited at the end of the face to face interview to fill in a self complete questionnaire about their experience of partner abuse. There were a number of methodological problems with this (primarily the failure to complete the victims forms which would have included more detail about their experience). But the findings on prevalence can be viewed as indicative and show that 15 per cent of women and seven per cent of men had experienced one or more of the six items asked about.

In the Women's Safety Survey, women were specifically told that we were particularly interested in learning more about women's experience of violence at the hands of their partners and that other research had told us that this was a more common experience for women than violence by strangers. They were then asked about whether or not they had ever experienced any of 22 items of physical or sexual abuse ranging in seriousness from "using a weapon against you" and "choked or tried to choke you" to "threatened to slap you" and "threatened to push or grab you in a way that could hurt you".

Overall, around a quarter of the women with current partners reported that they had experienced at least one act of physical or sexual abuse by their partner. The most common behaviour reported was being "pushed or grabbed in a way that hurt". Maori women were significantly more likely than non Maori women to report that they had experienced at least one act of physical or sexual abuse by their partner. The fact that violence occurred at some point in a relationship is not, however, very useful in terms of current policy and planning and so three issues were explored further: the frequency of the violence, the recency of the violence and the seriousness of the violence.

First, the number of these 22 acts which each woman had experienced was calculated. From this, it is clear that a small number of women reported that they had experienced many different acts of violence. For example, two per cent of the women with current partners reported that they had experienced ten or more acts of physical or sexual abuse by their partner. Maori women were significantly more likely than non Maori women to report that they had experienced multiple acts of physical or sexual abuse by their partner.

Second, women were asked about whether or not they had experienced any of these same 22 items within the last 12 months. Overall, fifteen per cent of the women reported experiencing at least one act of physical or sexual abuse in the past 12 months at the hands of their current partner. One per cent said that they had experienced this "very" or "quite" often in the past 12 months. Again, the proportion of Maori women was much higher in both cases.

Finally, three indicators of the seriousness of abuse were used: medical or hospital treatment, fear that a partner might kill them, and the woman's own assessment of seriousness. One per cent of the women reported that they had been treated or admitted to hospital as a result of their current partner's violence, one per cent also reported that they had received medical treatment from a doctor as a result of their current partner's violence and three per cent reported that they had been afraid that their current partner might kill them. In each case, the figures for Maori women were higher. Overall, half of the women rated the violence they had experienced at the hands of their current partner as "very serious" or "quite serious". Similar proportions of women said the violence they experienced had affected them "very much" or "quite a lot". The majority of women who believed that their children had witnessed or heard the violence they had experienced at the hands of their partner also believed that it had had an effect on their children.

why women stay in or return to violent relationships is complex and requires a range of possible responses and solutions. Women were asked what might make them safer and almost half replied that nothing would

Comparing New Zealand findings on prevalence with overseas data

Ten of the 22 items asked about broadly correspond with items used in a Canadian survey on Violence against Women and, overall, comparisons indicate higher levels of violence against women by their current partners in New Zealand than in the Canadian survey: 15 per cent of Canadian women reported that they had experienced at least one incident of physical or sexual assault by their current partner. The New Zealand figure was 24 per cent and, for Maori women, it was much higher: 44 per cent. It is not possible to make precise comparisons between the New Zealand data and the Canadian survey for a 12 month period separately for women with current partners as the data were not broken down in this way. However, three per cent of Canadian women had experienced violence by a spouse or ex-spouse within the last 12 months. The figure of 15 per cent in the New Zealand survey is clearly much higher, especially since it does not include "ex-spouses".

Comparisons with Australian data are also indicative of higher rates of violence in New Zealand by men against their current partners. For example, a survey carried out in Perth in 1994 used a number of different measures or definitions of violence which produced three different rates for the past 12 months: the highest was four per cent. More recently, the Australian Bureau of Statistics surveyed 6500 women and eight per cent of these women reported experiencing at least one incident of physical or sexual assault by their current partner during their relationship – the New Zealand figure was 24 per cent. And three per cent of the Australian women reported they had experienced violence by a current partner within the last 12 months – the New Zealand figure was 15 per cent. Thus, the Australian figures are in each case lower than those in the Women's Safety Survey.

Comparing what New Zealand men and women report about prevalence

A rather different way of looking at these findings is to compare women's experience of violence by their partners with men's accounts of the abuse that they have used against their partners. Leibrich et al. surveyed just over 2000 men in New Zealand in 1994. The two surveys are not exactly comparable since the men referred in their answers to any legal or de facto wife or girlfriend, whether living with them or not, whilst, in the Women's Safety Survey, the women were referring to their experience of violence with the one man they were currently living with. And the questions asked in the two surveys were not identical. However, the comparisons show that the men reported much higher rates of violence against their partners over their lifetime than the women reported ever experiencing at the hands of their current partner. Overall, more than a third of the men reported that they had been violent towards their partners during their lifetime while only a quarter of the women reported that they had ever experienced violence from their current partner. The percentages reported for the shorter time-frame, however, were broadly similar. This seems to go some way to confirming the findings on prevalence produced by the Women's Safety Survey.

Coping with partner abuse

Outsiders can often not understand why women continue to live with violent partners and so some attempt was made to gain an understanding of this. First, a range of strategies are used by women to cope with violence by their partners including leaving their partners for some length of time because of their violent behaviour. However, clearly, the women had returned to the relationship and this raises important questions about why this happens. For some women, the relationship continues to offer them something positive: they talk about the "good times" outweighing the "bad times". Others saw life on their own or with a number of young children and without adequate resources as an even less attractive option than the experience of violence. And some women saw their experience of violence as just part and parcel of "family life".

Thus why women stay in or return to violent relationships is complex and requires a range of possible responses and solutions. Women were asked what might make them safer and almost half replied that nothing would. Otherwise, "leave him permanently" was the principal strategy suggested. However, as just noted, the women had not done this. Most of the women who had experienced violence had spoken to someone about it, mainly their partners, their immediate family and their friends and neighbours, but they tended not to call the police. Only ten of the 126 women who disclosed any level of physical violence at the hands of their current partner had ever asked the police to come to

their home to deal with their partner's violence. Indeed, neither "police action" nor "Court action" featured in the "top five" influences which women believed might change an abusive partner's behaviour. The most common influences mentioned by the women in changing their partner's behaviour were "fear of losing me" and "counselling".

CONCLUSION

The level of violence against women by their partners does seem higher in New Zealand than in either Canada and Australia. Indeed, overall, the Women's Safety Survey confirms Leibrich et al: New Zealand men are quite violent towards their partners. One in seven women in this survey reported that they had experienced at least one act of physical or sexual abuse at the hands of their current partner within the last twelve months. The figure for Maori women was one in 4. One in 100 women reported that they had been victimised by their current partners very or quite often in the last 12 months. Again the figure for Maori women was higher: one in 50.

In understanding these findings, methodological effects cannot be entirely discounted. The sample, for example, may have been biased in a number of key respects: in particular, women who had experienced violence by their partners may have been more willing to participate in the survey than other women. This would mean that the figures quoted over-state the level of such violence. On the other hand, the women who agreed to participate in the research but who subsequently could not be traced may have been untraceable because they were the victims of abuse. This would mean that the figures quoted under-state the level of violence experienced by women at the hands of their current partners.

The Women's Safety Survey also had a number of unique methodological features: women were able to choose the method of interview most suited to them, they were asked about a long list of violent behaviours, and it was very clear from the outset that the survey was specifically about violence against women by their male partners rather than crime victimisation in general. These features might have lead to the women being more "open" about the abuse they experience(d) than women in other surveys. On the other hand, it is generally accepted that women are reluctant to disclose violence against them, especially by their current partners, for reasons of shame, embarrassment and so on.

Whatever the accuracy of the estimates of violence revealed in this survey, the data are certainly indicative of high levels of violence experienced by New Zealand, especially Maori, women at the hands of their current partners. It may be, however, that overseas studies continue to under-estimate the violence of men against their partners and so we cannot yet conclude, or try to explain, New Zealand's apparently high level of violence against women by their current partners.

With respect to responses to violence against women by their current partners, it seems clear that leaving their partners is not a solution for many women. They want the violence to stop but they do not necessarily want to leave the relationship. This often also means that calling the police is neither a preferred nor first solution for most women since this may impact on the relationship. The challenge is to find solutions which allow those women who do want to leave the relationship the options, skills and resources to do so and which enable those women who want to remain in the relationship to be safe from violence from their partners. ❑

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Remedies for breach of the Act

In the event that the Complaints Review Tribunal finds that there has been a breach of the Act, the following remedies may be awarded under s 85 of the Act:

- a declaration that the action of the defendant is an interference of the privacy of an individual;
- an order restraining the defendant from continuing or repeating the breach;
- damages for pecuniary loss, loss of a benefit or mental suffering;
- an order that the defendant perform acts to remedy the breach of the Act;
- costs.

Other legislation

We have already seen, that there is a great deal of legislation, other than simply the Act, which imposes obligations on employers regarding payroll information. In the event that these obligations are not met, this same legislation also imposes penalties, some of which are set out below:

A failure to provide an employee with access to wage and time or holiday records, and/or a failure to release those records upon request by the employee, would constitute a breach of s 47 of the Employment Contracts Act 1991, and would give rise to liability for a penalty under ss 50-53 of that Act. These penalties can be up to $2,000 for an individual, and $5,000 for a company, in respect of each breach.

A breach of an IPP might also provide a basis for, or be relevant to, a personal grievance claim in the Employment Tribunal or a claim for a breach of an employment contract in the Employment Court. For instance, in *L v M Ltd* [1994] 1 ERNZ, 123, the Tribunal considered the unauthorised disclosure of information regarding an employee's sexual orientation. The Tribunal concluded that the employer's actions resulted in a constructive dismissal, because the employee could not possibly continue in his employment and awarded the employee monetary remedies.

CONCLUSION

The operation of a payroll system necessarily brings with it the requirement to collect, disclose, maintain and use personal information regarding employees. This places an employer in the midst of a myriad of obligations imposed by both the Act and a range of employment related legislation. In the event that an employer fails to comply with these obligations, it is likely to face costly litigation and risk disruption to the workplace.

However, it would be wrong to view compliance with the Act as simply a costly inconvenience. There is an inherent tension between an employer's need to obtain and use personal information to operate a payroll system and the privacy rights of individual employees. The Act does not create this tension, but rather it recognises it and provides a framework within which it can be managed. ❑

CHARITABLE ACCOUNTABILITY

David Ireland, Kensington Swan, Wellington

asks whether there should be an end to the free reign

There is no specific law, nor standard procedure, nor Government department solely concerned with the accountability of charities to those who give them donations, in cash or in kind. There is no single source of information about charities and/or incorporated societies even though several Government departments keep registers of such bodies for their own purposes.

It has been concluded by an ad hoc working party initiated by the New Zealand Association of Philanthropic Trusts that it would be more appropriate for the sector to determine its own position on accountability before a position were to be imposed by outside sources

(Extract from the report of the Accountability of Charities & Sporting Bodies Working Party – the "ACSB Working Party" prepared by Heather Newell, February 1997)

One of the features of New Zealand law governing trusts is the lack of formal reporting requirements. Although there is a general obligation upon trustees to maintain proper records and accounts (see for example: *Re Bassett* [1934] NZLR 690), this obligation is not reflected in any formal statutory reporting mechanism and is at best an imprecise policy guideline for trustees to follow.

In respect of private trusts, lack of formal reporting obligations is logical. Such vehicles are generally mere extensions of the endeavours of private individuals who fund such trusts. Formalising reporting requirements for such vehicles, beyond any revenue requirement to file income tax and GST returns, would be similar in philosophy to requiring individuals to file reports of their own personal activities on a regular basis. It should be sufficient that the law gives identified beneficiaries of private trusts the ability to hold the trustees to account (for example, a beneficiary can compel a trustee to do that which is required of him: *Bartlett v Bartlett* (1845) 4 Hare 631).

Contrast this with the position affecting charitable or public trusts. For charities, it is the Attorney-General who must champion the cause of the public objects of the trust. In theory, the Attorney-General has wide powers to investigate the operations of any charity, and may apply to Court for a wide array of remedies in the event of mis-management being identified. However, as identified by the Property Law and Equity Reform Committee in the opening section of their 1979 Report on the Charitable Trusts Act 1957, the powers vested in the Attorney-General:

> may not be effective in practice because the Attorney-General has no means of obtaining information about the operation of existing trusts nor indeed does he even have any means of ensuring a knowledge of their existence. The only occasions in practice when his function are exercised are:
>
> - when trustees make an application to the Court for the approval of a scheme; and
> - when some complaint is raised by a member of the public. (Part I, para 3)

Identification of this accountability issue is not new. In New Zealand, it seems that every decade a new review is commissioned, reports compiled and recommendations made. The 1979 Property Law and Equity Reform Committee was followed in 1989 by the report of the Working Party on Charities and Sporting Bodies ("the Spencer Russell report"), focusing on the appropriate taxation regime to apply to charitable organisations and sports bodies. Hot on the heels of this report was the Coopers & Lybrand Peter Barr research project by Sue Newbury in 1992, entitled "Special Issues of Accounting for Charities in New Zealand".

The latest project undertaken in respect of the charitable sector is that of the ACSB Working Party established under the auspices of the New Zealand Association of Philanthropic Trusts and funded by the Department of Internal Affairs, the Department of Justice, and the voluntary sector. The purpose of this article is twofold: to provide a progress report on the efforts of the ACSB Working Party, and assess the appropriateness of reopening the accountability issue.

Before looking at the options for reform, it may be useful to briefly outline the current mechanisms for reporting and regulation of charitable organisations, which may serve to highlight some of the deficiencies and inconsistencies which have prompted this latest initiative.

ACCOUNTABILITY TODAY

Regulatory reporting obligations imposed on charitable organisations are minimal. Income-generating charities may be required to make tax returns, but the Commissioner of Inland Revenue is not concerned with accountability as such. The Commissioner's role is to ensure that income not entitled to an exemption is taxed, which falls well short of holding charitable trustees accountable for their administration. Further, other than limited registers of "donee organisations", the records of the IRD are not public.

Incorporation under the Charitable Trusts Act 1957 carries with it no ongoing reporting obligations, other than to record constitutional changes on the public register maintained by the Registrar of Incorporated Societies. There is no requirement to file annual accounts or reports, the obligation to maintain accounts is left to the general law affecting trustees. Regardless, the trustees of charitable trusts are

not obliged to seek the benefits of incorporation under this legislation, and thus are not forced into the public arena.

Other than charitable companies subject to usual corporate reporting obligations under the Financial Reporting Act 1996 and the Companies Act 1993, it is only charitable societies incorporated under the Incorporated Societies Act 1908 that face regular reporting requirements. These obligations consist of filing annual accounts with the Registrar of Incorporated Societies, and updating public constitutional records maintained by the Registrar from time to time. In practice, there is little the Registrar can do to verify that the records of a registered charitable trust or incorporated society are up to date, let alone check their administration.

Many larger charities, and in particular those which operate under a form of group structure or rely on community or state funding, have their own public reporting and accountability mechanisms set out in their constitutional documents. These arrangements are, at best, ad hoc. No central register is maintained as a filing or reference point for the reports of such organisations. Potential beneficiaries and donors of any charity are left to the goodwill of the charity in question for information on administration.

WORKING PARTY PROGRESS

Preliminary reports were made available by the ACSB Working Party to support regional seminars that were held in Wellington, Auckland and Christchurch in mid 1997. The objective was to facilitate a period of broad sector consultation, involving all classifications of charitable trusts, loosely identified as welfare, education, religious, sport, cultural, and arts organisations.

The main feature of the initial reports of the ACSB Working Party was the identification of four possible options for regulating accountability of charities into the new millennium, with a comprehensive survey conducted of the charitable sector to determine the level of support for each option. The four options identified were as follows:

1 **Status quo:**

Justification for maintaining the status quo is based upon the advantages of flexibility of the current regime, and the absence of any significant controversies to date. The down side of this option centred on concerns as to an erosion of the reputation of charitable organisations over time as the lack of accountability receives increasing media attention, with the possible consequence of an externally imposed regulatory environment.

2 **Legislative/Regulatory Options:**

This option would involve the creation of a separate form of charities commissioner as recommended in the Spencer Russell report of 1989, and this is the model used in the UK. A charities commissioner would stand alongside the likes of the Privacy Commissioner, the Chief Human Rights Commissioner and the Ombudsmen. The funding requirements of such a commissioner and the compliance costs that may be imposed upon the charitable sector must be weighed against the benefits of establishing a formal process for complaint and investigation and donor protection.

3 **Voluntary Accountability:**

This option involves the establishment of sector codes of practice with self-regulation. A number of industries have established similar structures (the advertising sector is one identified in the ACSB Working Party's report, with the Investment Savings and Insurance Association being another example in the financial services sector). Imposition of minimum standards of good practice and accountability was seen as generating significant advantages for those buying into the codes of practice and donors to their causes. The very voluntary nature of the option, however, render its effectiveness as a stand alone option doubtful, and member groups may be unwilling to fund administrative costs involved.

4 **Voluntary Accountability with Legislative Underpinning:**

This option combines the benefits of the previous two options identified, with the voluntary accountability option being imposed across the board through legislation. The option was identified as a major exercise requiring support at both Government and charitable sector level.

The option identified as the favourite by those surveyed was self-regulation, with nearly 70 per cent of responders preferring either option 3 or option 4. A high level of dissatisfaction with the status quo was identified. Both reporting obligations and applicable accounting standards were seen as needing greater uniformity.

In late 1997 a self-regulation project brief was released by the ACSB Working Party. The next phase in the project is to compile a report on the possible nature of a self-regulation system with legislative underpinning, identifying how such a solution might be implemented in practice. The working party proposed an extensive period of research prior to 31 March 1998 covering international literature and examples of self-regulation and codes of practice in New Zealand and overseas, together with rules and regulations that impact upon the sector. Organisational structures would also be reviewed as a basis for developing guidelines.

The next stage involves development of working codes of practice and identifying changes to existing legislation required to support an effective self-regulation system. The outcome of this process will include guidance as to appropriate accountability systems that can be implemented in a cost effective fashion, with best practice guidelines developed and appropriate thresholds for compliance identified. This stage is proposed for completion by 31 July 1998.

The above is a very brief synopsis of the comprehensive work undertaken by the ACSB Working Party. The analysis above really begs the question, however – is there actually a problem with the current system? Who will actually benefit from any changes?

THE NEED FOR ACCOUNTABILITY

There is a paucity of case law in New Zealand involving mis-management of charitable trust funds which might prompt calls for increased accountability. The concern is that this may not so much be a reflection of a sector that is above reproach, but is more a reflection of the very limited circumstances in which issues relating to mis-management might come before the Courts. Further, much of the current call for accountability is not so much born of a concern as to legal non-compliance, but rather a lack of formal accountability to the gifting public.

One example of mis-management is to be found in the case of *Hogan v Hogan* (HC, Auckland, 15 May 1989, A154-84, Thorp J). This case involved proceedings brought by one of the disaffected trustees of a charitable trust known as the Three Streams Conservation Trust, established and managed by a Mr Hogan. Concerns were expressed as to

mis-management, and in particular the extent to which Mr Hogan had exercised unilateral control over the trust and derived benefits from it. Separate audits carried out on the trust identified a failure to keep proper accounts, although no evidence of mis-appropriation of funds had been found.

In the end, Thorp J simply made an interim order removing a trustee who was resident overseas. The remaining trustees were then given time to re-constitute the trust with a replacement sole corporate trustee, with Mr Hogan being constrained by a written undertaking not to take or accept any further pecuniary benefits from the trust.

The circumstances of the case are perhaps not that unusual in New Zealand. Many small, charitable trusts are established with a general or specific benevolent intent. The person establishing such a trust will often maintain a heavy involvement with the trust's operation and fortunes. In *Hogan*, had there not been a falling out of the trustees it is unlikely that it would have been necessary for an audit to be carried out of the trust's activities, or proceedings issued by a trustee seeking removal of her fellow trustees.

A requirement for filing annual accounts with some regulatory body (such as the Registrar of Incorporated Societies) may well have assisted the Hogans to focus on the need to maintain proper accounts. Of itself, however, simply filing unaudited accounts may not have prevented the level of mal-administration that was evident in *Hogan*. It would be unrealistic to expect any regulatory body to pick up on these aspects of inappropriate trustee behaviour, in the absence of trustees actually highlighting a problem.

Aside from the Courts, the other main avenue by which examples of mis-management might come into the public arena is through the media. One of the most publicised controversies concerning fundraising activities in recent times related to the Jeans Day Appeal conducted to benefit child asthma research through the Child Health Research Foundation in November 1995 and November 1996. There were a number of public criticisms of the fundraising campaign and concerns expressed as to the level of promotional costs involved. Once information was made available about the ratio of promotional costs to revenue generated, critics of the appeal had a field day in the press.

Whatever the merits of the Jeans Day saga, it illustrates the current lack of formal accountability of organisations conducting public fundraising campaigns. In the end, donors were left in a position of uncertainty, not knowing the full story and with no regulatory body available to whom full account would be made. Media reporting fuelled these concerns. The ultimate losers? The potential beneficiaries of the funds raised, which funds were undoubtedly reduced by the level of controversy.

THE FUTURE

In 1979 the Property Law and Equity Reform Committee concluded that

> it would be difficult to justify the setting up of a body of officials to supervise charitable trusts in New Zealand ... the benefit of the establishment of organised supervision would be disproportionate to the resources and manpower involved.

The Committee's main recommendation for change as far as accountability is concerned was for every organisation incorporated under the Charitable Trusts Act to be required to file accounts, in similar fashion to the requirements of s 23 Incorporated Societies Act 1908. In addition, it recommended that every charity making a public appeal for funds should be required to have its accounts audited, subject to appropriate exemptions. The basis for this limited reaction was the lack of any evidence of any significant amount of misappropriation or misapplication of funds. The justification for requiring public fundraisers to present audited accounts was the lack of any practical protection against potential abusers of public benevolence.

The ACSB Working Party has not identified any significant rise in the misappropriation of funds since the 1979 Report, suggesting that the legal basis for the limited recommendations of the Property Law and Equity Reform Committee remains the same. The main difference now is perhaps a greater public expectation as to accountability. Of the charitable organisations surveyed by the ACSB Working Party, 74 per cent indicated a preference for some form of increased accountability.

The main focus of the ACSB Working Party appears to have been on charitable organisations that indulge in raising funds from the public. The main concern identified was protection of donors against organisations that misappropriate funds. In the trusts context, this is akin to suggesting that trustees should be held accountable to the settlors of the trust. This enhanced accountability might eventually benefit the trust beneficiaries, but this would be indirect. For trusts established by private endowment (either inter vivos or by will), increasing accountability to donors may achieve little. The public revenue is already being protected by the Inland Revenue Department which has an interest in ensuring that only trusts that are genuinely charitable enjoy an exemption from income tax. Private donors to such trusts will usually ensure administration is in keeping with their wishes.

As evidenced by the Jeans Day example, it is arguable that the main beneficiaries of increased accountability would be the very organisations indulging in public fundraising. The benefit to them will be an increased public confidence leading to a greater chance of teasing money from the public.

A concern with any form of regulation (whether imposed by legislation or self-regulating) is the compliance costs that would be incurred. Those costs are ultimately borne by the charitable beneficiaries. Further, sanctions imposed on organisations for non-compliance need to be carefully considered. It would be undesirable for the charitable beneficiaries to foot the bill for penalties imposed, and imposing penalties on innocently non-complying trustees would serve as a major disincentive for benevolent individuals thinking of taking on a charitable trusteeship.

The above concerns suggest that different levels of accountability depending on size and scope of activities, may be an appropriate solution. The limited recommendations made in 1979 still have much to commend them. Coupled with an improved accounting standard tailored for charitable organisations, and the development of industry codes of practice for those organisations who feel the cost benefit analysis works out in favour of the underlying beneficiaries, these recommendations would seem to go a long way towards addressing the accountability concern.

The ACSB Working Party has undertaken a significant task and its efforts to date are to be commended. Those practitioners interested in the area or who feel they have something valuable to contribute to the later stages of the Working Party's project, should contact the Working Party, care of the New Zealand Association of Philanthropic Trusts, PO Box 1521, Wellington.

The author gratefully acknowledges the assistance of Law Clerk Samuel Moore in compiling this article. ❑

CHARITY 'RATING'

Kris Mauren, of the Acton Institute, Michigan

explains how a "charities rating" scheme can identify effective charities

The Acton Institute began a massive project in 1995 called the Samaritan Awards, to identify successful private charities to the media, philanthropic foundations and the public-at-large. Since 1995 we have screened more than 2000 private charities, making 30 Samaritan Awards to outstanding charities, and naming another 150 excellent organisations. We have also awarded these organisations $100,000 in amounts of up to $10,000.

But, financial assistance from the Acton Institute is the smallest part of our support to America's best charities. Many of the recipients of Samaritan Awards over the past years have reported to us that media attention as a result of their recognition has brought tremendous new support, both financially and in numbers of volunteers. Most gratifying to us, however, are the new charities being formed around the country, inspired by the Samaritan Award winners, and based on their successful methods. The annual Samaritan Awards announcement (in December) is also watched carefully by policy makers. In 1996, when Congress was debating welfare reform, three of our ten 1995 Samaritan Awardees were invited to give testimony on their organisations' successful models for effective compassion.

Samaritan Award winners are also publicised through the Acton Institute's World Wide Web site, where anyone can review a profile on each of the 180 groups honoured over the past three years. You may also search our extensive database of 2000 other charities by several methods: area of service (housing, job training, drug/alcohol rehabilitation, etc); geographic coverage; percentage of budget spent on overhead; sources of income.

All charities are not equal. We have found that the most effective charities follow the seven principles of effective compassion described by Marvin Olasky in his book, *The Tragedy of American Compassion*. Dr Olasky identifies "ABCs of Effective Compassion" and we use these principles as the primary "screen" by which we evaluate charities for the Samaritan Awards. The principles are the following: A: Affiliation; B: Bonding; C: Categorisation; D: Discernment; E: Employment; F: Freedom; and G: God.

Successful organisations should stress affiliation, attempting to reconnect the individual with his or her family and community. This re-establishes the natural order of dependency and responsibility among families and communities, allowing them to care for all their members. Akin to this, the charity should ensure bonding between those receiving aid and those contributing their time and skills. This implies that effective rehabilitation occurs only when the charity, volunteers, and recipients are willing to invest both the time, and the resources necessary to train the recipient in the proper life-skills necessary for independence.

Another important determinant of effectiveness is the emphasis on categorisation, or how effectively the charity distinguishes and classifies the numerous harmful behaviours or situations that the recipients face. Treatment needs to be tailored to specific problems, and even for specific recipients. The most effective charities often purposely limit themselves to one or a few types of people they will agree to help, as well as to what problems they will address. The charity should also stress discernment in its distribution of aid. It will refuse to grant aid to those who do not need it, or to those unwilling to change whatever destructive behaviour brought them to the charity in the first place.

The charity will also make employment a condition of receiving treatment, ensuring both that the recipients learn vital job skills, and that they are contributing to the community which is helping them. This also gives the recipients a sense of ownership in their work, instead of always being the beneficiaries of an unknown philanthropist. The charity will also promote freedom, teaching recipients the necessary skills in order to diminish their need for charity. Relief should not be seen as an end in itself, but as a means to enable the recipient to become self-sufficient.

Lastly, the charity will emphasise the importance of God in its program. While exceptions exist, the Acton Institute found that the majority of the most effective charities, those whose recipients were able to maintain long-term success, often had a strong spiritual component to their program.

The Institute uses several other criteria in determining effective charities. Some are managerial – is there a high success rate, measurable by outside studies, is the program cost-efficient and reliant strictly on private funds, can it be replicated in other cities? Others focus on the educational aspects of the charity – is there a mentoring component that builds character in the recipient, does the program lead the recipient out of dependency, does it challenge the recipient to work or learn in order to receive assistance? The Institute also emphasises the emotional or spiritual success of a charity – does it promote bonding between volunteers and recipients, does it address the individual needs of the recipient, does it have a vibrant spiritual component, instilling in the recipient a sense of worth and self-esteem?

The Institute recognises the importance of objectively evaluating the candidates for its Samaritan Awards program, and subjects each application to a thorough screening. There are eight separate and independent evaluations by both Institute staff and noted experts in the field. Our internal evaluation process includes an extensive Judge's form, with numerous questions about each application. Each question is graded on a continuum of 1-10. Granted, there is a heavy dose of subjectivity here, but eight independent evaluations mitigates this problem. Our thorough process ensures that the Samaritan Awards program continues to achieve its goal: highlighting America's most effective charities and their methods of achieving success. ❑

WELFARE PROVISION BY CHARITIES

Dr Roderick Deane, former President of IHC NZ Inc

offers some reflections on the funding of the voluntary welfare sector

This article explores the possibility of developing a new framework of thinking with respect to the way in which the government should build its relationship with voluntary welfare, ie charitable organisations in the private sector. These organisations currently provide a huge level of support to people with a variety of disabilities encompassing both intellectual and physical handicaps.

In the past, voluntary welfare organisations were typically funded by a mix of direct government grants, usually via the Department of Social Welfare, fees for services, and internal activities such as workshop sales and private sector fundraising. More recently, direct government funding has come from the regional health authorities, now consolidated into the Health Funding Authority.

Any framework must encompass the advocacy role, the provision of services, the need for evaluation and monitoring, and the appropriate kind of financial support.

The voluntary welfare sector's strength arises from its immediacy of client and family involvement, being close to client needs, having a high level of self-motivation and independence, extensive community involvement in many cases, the emphasis on the maintenance and building of self-esteem, the good quality support services typically associated with the sector, the promotion of choice which arises from a diversity of service providers (regional, private sector, government), the mixed sources of funding and the potentially moderate cost of support, particularly as compared with full government provision.

Support options obviously range from (1) family support to (2) community living to (3) the voluntary welfare sector arrangements through to (4) fully government funded government institutional care arrangements.

The tradeoffs between cost and quality are complex. However, one could typically argue that family support for people with disabilities would usually be the lowest cost option but provide the highest quality care. In this area, the level of government financial support per capita has been relatively low compared with some of the other options. Community support is not dissimilar in the sense that costs are often low relative to quality of delivery and the imposition of needs on the government are more moderate. At the other end of the spectrum, fully government owned organisations, such as psychopedic hospitals, typically have high per person costs, moderate quality in the sense of the separation of individuals from a normal involvement in their community. But in the past this has been the area where the government has provided the highest level of per capita funding support. In between the family and full government provision options sit the voluntary welfare organisations, which are usually of more moderate per capita cost than government run bodies, and provide more community involvement with the associated improved quality of life.

These typically receive the lowest level of government financial help. This leads one to ask why such a strange situation has arisen and been allowed to persist for so long.

WHAT INHIBITS CHANGE?

Inhibitions include: the lack of an agreed framework between the various private sector and government organisations involved in disability; the problem of vested interests, as also seen in sectors such as education, where staff can be as much the driver of institutional arrangements as the needs of the ultimate users of the services (eg psychopedic hospitals and the associated staffing issues); the paternalism of some members of the community towards those with disabilities; the fear not only of change but also of inclusion of people with disabilities within their daily lives, although, fortunately, this has been changing over recent years; and the vast misunderstandings about people with disabilities, as illustrated by the media sensationalism directed at a few difficult situations which ignores the bulk of people with disabilities who live happily within their communities.

If there are to be further improvements in the lifestyles of people with disabilities, and in the way in which government helps fund their needs, agreement is needed on some basic principles. An appealing set of aims would include:

- to promote freedom of choice so that people with disabilities are not restricted in their options for help;
- to facilitate client-driven/customer responsive support arrangements;
- to provide support which ensures that people can get as close as possible to normal community living;
- to avoid isolating people with disabilities (such as in psychopedic hospitals) and thus to treat disabilities as simply part of the normal fabric of life in the community;
- to ensure that the most efficient and highest quality sectors get the most support; from an equitable point of view the same point applies, ie to ensure that the greatest need gets the most support;
- to facilitate adaptability for changing needs;
- to provide for the monitoring of standards; and
- to separate funders and providers.

The reforms of recent years have adhered to some of these principles and facilitated some changes in the right direction, but the policy framework still falls well short in many respects. Most people in the voluntary welfare sector, and those dealing with people with disabilities, would agree that much progress still remains to be achieved.

In converting the preceding principles into practice, the main implications seem to be the requirement for:

- normalisation, as in providing normal community living for people with disabilities, or getting as close to this as we possibly can;
- mainstreaming, as in providing as close as possible normal education for young people with disabilities;
- supported employment, as in facilitating employment arrangements in the private and public sectors in a normal way rather than in specialist disability workshops (some experiments with this have been very successful);
- home support, as in the need to provide the most funding per person in a way which gets closest to meeting the preceding principles; and
- normal leisure activities.

The practical implications of the preceding rather concentrated line of reasoning would be that there should be a concentration upon funding individuals rather than institutions. Individuals with disabilities, and their families, friends and guardians, know better what their needs are than third party institutions do. Indeed, by way of example, the IHC has been a long term advocate of this, having expressed a willingness over the years to give up its bulk funding in favour of individualised funding if others involved in the sector were to do the same (including the psychopedic hospitals). This would allow individuals and their families to contract back to the appropriate service providers.

The trick is to relate funding to individual needs, to facilitate individual choice, and to encourage high quality/efficient service providers rather than prop up higher cost/lower quality institutions.

IHC, in its discussions with government, often argued that the real issue was unlikely to be simply the total quantum of funds. Instead, the problem has always seemed to be the procedure of distribution of those funds, which has been skewed on a per capita basis in favour of the lower quality, higher cost, institutionalised arrangements rather than towards the lower cost, better quality, community related, family arrangements. This is not to say that transition problems would not be significant, and that the monitoring of standards is not an essential element.

The essence of the matter is that disability issues are not health issues. The inclusion of disability funding within the health sector has diverted attention from the real heart of the problem. People with disabilities are not sick, but simply need, in many cases, some additional financial support to be able to live close to normal lives in normal communities. In other words, disability funding issues are essentially income maintenance issues rather than health issues.

If one was to accept all this, what would one do? The immediate steps in the simplest form would involve:

- A cessation of direct government or HFA funding of institutions and voluntary organisations.
- The diversion of all of these funds to individualised, needs-based funding for people with disabilities.
- To treat this as an income maintenance issue rather than a health issue, which suggests funding through DSW rather than through the health authorities (ie supplementation of present benefit arrangements for which DSW is better suited than the HFA in any event). An appropriate needs assessment framework would need to accompany this change. This is not a straightforward matter, but good workable models do exist.
- This would exclude the HFA and the Health Ministry from the funding process since this just adds confusion with respect to health issues more broadly and the muddle between these and the income maintenance requirements of people with disabilities (while acknowledging of course that from time to time people with disabilities also have health problems which need to be appropriately cared for by the health sector).
- Develop further the standards and monitoring systems, but keep these as simple and easy to understand as possible with minimal administrative costs.

WHAT WOULD THE RESULT BE?

People with disabilities would be more likely to get the services they want, they would have more real choice, the greatest needs would get the most money, the highest quality support arrangements would also get the most money via contracting back, family support would expand substantially, government institutions would contract and probably all close (as indeed has been happening but too slowly), the HFA would have less involvement in this process, and voluntary welfare charitable organisations may well be able to concentrate more on their true role which is that of advocacy rather than service provision. They have been forced into service provision at least in part because of the inadequacy of our family support arrangements.

Since the above framework has over many years been strongly supported by the democratically based membership of an organisation such as the IHC, this immediately discounts any hypothesis that in advancing this case one is simply advancing some sort of mythical "market" model. The real concern is to get the funding into the hands of the people who really need the financial help, and to facilitate them to use the funds as they see best to provide care within the family unit or to contract back to the organisations which best meet their needs.

As a matter of historical interest, on a couple of occasions in the past the IHC almost persuaded ministers to go down this route by way of experimentation but in the end too many people lost their nerve. The ideas were essentially defeated by those with vested interests, despite being so strongly advocated by those with the need for help.

Given the current level of dissatisfaction with the health reforms, including particularly the disability sector issues, the need has never been greater to develop an agreed framework of thinking between the government and the voluntary welfare, charitable sector. Individualised, needs-based funding has the potential to address many of the concerns of people with disabilities and to ensure a more rational basis for funding charitable organisations which contribute so substantially to improving the lifestyles of the disabled. Of more importance, it provides a technique to promote higher levels of self-esteem, self-reliance, independence, and a wider array of choices for people with disabilities. ❑

POLITICS AND CY-PRES

Professor Charles Rickett, The University of Auckland

examines two recent cases where charitable intention was in issue

Two recent decisions, one from New Zealand and the other from New South Wales, discuss the interminably difficult issue of the law's unwillingness to extend charitable status to "political" purposes and tackle the problem of failed gifts in the law of charity.

RE COLLIER

In *Re Collier* [1998] 1 NZLR 81, Mrs Collier's will contained a residuary gift to a trustee "upon trust to form a charitable trust ...". The trust's objects were to be fourfold:

(a) "[t]o promote the idea of world peace contained in [a] telegram" which Mrs Collier had sent in 1966 to U Thant, the then Secretary-General of the United Nations;

(b) "[t]o promote the idea that people suffering from terminal illness ... be able to die with dignity ...";

(c) to promote the idea of, in effect, voluntary euthanasia; and

(d) "[t]o promote a government enquiry designed to investigate and expose the death of [X] and to have published the book I have written ...".

The trustee and executrix of the estate sought declarations as to whether there were valid charities, and if not, as to the destination of the property.

Charitable purposes?

In considering the first purpose, Hammond J was immediately drawn into the area of political trusts. His Honour usefully outlined three categories of political trusts to which the case law has denied charitable status. Of these, only the second category – trusts to support a political party – was regarded by Hammond J as uncontentiously non-charitable. It is undesirable, he suggested, as a matter of public policy, to confer the advantages of charitable status on trusts which secure a certain line of political administration and policy.

The first category – trusts to change the law itself – is said not to be charitable because, as Dixon J said in *Royal North Shore Hospital of Sydney v A-G for New South Wales* (1938) 60 CLR 396, 426(cited by Hammond J), "[a] coherent system of law can scarcely admit that objects which are inconsistent with its own provisions are for the public welfare". Hammond J questioned whether this reason can start today. In particular, he pointed to three considerations. First, Judges themselves make suggestions for changes in the law, implying that a change in the law in that particular respect might be a matter worthy of public debate; a trust to promote such a change might accordingly be in the public interest. Secondly, Hammond J referred to the freedom of thought, conscience, religion and expression provisions of the Bill of Rights Act 1990, and effectively suggested that the law of charities should play its part in realising the benefits of the provisions. Thirdly, His Honour asked why the law allowed existing charities to make "political" statements, but would not extend recognition to trusts whose purpose was to campaign for law reform?

The third category – trusts for the perpetual advocacy of a particular point of view, or "propaganda" trusts – is often justified on the basis that it is necessary to maintain judicial impartiality and avoid Judges having to make decisions as to the worth of a particular view. Hammond J suggested that it was unnecessary for Judges to enter into any debate themselves, and accordingly the justification lost much of its force. The only function of the Court was "to sieve out debates which are for improper purposes", such as the promotion of revolution or outright disobedience of the law.

Having expressed reservations as to the extent to which the "political" nature of proposed trust purposes should be taken into account in determining validity as a charity, Hammond J felt constrained by the weight of authority to apply those extended notions to the bequests before him. As such, His Honour went on to make the following findings.

The first purpose – the promotion of world peace – was non-charitable; it was both "political" as a "propaganda" trust, and unlawful since (by reference to the testatrix's telegram to U Thant) it encouraged soldiers to disobey military law by laying down arms. The second purpose – the promotion of death with dignity – was not charitable, and failed. It was not for the relief of the aged, but extended to all. It was not educational, because it simply promoted an idea, without instruction or accumulation of knowledge. The third purpose – promotion of voluntary euthanasia – was non-charitable, because it was designed to promote an illegal purpose, and it was "political" as a trust to advocate a change in the law. The fourth purpose was in two parts. First, there was promotion of a Governmental inquiry into the testatrix's friend's death; this was non-charitable as "political", possibly (but not made clear by the Judge) because it was a "propaganda" trust. Secondly, there was to be publication of the testatrix's "book", which the Judge held to be non-charitable because the work, which the Judge had seen, failed to pass a minimal standard requirement, it having "no educative value, or public utility".

The consequences of failure

It is of fundamental importance to appreciate that the reasons given by the Judge for not upholding the bequest boiled down to a finding that it failed at the outset to satisfy the legal definition of charity. The combination of the political nature of the gifts and the lack of public benefit meant that there simply was no charitable intention at all on the part of the testatrix. That being so, unless the bequest could satisfy the requirements for a valid non-charitable purpose trust (not so on the facts), the bequest ought to have failed, and the property fall into intestacy. However, this was not to be so!

Hammond J, in discussing the consequences of his findings that the charitable bequests failed, said, quite correctly, that the law provided that if bequeathed property "stayed in the public domain (through a general [although His Honour preferred the term 'paramount'] charitable intention) the cy-pres doctrine could be applied". He then went on to comment that "the general reluctance of Courts to render a construction leading to an intestacy" meant a leaning in favour of a general charitable intent. More importantly, however, he suggested that "strong policy reasons favour[ed] that general approach, *in its own right*, with respect to charity" (the Judge's emphasis). He gave two reasons. First, the importance of charity in socio-economic terms meant that "in the public interest there should be an open recognition of a presumption, as opposed to a construction, in favour of charity". Secondly, the open articulation of such a presumption would impact upon many of the problems caused by poor drafting of bequests (whence many bequests were lost because a general charitable intention was not clear from the document), because it would "force draughtspersons ... to remove the presumption if the client *really* meant, 'this purpose, and no more'" (the Judge's emphasis). There is much to be said for the more generous position advocated by Hammond J, but only in the context of establishing a general charitable intention for cy-pres purposes. It is particularly important that the reasoning of the Judge not be read as a suggestion that the definitional requirements of charity, as long laid down in the case law, can in effect be liberalised by appeal to some free-wheeling presumption. The difficulty is that the manner in which His Honour proceeded led exactly to that outcome.

Having made general observations about the unlocking of a paramount charitable intention, Hammond J then asked whether Mrs Collier had any such intention. He held that she did, in respect of the second purpose:

> In my view, that clause does move beyond the particular to the general. It exhibits a paramount concern on the part of Mrs Collier, which she wished to see addressed by means of a charitable trust, to assist the circumstances under which sick and elderly persons die. ... there was in that respect a paramount charitable intention.

This was a wrong turn of enormous proportion. Having earlier held that the purpose was not a valid charitable one, how could there possibly be a general charitable intention? The point of the cy-pres doctrine is that it makes possible the continued dedication to charitable purposes of property either already dedicated to charity (subsequent failure) or intended to be dedicated to charity (initial failure), but where there is impossibility, impracticability, or illegality; but not where there is no charitable intention at all. Thus, cases of initial failure arise where a testatrix has created a testamentary charitable trust which, at her death, is impossible or impracticable to carry out. They do not arise, for cy-pres purposes, where no charitable trust ever came into being, because in that circumstance such intention as the testatrix had was not charitable. It is quite illegitimate to use the cy-pres doctrine to save as charitable – justified on a "paramount" intention test – a gift which was not charitable – by application of the definitional test.

A further niggling concern is this. The residuary gift was to set up a trust with four purposes. There was no indication that there were A and B grade purposes. All purposes seemed of equal importance to the testatrix. If, then, the bulk of those purposes failed entirely to achieve charitable status, how could it possibly be said that there was a "general", or even "paramount", charitable intention present? There was no clear intention on Mrs Collier's part to devote her residuary estate to charitable purposes. As I once put it ("Charitable Attitudes to Charity" [1989] NZLJ 431, 433), "[t]here can be no general charitable intention unless there is exclusive charitableness".

The scope of s 32

Hammond J considered the effect of s 32 Charitable Trusts Act 1957. In the light of the preceding analysis, it is impossible to conceive of the provision applying to the facts in *Collier*. Section 32 provides that, "in any case where any property ... is given or held upon trust, or is to be applied, for any charitable purpose, and it is impossible or impracticable or inexpedient to carry out that purpose [etc]", then, irrespective of the existence or not of a general charitable intention, the property could be disposed of for some other charitable purpose. This is loosely referred to as "statutory cy-pres". The section could not apply because, as suggested, there was no property given or held at the outset for a charitable purpose!

This was, in a roundabout way, the very reason Hammond J gave for its inapplicability, although he failed to appreciate that the same reasoning should have been applied in determining whether inherent or common law cy-pres applied. His Honour cited the unfortunately unreported Court of Appeal decision, *Alacoque v Roache* CA88/85, 17 May 1988, which, he said, had held that "s 32(1) does not apply to gifts which never take effect so as to be held for charitable purposes". That is correct as a matter of statutory interpretation. Section 32 is not a panacea for the salvation of gifts for non-charitable purposes as charitable. In that context, all that s 32 does is to avoid the difficulty of divining a general charitable intention where a particular charitable purpose already exists, but where that purpose cannot be achieved for some reason. Hammond J suggested further that *Alacoque* established "that the statutory provisions in s 32(1) only apply to trusts which have come into existence, and subsequently failed". I am not sure this proposition is correct, either on the wording of s 32, or in interpreting statements in *Alacoque* itself. I have traversed these matters at some detail in an earlier paper, generously cited by Hammond J ("The Dead Hand's Grip" [1988] NZLJ 335).

Saving non-charity for charity

Having discovered a paramount charitable intention under only one of four purposes, all of which had failed to generate a valid charitable purpose at the outset, Hammond J then felt able to save the entire residuary gift for charity by an application of s 61B Charitable Trusts Act.

That section is a validating provision addressing the problem caused by the common law rule that unless a trust is for exclusively charitable purposes it will be regarded at best as non-charitable. Its scope was authoritatively discussed by Tipping J in *Re Beckbessinger* [1993] 2 NZLR 362, 372-376. His Honour pointed out the two cases where s 61B might be called upon. First, there was the case "where there are clearly included in the gift as separate and distinct objects purposes which are charitable and purposes which are not charitable" (p 373), where the blue pencil rule could simply be applied to strike out the purposes which were not charitable. Secondly, there were cases "where a fund is to be applied in terms which are so general so as to include both charitable and non-charitable purposes" (p 373), where the blue pencil test could not be applied, and instead a modification of the donor's words would be needed. Tipping J then

proceeded with a full analysis of the section and the case law, and concluded (at p 376, with my emphasis):

> In my judgment one must look at the words of the gift in the context of the instrument as a whole. *If the gift is substantially charitable* but would otherwise be brought down by the presence of some actual or potential non-charitable and thus invalid element, the section applies. ... The Court cannot in my judgment say, with a gift which is so vague and general as to be invalid for uncertainty, that because the gift might have been applied for a charitable purpose, s 61B can be used to save it. *The testator must be shown to have had a substantially charitable mind* but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.

In *Collier*, Hammond J recognised the need for a substantial charitable content. One might be forgiven for thinking that that alone would be enough to determine that s 61B not be available. But having upheld a paramount charitable intention (for the purposes of cy-pres) in respect of one purpose, His Honour thought it would be "extraordinary" if a Court were unable to give effect to it.

> Section 61B should be given a broad and beneficent construction; as long as there is one charitable purpose (which can include a paramount charitable intention) the section is operative. Any uncertainty as to terms can be cured by a scheme.
>
> If the paramount charitable intention I have identified is within s 61B, then in my view s 61B(3) governs the issue of quantum. Whatever moneys were to have been applied under the imperfect trust provision [Mrs Collier's residuary gift] are arrogated exclusively for the paramount charitable purpose ....

The conceptual problem

There is a conceptual problem evident in *Collier*. The first issue must rightly be the charitableness of the four purposes. If we assume that only the second purpose was charitable at the outset (without adopting the convoluted route taken by Hammond J), the second issue, in light of the mixture of charitable and non-charitable purposes – an imperfect trust provision – and in order to save the entire gift as charitable for the pursuit of that purpose, must be whether s 61B can be applied. That requires a substantial charitable intention. In my view, it is unlikely that such an intention existed here so as to permit validation. In effect, the entire residuary gift should fail. On the other hand, if we assume that s 61B is applied so as to save the second purpose, then we have a charitable trust whose purpose is, in Hammond J's words, "to assist the circumstances under which sick and elderly people die". There is no need for cy-pres at all! If, as here, the inherently charitable nature of the trust is expressed in vague or ambiguous terms which lack the type of definition necessary for trustees to be able to act, then an administrative scheme can be arranged and approval given by the Court. That is not cy-pres, because there is no change in purpose being undertaken, but merely a sharpening of the definition of the already charitable purpose.

Why then does cy-pres, and/or s 32, play any role? The short answer, I suggest, is that in *Collier* it ought not to have arisen. A role for cy-pres (whether statutory or common law) might have arisen if, for example, the specific purposes of the trust were charitable, but for some reason were impossible or impracticable to achieve as stated. Some alteration to those charitable purposes would be necessary to ensure the dedication of the funds to charity. That is what cy-pres is concerned with. Where common law cy-pres is in issue, a general or paramount intention is needed (ie the particularity of the stated charitable purposes must be secondary to a general intention to benefit charity). Where s 32 is in issue, the requirement of general charitable intention is removed. The charitable purposes in issue might of course themselves have been earlier "saved" from invalidity by the operation of s 61B. Section 61B would have been used to determine (statutorily) that the purposes were exclusively charitable.

The technique in *Collier* – resort to common law cy-pres (and by implication s 32 if necessary) followed by application of s 61B – cannot, in my view, be supported. While one can appreciate the motive behind Hammond J's approach – to save for charity a gift which would otherwise fall into intestacy and be distributed to persons whom the testatrix did not intend to benefit – the reasoning used to get there may create difficulties for the future.

The real focus must surely be the law of political trusts, which at present denies validity, let alone the advantages that flow from the status of a charitable trust, to gifts with political characteristics. Hammond J implies that a liberalisation can be forged from within the present judicial jurisdiction over charity; others suggest that perhaps a non-judicial body might be a more relevant and bolder decision-maker (Hackney, "The Politics of the Chancery" [1981] CLP 113). One thing seems to be becoming glaringly obvious. It is by no means easy today to maintain a sanitised version of charity, where activities can be pursued without challenge to political policy and the established law (usually in the form of legislation and regulation) which promotes that policy. Nor is it easy for the pursuit of charity to be undertaken without advocating particular viewpoints. Charity is in fact becoming more political, and the English model (which New Zealand has adopted) is under increasing strain (see, for example, Sprince, "Political Activity by Charitable Organisations: an English Model With More to Learn Than to Teach?" (1997) 11 TLI 35).

PUBLIC TRUSTEE v A-G FOR NSW

The second decision is *Public Trustee v Attorney-General for NSW* (unreported, Santow J, Eq Div, No 1893/97, Sydney, 30 September 1997). The case raised similar issues to those in *Collier*, and, in my view, Santow J dealt with them in the correct manner.

A testatrix's will disposed of her entire estate "to the Federal Council for the Advancement of Aborigines and Torres Straits Islanders [FCAATSI] for the general purposes thereof ...". The FCAATSI was an unincorporated association which had ceased to exist about eight years prior to the testatrix's death. Santow J stated that "the gift must fail, and fall into residue unless a general charitable intention can be found so that the gift can be rendered cy-pres". Where a trust was for the purposes of an institution, and those purposes were predominantly charitable, then a general charitable intention might be found to exist. His Honour then highlighted the issue before him:

> [T]he difficult question which arises in this case is whether a body whose constitutional objectives include changes to existing law as well as non-political objectives, and who may employ political agitation in order to achieve its aims can be charitable, on the basis that its

> overall purposes are directed to the benefit of an impoverished and disadvantaged segment of the community.

Santow J's analysis of the "Objectives" clause of the FCAATSI's constitution revealed four of the eleven objectives to be political. Objective (i) was the abolition of discriminatory legislation. Objective (ii) was the introduction of legislation to achieve a number of ends. Objective (x) was the acceptance by the Commonwealth government of primary responsibility for matters affecting Aborigines and Torres Straits Islanders. And objective (xi) was the sponsoring of Aborigines and Torres Straits Islanders to contest political elections. Objectives (iii) to (ix), on the other hand, were clearly not political, and were charitable as designed to promote the public welfare of Aborigines and Torres Straits Islanders.

Mixed purposes

There thus existed a mixture of charitable and non-charitable purposes. Santow J thus turned to the New South Wales equivalent of s 61B, and concluded that the provision (s 23 Charitable Trusts Act 1993(NSW)) required:

> that the existence of charitable purpose be ascertained, disregarding any permitted application for a non-charitable and invalid purpose, on the basis that such application had been or could be taken to have been so directed and allowed by the trust. If what remains permits an application for the charitable purpose as one way of completely satisfying the testator's presumed intention, that suffices for validity.

It should be noted that the "satisfaction of the testator's presumed intention" test differs from the New Zealand "substantially charitable mind" test, but for the purposes of revealing the correct order in which the analysis should be made that difference is without importance.

Santow J concluded that the four non-charitable (political) purposes could be severed by application of s 23. The retention of the remaining charitable purposes as the sole purposes of the gift would not distort the testatrix's intention.

The statutory presumption

The Attorney-General submitted that the existence of a provision (s 10 of the NSW Act) which presumed a general charitable intention, unless excluded in the trust instrument (which accordingly does not go as far as New Zealand's s 32, where a general charitable intention is declared unnecessary for statutory cy-pres) altered the common law in providing a presumption of a general charitable intention. Santow J rejected this contention, stating:

> This presumption ... is not concerned with whether the intention is *charitable*, but rather whether it is *general*. At common law there is no presumption in favour of a general as opposed to a particular charitable intention, although little is required to find a wider charitable purpose as the essential object of a charitable trust; ... It must be correct, as submitted by the [Public Trustee], that s 32 is directed toward amendment of this rule only. There is nothing in the section which alters the [common law] requirement that before a general charitable intention becomes relevant, the Court must find that the gift is for a charitable purpose.

This final comment provides a crisp rejoinder to the position taken by Hammond J in *Collier*, where His Honour did exactly the opposite (in a context where he was not even drawing support from s 32, which he considered to be inapplicable!).

Santow J made a further point in respect of the relationship of s 10 with s 23. Section 10(2) provided for a presumption of a general charitable intention "unless there is evidence to the contrary in the instrument establishing the charitable trust". If an instrument was construed and given effect with the severance directed by s 23 (because that severance accorded with the testator's presumed intention), that instrument was now subject to s 10 because there could be nothing remaining in it which was evidence of a contrary intention. This analysis is analogous to that which applies in determining the relationship between the New Zealand ss 32 and 61B.

The structure of Santow J's reasoning

The structure of Santow J's reasoning, the logic of which is to be commended, is shown in his conclusion, thus:

> Applying s 23 ... to FCAATSI's objectives, I conclude first, that those objectives include charitable purposes among its main objects as well as political ones and second, that those charitable objectives are capable of severance from those political objectives earlier identified, so as to attribute a general charitable intention to the testator according with the testator's presumed intention [the s 10 point]. ... It follows that a cy-pres scheme should be permitted, consistent with the testator's general charitable intention.

Politics and charity

There is much in this case of interest in respect of the law of political trusts, particularly in respect of the first and third categories of such trusts as identified by Hammond J in *Collier* – trusts to change the law and propaganda trusts.

Santow J contrasted the rather blunt approach of Slade J in the English case of *McGovern v AG* [1982] Ch 321, where it was declared (at 335) that "a trust of which a principal object is to alter the law of this country cannot be regarded as charitable", with the more discriminating approach of Dixon J in *Royal North Shore Hospital* at 426. Santow J discerned in Dixon J's comments a distinction between an object simply contrary to the established policy of the law (which automatically fails), and a trust where the main purpose is agitation for legislative and political changes. This led His Honour to suggest that the way was clear to assess whether an object seeking to supplement the law was inconsistent with it. The result was, he said, that "a trust may survive in Australia as charitable where the object is to introduce new law consistent with the way the law is tending [since] [t]here is then no longer contrariety with an *established* policy of the law" (Santow J's emphasis). Later in his judgment, Santow J implied that had it been necessary he would have been prepared to find that so far as the purposes in the present case were concerned with promoting change in the law towards anti-discrimination law, such change would be quite consistent with Australian trends. In this approach there is room for considerable liberalisation in the context of the validation of trusts to change the law.

Santow J also discussed the issue whether pursuit of (otherwise) charitable objects by means of political agitation was enough to invalidate those objects. Importantly, there was a need for care to be taken in assessing whether "agitation" or, in the alternative, "education" was what was really intended. His Honour stated:

continued on p 62

TAX AND CHARITIES' BUSINESSES

Tony Molloy QC

seeks tax concessions for businesses operated for charities and sports clubs

TRUSTS FOR CHARITY GENERALLY

Section CB 4(1)(c) Income Tax Act 1994 (read with para (d) in the case of a testamentary trust) provides that revenue otherwise assessable under s BD 1 as "gross income", will be exempt where it shall have been:

> derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual ....

Businesses run for New Zealand charity

Section CB 4(1)(e) Income Tax Act 1994 extends a like exemption to revenue derived directly or indirectly from:

> any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes within New Zealand, or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual: ....

The essence of charity: public benefit

The distinctive features of charity are that it serves a public purpose and that it confers a public benefit.

The Courts have had to deny the name – and the considerable fiscal benefits – of charity to many a strange cause or organisation. For an example, take the case of *Thomas v Roberts* (1850) 3 De G & Sm 758. At p 771 a bemused Vice Chancellor gave the thumbs down to a community founded by an erstwhile Anglican cleric who had taken to styling himself "The Servant of the Lord" and who called his group Agapemone:

> Its inmates, who are not few, and are of each sex, can hardly be nuns and friars for ... the men and women are not separated. They, however, call themselves and address each other as brothers and sisters; there appears to be something, whether really as well as professedly, or professedly alone, in the nature or design of the institution, which perhaps might render it fit to be described as a spiritual boarding house: though to what kind of religion, if any, the inmates belong, does not I think appear .... They sing hymns, I think, addressed to the Supreme Being; but ... they do not, in the sense of supplication or entreaty to God, pray at all. The Agapemonians appear to set a high value on bodily exercise of a cheerful and amusing kind .... They play ... at lively and energetic games, ladies and all. So that their life may be considered less ascetic than frolicsome. The particulars, however, of the Agapemonians' esoteric existence, being not open to general observation, are little, if at all, known beyond their own boundary. But to works of usefulness or charity without, they do not seem, so far as I can collect, addicted.

There was plenty of private amusement but no discernible public benefit. Much fun, but no charity.

Court control of charitable trusts

There is no charity whenever there is lacking a basis on which, as the guardian of charity, the Court could step in and direct or control the administration of the trust.

Thus the Court refused to recognise as charitable the trust attempted in *Re Hummeltenberg* [1923] 1 Ch 237:

> for the purpose of establishing a college for the training and developing of certain persons, male and female, as mediums, preference given to healing mediums and those for diagnosis of disease. It would be desirable if mediums during their development could be employed in garden or farm work, such occupation might be useful to their development.

The Court could see no sufficient basis on which it would be able to supervise or control the administration of anything so vague as to its purposes. The trust was struck down as non-charitable.

Recognised head of charity

Even if the gift is open to a wide section of the public, and even if it could be of benefit to the public, it still will fail as a charity unless it falls within one of the heads of beneficence recognised as charitable for being within the spirit of the Preamble to "the Statute of Elizabeth" of 1601.

For this reason the Court knocked back the scheme in *Re Gwyon* [1930] 1 Ch 255. A reverend gentleman tried to create a trust to provide knickers for local boys aged between 10 and 15. The word "Gwyon's present" was to have been embroidered on to the waistband. The boys were to be eligible for a new pair each year, so long as those words were still decipherable on the previous year's pair.

Because Good Queen Bess evidently had not been into knickers, the objects of the Rev Gwyon's regard had to pay for their own.

Education – truly educational purpose

One head of charity given explicit mention in the Statute of Elizabeth is that of education.

The Courts will construe that pretty generally, but a line still has to be drawn. In *Re Pinion* [1965] Ch 85 the attempt was made by a painter to set up a charitable, educational, trust by directing that his studio be turned into a museum housing his collection of [mainly his own] paintings, old furniture and china, and general bric-à-brac. One of the Judges in the English Court of Appeal caught the mood of the whole Court when he declared that:

> I can conceive of no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value.

Clear general charitable intention

I have of course been choosing the weirder cases, and it must not be thought the Court spends all its time frustrating the aspirations of would-be public benefactors.

So if you find yourself appointed a trustee of a trust which cannot of itself be carried out, it might be possible to salvage it nonetheless. The key to salvation will lie in whether the terms of the deed or will show a clear general charitable intention. Where you can point to this, the Court can save the trust. It does this by approving a scheme to give effect to that general charitable intention.

Sometimes the Court has done this in a way which might have seemed calculated to set a few teeth on edge, for example, *Da Costa v De Pas* (1754) Amb 228.

The attempt had been made to create a trust to found an institution where instruction could be given in the tenets of Judaism. In those days anything involving the teaching of either Catholic or Jewish theology was void in England as superstition. So the proposed trust was impossible to be lawfully carried out, and it could not be enforced.

But the Court found that the deed showed a general charitable intention: viz, the advancement of religion.

So it ruled that the funds were to be applied to the foundation of an orphanage at which children of the poor would be instructed in *Christianity*.

Concessional tax treatment for trusts that fail as charities

Lots of organisations for which you might be asked to act will not be charitable in law. For example, however you might be able to re-argue the point today [cf Waters *Law of Trusts in Canada* 2ed (1984) 593], there is authority that the mere promotion of sport is not charitable in law: *Laing v Commissioner of Stamp Duties* [1948] NZLR 154, ruling that the Otago Swimming Association was not within the spirit of the Statute of Elizabeth I.

A strange omission, perhaps, considering that her Majesty herself was said to have taken a bath once a year: whether she needed it or not.

Section CB 4(1)(h) exempts from New Zealand tax income which is:

> derived by any society or association ... established ... for the purpose of promoting any amateur game or sport ... conducted for the recreation or entertainment of the general public, and if no part of the funds of the society or association is used or available to be used for the private pecuniary profit of any proprietor, member, or shareholder of that society or association.

SETTING UP BUSINESSES TO ATTRACT EXEMPTIONS

Setting up settlements for charitable purposes within s CB 4(1)(c) is something with which many are familiar.

Less familiar is the structuring of a business the revenues of which will be tax exempt as derived by trustees for charitable purposes within s CB 4(1)(c) or (d), or as derived by a society or association within s CB 4(1)(h).

Let us say that you act for a group which is keen to encourage amateur equestrian eventing in New Zealand. Let us say also that, among the ways in which it aims to do that, it intends breeding suitable ponies at prices affordable to a much wider range of people than at present; and it intends manufacturing saddlery, portable jumps, and other equipment at much lower prices than are available at present. Even at the lower prices it intends to charge, it hopes to make a good profit on these activities.

The group then would like the sport to be able to enjoy the *whole* of that profit, rather than just a tax-paid residue.

The members want the business to be incorporated, so that it can be run as a proper commercial enterprise.

How do you set about reconciling all these objectives?

Ensure income is derived by the association

The first objective is to ensure that you do not create a corporate structure which results in the company deriving the profit in its own right and then paying it over to the client association. If the company shall have derived the income in its own right, it will be taxable on it without regard for the privileged tax status of the association.

That is what happened in *MK Hunt Foundation v CIR* [1961] NZLR 405. The actual decision is dubious on the facts. (See *CIR v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450, 457 lines 13-15) However, the principle is important. It was stated at p 411 line 6:

> It is one thing for a body to exist for charitable purposes but it is quite another thing for a company to exist to pursue ordinary commercial activities even though as a financial consequence some other body is thereby enabled to act charitably in the legal sense. Were it otherwise every commercial firm which makes donations to religious and charitable causes would be entitled to claim itself to be in part a charitable body.

Ensure creation of a a trading entity effective to produce income for the association

The next objective is to ensure that the chosen trading entity shall have all the powers it needs to trade effectively so as to produce income for the benefit of the association.

Wide commercial powers are to be expected. Provided the first objective shall have been achieved, these wide powers will not derogate from that achievement.

A relevant authority, in which the IRD unsuccessfully argued otherwise, is *Carey's (Petone and Miramar) Ltd.* From line 28 at p 455 the Court of Appeal held:

> The contention was advanced by counsel for the Commissioner that, inasmuch as the respondent was authorised to use the trust property in conducting a commercial business, the property could not be said to be held upon a charitable trust; that moreover the charities could take no benefit unless and until income was paid over by the

respondent to the Board and that it could, if it chose, apply any part of the income in extending the business, and that therefore this could not be regarded as the execution of a charitable trust. In our opinion the fact that such wide powers – unusual in a trustee – were given does not negative the charitable nature of the trust. The conduct of the business is subjected to the dominating consideration that the income, when ascertained shall be paid to the Board to be apportioned exclusively amongst charities. All the wide powers given to the respondent are for the purpose of developing the business and increasing the income yield. It is indeed not uncommon for trustees to be given such powers as to carry on farming or other business for the benefit of the widow or children of a testator; in such a case the whole net income from the investment is held in trust for the nominated beneficiaries. It cannot be doubted that a trust is thus constituted, and if the objects of such a trust are indubitably charitable, can it be contended that it is not a charitable trust?

Power to plough income back

In *CIR v Carey's (Petone and Miramar) Ltd* [1962] NZLR 582, affd [1963] NZLR 450, both Barrowclough CJ and the Court of Appeal thought it significant that the company in that case was bound to distribute its income year by year.

The significance, however, was that this feature distanced the facts of the case from the facts of *MK Hunt Foundation*. This made it easier for Their Honours to distinguish the decision of Hardie Boys J in that case, and, so, meant that they did not have to disapprove it.

That is as far as the point goes, however, and it must not be thought that this feature is essential to the structure of the operation. *Calder Construction Co Ltd v CIR* [1963] NZLR 921, 926 line 1ff held as much:

> On this construction, provided the business is carried on in trust for charitable purposes, it is immaterial that the whole of the income derived from it is not obliged to be paid immediately to the charity or charities. By extending exemption to businesses, the Legislature must be presumed to have accepted that normal prudent business practices, such as the creation of reserves out of income or the application of part of the income of the business for development purposes would be adopted. The para [the equivalent of s CB 4(1)(e) Income Tax Act 1994] does not in terms require the income of the company to be applied exclusively and immediately for charitable purposes and I can see no reason for implying such a condition. So long as any resulting assets must ultimately be applied to "charitable" purposes the business is nonetheless carried on in trust for such purposes because such application is postponed.

Drafting the constitution to secure approval by the IRD

If these objectives are to be secured, and if the pathway to Inland Revenue concurrence is to be smooth, the drafting must clearly confine the activities to charitable purposes, where paras (b) and (e) of s CB 4(1) are to be relied on, or to the sporting association where para (h) is to be the basis of the proposed structure.

Provisions I have advised for inclusion in constitutions, and which have been found acceptable by the IRD in the context of the particular organisations in respect of which they were drafted, are shown in the box on next page.

Remuneration restrictions

The second proviso to s CB 4(1)(e) Income Tax Act 1994 is important in these cases.

The proviso refers to persons such as shareholders in, and directors of, the company carrying on the business. It envisages them, in the carrying out of the business, deriving any income or other benefit or advantage, such as "All monetary remuneration" under s BB 4(b). It applies where such a person as shareholder or director can:

> ... in any way (whether directly or indirectly) to determine, or to materially influence in any way the determination of, the nature or the amount of that benefit or advantage or that income or the circumstances in which it is or is to be so ... derived ....

Where it applies, this proviso deprives the entire income of the business for that year of its exempt status, and makes the company assessable with that income as trustee income.

Something along these lines may be necessary in the Constitution:

Remuneration for services

Remuneration may be paid for any services actually rendered to the company, provided only that:

a. The rate of remuneration shall have been determined by the auditor, and that
b. The amount of remuneration shall have been approved by the auditor; and that
c. The auditor shall have certified that the determination or approval was given entirely independently, and without regard to the views of any shareholder or director or of any person associated with any shareholder or director.

No private benefits

Save where the conditions in the immediately preceding clause shall have been complied with:

a. No income or property of the company may be paid or applied, directly or indirectly, other than to the Association.
b. The company may not authorise any of the benefits for which s 161(1) of the Act makes provision.

Departmental approval

The law does not require the documents to be submitted for the prior approval of the IRD. Trustees who are confident that their trusts are charitable, or are otherwise within these concessional provisions, could simply proceed on the basis of that confidence.

Although that course would be legal, it would not be prudent. Were their confidence to have been misplaced, the results could be catastrophic, and even penal.

Prudence accordingly requires that, once they have been settled in draft, the documents should be submitted to the IRD for consideration.

It may be desirable that the association itself not be a shareholder in the company: *Re Grasslands Farms Ltd* [1975] 1 NZLR 92.

When provisions such as these are included with the other provisions required for a constitution, the IRD appears likely to accept that the company is carrying on the business as trustee for the association: so that the company's income is the income of the association. ❑

GENERAL

Name of company

The name of the company is ..... Ltd.

Why company exists

1 The sole purpose for which the company exists is to carry on, as trustee in trust for the ..... Association, any business associated with the promotion in New Zealand of the amateur sport of ....., including the maintenance and improvement of standards and of equipment.

2 Every right and power of the company, and of its members in respect of the company, is subservient to that purpose.

3 The income and property of the company will be dealt with as provided in this Constitution and in no other way.

Constitution to prevail where Act permits

For the purposes of s 124 of the [Companies] Act, and for the purposes of any other enactments which yield to a contrary constitution, the provisions of this Constitution prevail over the provisions of the Act.

"Entitled persons" able to enforce the purpose of, and the limitations on, the company

For the purposes of s 164(c) of the Act, the ..... Association is an entitled person.

Property of the company to be transferred to association on winding up

1 Should the company be wound up, any surplus shall be transferred to the ..... Association.

2 If the company shall have been wound up at a time when the ..... Association shall no longer exist, and if no successor body shall have been brought into existence within six months of the date of dissolution of the company, the surplus shall be paid or distributed by the liquidator to or among such bodies, established primarily for the promotion in New Zealand of any amateur sport conducted for the recreation or entertainment of the general public:

a. As the directors shall have decided most nearly resemble the ..... Association; or

b. In default of a decision by the directors, as may be determined by the High Court of New Zealand on the application of the liquidator or of any member of the company.

Profits of the company are profits of the ..... Association

1 All profits arising from the operations of the company shall be profits of the Association.

2 After making provision for all just and lawful debts, for appropriate depreciation, and for prudent reserves, any profit shall be paid to or applied for the benefit of the Association in each year.

WINDING UP

Disappearance of substratum

Should the ..... Association at any time be dissolved, and should no successor body or organisation have been brought into being within six months after the date of dissolution, the company shall be wound up forthwith.

Distribution on liquidation

Any surplus on winding up shall be paid to the Association.

continued from p 58

> The enquiry should rather be directed to the degree of objectivity surrounding the endeavour to influence, particularly where the trust relies on an educational end, and whether political change is merely the by-product or is instead the principal purpose.

Santow J faced an argument that the objectives of the FCAATSI which were not obviously political on their face were nonetheless invalid as political because they were intended to be achieved by overt political action. This claim required recourse to extrinsic evidence. While not inclined to permit such evidence, His Honour discussed the impact of the submission. Of particular interest are some of His Honour's concluding comments:

> The cases on charities also involve some confusion between means and ends when it comes to their persuasive activities. There is a range of activity, from direct lobbying of the government, to education of the public on particular issues, in the interests of contributing to a climate conducive to political change. The line between an object directed at legitimate educative activity compared to illegitimate political agitation is a blurred one, involving at the margins matters of tone and style. ... Since s 23 of the Charitable Trusts Act 1993 [New Zealand's s 61B] at least, the rule against trusts for political purposes is not to be applied so strictly as automatically to preclude a body from being charitable which carries out activities directed at advancing a charitable object ... through means which seek to influence public opinion to that end. ...
>
> Persuasion directed to political change is part and parcel of a democratic society in which ideas and agendas compete for attention and allegiance. Much will depend on the circumstances including whether an object to promote political change is so pervasive and predominant as to preclude its severance from other charitable objects or subordinate them to a political end. It is also possible that *activities* directed at political change may demonstrate an effective abandonment of indubitably charitable objects. But if persuasion towards legislative change were never permissible, this would severely undermine the efforts of those trusts devoted to charitable ends that ultimately depend on legislative change for their effective achievement. In New South Wales at least, s 23 ... [in New Zealand s 61B] assists in avoiding that consequence in those cases which meet its requirements. ❑

GAMING PROCEEDS AND SPORTS CLUB BENEFICIARIES

Kerry Ayers, of Helmore MacDonald and Stanley, Christchurch

raises two current issues affecting charitable trusts

INTRODUCTION

Trusts do not exist in a social vacuum. Their uses are determined by the needs of the members of the community within which they operate.

In recent years a number of charitable trusts have had to consider to what extent they can benefit sporting activities, and how they are affected by the use of revenue from gaming machines. The purpose of this article is to discuss these two issues.

Prerequisites to trust being "charitable"

Before a trust is considered charitable in law, two preconditions must be satisfied. Firstly, the trust must be established for a purpose which within the spirit and intendment of the preamble of the Charitable Uses Act 1601 (UK). Secondly, the trust must benefit the public or a sufficiently significant section of it. A traditional third requirement that the trust must be exclusively for purposes which are charitable is now less important because it has been qualified by statute.

Spirit and intendment of the preamble of the Charitable Uses Act 1601

The preamble of the Charitable Uses Act 1601 (UK) (also known as the Statute of Elizabeth 1601) lists many purposes which the law considers to be charitable. It is not exhaustive: it merely lists those trust purposes which the English Courts had, by the time of its enactment, determined to be charitable. The preamble is really just a list of examples of charitable trust. Nevertheless, the Courts have regarded themselves as constrained by the Act so that only purposes which are within the "spirit or intendment" of the Act are capable of being charitable.

The range of purpose trusts which were charitable was conveniently summarised by Lord MacNaughten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531. In a much-quoted judgment His Lordship determined that there were four categories of trust which came within the spirit and intendment of the Act and were therefore for a charitable purpose. These were: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and the "miscellaneous" class of trusts for other purposes beneficial to the community.

Benefit of the public generally or a section of the public

For a trust to be charitable it must not only be for a charitable purpose but must also have the effect of benefiting of the public generally or at least a significant section of the public. The exception to this rule is trusts for the relief of poverty, which may have no element of public benefit yet still be charitable (see, for example, *Dingle v Turner* [1972] AC 601).

This requirement has been given a wide interpretation in some instances. For example, a trust for the education of the daughters of missionaries has been held to have benefited a sufficiently large section of the public to be charitable – *German v Chapman* [1877] 7 ChD 271 (CA). A case which clearly fell on the other side of the line is *Gilmour v Coates* [1949] AC 426. Here a trust for the benefit of strictly cloistered and secluded nuns was held to be for the advancement of religion, but failed because of the lack of public benefit.

Whether the requirement of public benefit has been met is a question of law. It is not always easy to determine whether a particular trust for a charitable purpose truly benefits a section of the public or merely a number of private individuals.

An early test which found favour was put forward in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297. In this case it was held that there must be more than a numerically negligible number of people who may benefit before the test of public benefit will be satisfied. Also, the quality which distinguishes the beneficiaries from the rest of the public must not depend on their relationship, whether in blood or in contract, with a particular individual (or group of individuals). There must be no nexus between the potential beneficiaries. They must not, in other words, be a private class.

In *Oppenheim* itself, the trust was to benefit the children of employees and ex-employees of a company and its subsidiaries. It was held that the potential beneficiaries (of which there were more than 110,000) were not a section of the public due to the fact that the factor that distinguished them from other people was a "personal" relationship.

The *Oppenheim* test has been criticised (see the dissenting judgment of Lord MacDermott, which has been referred to with approval in later cases. His Lordship raised the point that the members of a particular profession would undoubtedly be a section of the public (even if the number within that profession were very small). However, where the members of that profession were employed solely by one employer (such as a state railway corporation), the same beneficiaries would not be a section of the public because of the personal nexus with the employer). In *Dingle v Turner* [1972] AC 601 the House of Lords (obiter) considered the distinction between personal and impersonal relationships

as unsatisfactory, and considered that the issue was best resolved by judging as a question of degree whether the public benefit requirement had been met. Arguably this approach is just as unsatisfactory. The House of Lords also left open whether the test of public benefit is different under each of the four heads of charity.

The highest New Zealand authority on the issue is *NZ Society of Accountants v CIR* [1986] 1 NZLR 147. The Court of Appeal held that certain fidelity funds did not benefit the public or a sufficient section of it, so could not be a charitable trust under the fourth head of *Pemsel*. The Court held that the benefit came to recipients due to their connection with a particular practitioner. The Society's argument that the public as a whole (not just actual claimants) benefited from the trust through having increased peace of mind. This was rejected by the Court as being too insubstantial to amount to a benefit. The leading judgment in *Dingle v Turner* was referred to and quoted by Richardson J (as he then was) in support of the Court's view.

The *NZ Society of Accountants* case does not, with respect, deal convincingly with other authorities which have accepted that a "wider" benefit is enough. For example, a trust to establish a bridge which is to be available for all the public is undoubtedly a charitable trust, regardless of how many people actually use it. This was a hypothetical example given by Lord Simonds in *IRC v Baddeley* [1955] AC 572. In another case a trust for the purchase of plate and the maintenance of a library for officers of the armed forces was seen as benefiting the public, and not the officers themselves, by making the armed forces more efficient servants of their country *Re Good* [1905] 2 Ch 60. Both of these cases were referred to but not clearly distinguished.

Later New Zealand cases have had to consider the public benefit issue. In *Educational Fees Society v CIR* [1992] 2 NZLR 115, Gallen J regarded the current trend in authority as that exemplified in *Dingle v Turner* and (the general tenor of) the *New Zealand Society of Accountants* case. He formulated the question in the alternative as "is the trust substantially altruistic in character?"

The result is that at present, although it cannot be stated absolutely, the likely approach is that the *Oppenheim* test will be rejected and that a pragmatic approach will prevail. In practice it will be difficult to determine whether the public benefit element has been satisfied. It is not even certain whether the test is the same under each head of charitable purpose – *Re Twigger* [1990] 3 NZLR 338.

CAN A SPORTS CLUB BE THE BENEFICIARY UNDER A CHARITABLE TRUST?

Would such a trust be for a charitable purpose?

Advancement of education. In some circumstances the promotion of sporting achievement can come under the second head in the *Pemsel* case, namely the advancement of education. "Education" is not limited to traditional academic endeavours: it also includes physical education – *Re Mariette* [1915] 2 Ch 284. A gift to a school for the purpose of building squash courts was charitable. However such sporting activity must be connected with what is more traditionally regarded as education. It is not enough to say that the sport promoted by the club is educational in the sense that all experiences are loosely educational *IRC v Baddeley* [1955] AC 572. The physical activity must truly be "part of the package" of the beneficiaries' education. This would not be the case where the sports club in question was unconnected with a school or university.

Other purposes beneficial to the community. The other possibility is that the trust for the sports club comes under the fourth head of *Pemsel's* case: other purposes beneficial to the community. It is not enough merely that there is public benefit from the particular trust. There must be a benefit in a way which the law regards as charitable. In other words, it must be within the spirit and intendment of the Charitable Uses Act 1601 (UK). Examples of trusts falling within this class are trusts for the benefit of a particular country, and trusts to increase the efficiency of the police or armed forces.

The authorities indicate that gifts to encourage sport generally or any specific sport are not charitable – *Re Nottage* [1895] 2 Ch 649. This is due to the judicial belief that trusts for sport are primarily for amusement purposes and are not within the spirit and intendment of the Charitable Uses Act 1601 (UK). Hence any gift by a charitable trust to a sports club will probably be a breach of trust because the gift would not be for a charitable purpose.

Would there be public benefit?

Even if the trust for a sports club was considered to be a charitable purpose, it would still need to satisfy the requirement of public benefit before it could be a charitable trust.

As discussed above, the test of whether a trust benefits the public or a sufficient section of it is not settled. However, it is the writer's opinion that it is very unlikely that the test would here be satisfied. The members of the sports club all have the *Oppenheim* "personal" connection with each other by way of their relationship to the club, which is contractual. On a pragmatic analysis, the number of people benefiting is also likely to be quite limited. Arguably in these circumstances there would be no benefit to the public or a sufficient section of it.

Section 61A Charitable Trusts Act 1957

Section 61A was passed to modify the legal position regarding recreational charities. It provides that if facilities for recreation or leisure are provided in the interests of social welfare then they are deemed to be charitable, provided that there is still the necessary element of public benefit. This section operates to save trusts to build a community hall, for example. Before s 61A these trusts satisfied the public benefit test, but were not charitable because they were not for a charitable purpose.

The section is of no assistance as far as gifts to sports clubs are concerned, since the lack of public benefit still prevents the trust achieving charitable status.

However, the situation may be different if the trust was to promote sports clubs involved in a certain sport in a particular area, such as all netball clubs in New Zealand. The trust would still need to be for a charitable purpose and not merely a private trust for certain clubs (a trust must be for a purpose, not for a person: *A-G for New South Wales v Perpetual Trustee Company Ltd* [1940] 63 CLR 209). Here the purpose (although probably not charitable at law) is saved by s 61A, and arguably the various clubs (and their members) would be so numerous that they could properly be considered a sufficient section of the public.

CHARITABLE TRUSTS AND GAMING MACHINES

Introduction

A charitable trust will often need to fund-raise to obtain money to fulfil its objectives. One avenue is the use of gaming machines, which are regulated by the Gaming and Lotteries Act 1977.

Gaming and Lotteries Act 1977

Section 3 of this Act includes "gaming machines" (as defined) as an illegal game of chance. Under s 8 however the Minister of Internal Affairs can grant a licence to a "society" authorising it to conduct what would otherwise be an illegal game of chance provided the Minister is satisfied that the society's object in doing so is to raise money for an "authorised purpose".

"Authorised purpose" means "any charitable, philanthropic, cultural, or party political purpose, or any other purpose that is beneficial to the community or any section of it" (Section 2, Gaming and Lotteries Act 1977). Importantly, the need for public benefit appears to qualify only "any other purpose" and not the entire definition.

A "society" is widely defined and includes any association of persons, whether incorporated or not, which is established and conducted for a non-commercial purpose. This would include an incorporated charitable trust, and also a sports club.

Can a sports club operate gaming machines?

The combination of these provisions indicates that in order to obtain a licence to operate gaming machines, the society need not be charitable. Thus it will not need to come within the spirit and intendment of the Charitable Uses Act 1601 (UK). Arguably it will not even need to satisfy the public benefit test if it can be considered a "philanthropic" or "cultural" purpose under the "authorised purpose" definition in the Gaming and Lotteries Act. A sports club would probably come within those terms. Accordingly it can apply for a licence to operate gaming machines of its own accord.

Can a charitable trust operate gaming machines?

A charitable trust could also obtain a licence to operate gaming machines, since it is a "society" which would apply the profits for an "authorised purpose".

But would applying gaming machine profits to a particular sports club be a breach of the charitable trust? This would depend on whether the sports club can be considered a charitable object. This is doubtful because for the reasons discussed above. Section 61A Charitable Trusts Act 1957 saves trusts for mere recreational or leisure purposes (if they are provided in the interests of social welfare) by treating them as if they were within the spirit and intendment of the Charitable Uses Act 1601 (UK). However, as mentioned above, the section still requires that the public benefit prerequisite is satisfied. This latter element probably excludes the sports club from being a beneficiary.

Consequences

The result is probably that a sports club can obtain a licence, operate gaming machines, and keep the profits for its non-commercial purposes. On the other hand, a charitable trust (although it could raise funds in the same manner) could not apply the money to benefit the same sports club, since (on the authority discussed above) the club could not be a beneficiary and any gift would be a breach of the trust.

The result is probably that a sports club can obtain a licence, operate gaming machines, and keep the profits for its non-commercial purposes. On the other hand, a charitable trust (although it could raise funds in the same manner) could not apply the money to benefit the same sports club

An example will assist. Take a working men's club, which is an incorporated body under the Friendly Societies and Credit Unions Act 1982 and which exists for non-commercial purposes (the "W M Club"). The W M Club has established a charitable trust, and this too has been incorporated under the Charitable Trusts Act 1957 (the "W M Club Trust"). The W M Club could obtain a gaming machine licence and apply profits to the local rugby club, since this is arguably an "authorised purpose", without there needing to be benefit to the public. The W M Club Trust could obtain a licence also, and apply gaming proceeds to its charitable objects. A particular sports club could not be specified as the beneficiary in the trust deed. Nor, if the trust deed allowed the board a discretion to apply to any deserving beneficiary, could the W M Club Trust give the proceeds to the sports club, since the public benefit requirement would not be met and this would prevent this gift from being charitable. If the gift went ahead the board of the W M Club Trust would be in breach of trust.

CONCLUSIONS

A gift in favour of a sports club must both be for a charitable purpose and benefit a sufficient section of the public before it can be charitable. These requirements may be difficult to meet. Promotion of a sports club is not within the spirit and intendment of the Charitable Uses Act 1601 (UK). However, s 61A of the Charitable Trusts Act 1957 saves this element by providing that purely recreational trusts can be charitable. The requirement of public benefit also poses problems. The test to be applied is uncertain. The present trend in New Zealand is towards a pragmatic approach. It is a question of degree. The existence of a personal connection between the beneficiaries may no longer be fatal. The terms of the particular trust deed will be crucial.

Gaming machines represent an available source of revenue for both charitable trusts (whether incorporated or not) and sports clubs (whether incorporated or not). The legislative licensing requirements must be complied with. A sports club could apply gaming machine profits towards expenses of a charitable, philanthropic or cultural nature. A charitable trust could only apply such profits to charitable purposes within the terms of the trust deed. This would probably exclude the sports club, depending on the terms of the trust. The result is that gaming machines can be utilised by a sports club for its own benefit, but a charitable trust may not be able to apply its gaming profits to the same sports club. ❑

RECENT LEGISLATION

CRIMINAL PRACTICE

edited by
Catherine Cull

CRIMES AMENDMENT ACT (No 2) 1997

Participation in a criminal gang (s 98A)

a. Penalty – three years' imprisonment.
b. Basic elements of the offence –
   - Participates in any criminal gang knowing that it is a criminal gang, and;
   - Intentionally promotes or furthers any conduct by any member of that gang that amounts to an offence or offences punishable by imprisonment.
   - *"Criminal gang"* is defined as a group of three or more persons where at least three members of the group have each been convicted of a serious offence, a list of which is set out in s 98A(1).
   - The prosecution do not have to prove that the accused has committed any other offence or that the accused was a party with s 66 Crimes Act to any particular offence committed by any other person.
   - The prosecution does not have to prove that the accused knew of, intended or promoted the commission of a particular offence.
   - The accused is deemed to know that a gang was a *"criminal gang"* if the accused has been warned on at least two occasions that the gang is a *"criminal gang"*.

New search provisions

Power to search vehicles for goods stolen or obtained by crimes involving dishonesty (s 227B)

This section introduces a power for police to search without warrant any vehicle to locate stolen property or property obtained by a *"crime involving dishonesty"* (defined in the Crimes Act as any crime coming within s 217 to 292 of the Crimes Act). The new power relates only to searching vehicles. Police are authorised to use reasonable force to enter the vehicle and may seize any such property located. Before searching, police must identify themselves to any person in or on the vehicle, and if not in uniform, must produce ID if required. Police must also have reasonable grounds for believing such property is in or on any vehicle. Police must inform any person in or on the vehicle that the search is being conducted under s 227B of the Crimes Act.

Statutory search power (s 314A)

Sections 314A to 314D clarify the situation where police have a specific power to search a vehicle, but where that search power does not specifically allow police to stop the vehicle in order to carry out the search. This follows the Court of Appeal ruling in *R v Pearce and Fagan* (1996) which held that because s 18 Misuse of Drugs Act does not specifically authorise police to stop vehicles for the purpose of search, then no power to stop the vehicle can be implied in that section.

Section 314A states that any power conferred by statute that expressly authorises any member of the Police to search a vehicle whether or not it involves the issue of a warrant or authorises any other person to exercise the power is a statutory search power.

General power to stop vehicles (s 314B)

Whenever the grounds exist for exercising a power to search a vehicle, police may rely on s 314B to stop that vehicle for the purpose of carrying out that search. Police must either be in uniform or use red and blue flashing lights and siren (the same criteria which exist under s 66 of the Transport Act and s 317A of the Crimes Act). The requirements contained in subs (4) are that the officer must immediately the vehicle has stopped –

a. Identify himself or herself to the driver of the vehicle.
b. Tell the driver that the stopping power is being exercised under s 314B for the purpose of exercising a statutory power of search.
c. Tell the driver the statutory search power in respect of which the stopping power is being exercised.
d. If not in uniform and if so required, produce evidence that he or she is a member of the Police.

Powers incidental to stopping vehicles under s 314B(s 314C)

Whenever a vehicle is stopped pursuant to s 314B police may request the name, address and date of birth of each person in that vehicle.

Offences relating to stopping vehicles under s 314B(s 314D)

The effect of the above changes are that if police have a power to search any person under either the Crimes Act (s 202B), Misuse of Drugs Act (s 18(3)), or the Arms Act (s 60), and that person is in a vehicle, police have the power to stop the vehicle to carry out the search. Once the vehicle has been stopped, police are able to rely on ss 314B to 314D to obtain the details of each person in that vehicle.

HARASSMENT ACT 1997

Section 8 of this Act creates a new offence of criminal harassment –

a. Penalty – two years imprisonment – summary offence.
b. Basic elements of the offence –

- s 8(1)(a) – the offender harasses another person and intends to cause the victim to fear for their safety or the safety of a person with whom they have a family relationship.
- Harassment is defined as a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act (s 4) on at least two separate occasions within a period of 12 months.
- s 8(1)(b) lowers the level of mens rea to recklessness. It is enough to prove that the offender knew that the behaviour would be likely to have the effect of reasonably fearing for that person's safety or the safety of another in a family relationship.
- s 8(1)(b) introduces a subjective element and the Court must take account of the victim's particular circumstances.

SUMMARY OFFENCES AMENDMENT ACT 1997

Sections 6A, B and C create new offences of associating with violent or serious drug offenders

Penalty – three months' imprisonment or $2,000 fine.

Section 6A sets out that it is an offence to habitually associate with a violent offender in circumstances from which it can reasonably be inferred that the association will lead to the commission of a crime involving violence by that person or any such offender.

"Violent offender" means a person who has been convicted on at least two separate occasions of a crime involving violence.

No offence can be charged unless the defendant has been warned by a constable on three separate occasions that continued association may lead to the bringing of such a charge and that such warnings are given not more than seven years after the date of that violent offender's last conviction for a crime involving violence.

> **"Criminal gang"** *is defined as a group of three or more persons where at least three members of the group have each been convicted of a serious offence, a list of which is set out in s 98A(1)*

Section 6B sets out that is an offence to habitually associate with a serious drug offender in circumstances from which it can reasonably be inferred that the association will lead to the commission of a serious drug offence by that person or any such offender.

"Serious drug offender" means a person who has been convicted on at least two separate occasions of a serious drug offence. In respect of Class C drug offences only convictions which involved a *"substantial"* amount of cannabis will qualify as a serious drug offence.

The same warning provisions as for s 6A apply.

Section 6C states that *"habitual association"* may be proved by proving the three separate warnings and that all three warnings were given within a period of two years. The prosecution is not limited to proving an *"habitual association"* in that way.

Section 21 – intimidation offences – has also been amended.

CRIMINAL APPEALS

PRACTICE NOTE [1997] 3 NZLR 513

From 1 January 1998 this practice note becomes effective. It sets out the procedure to be taken when conducting a criminal appeal in the Court of Appeal.

Counsel should be aware of the following new procedures –

1. Counsel should advise if the appeal merits being heard by five Judges, eg legal, social and general economic importance, conflicting decisions in the lower Courts or if the Court is to be asked to depart from its own earlier decision.
2. As soon as the Case on Appeal is prepared and sent to counsel by the Registrar counsel must advise what other documents from the file will need to be before the Court.
3. Time limits for filing submissions are –
   i. For a Court of five Judges the appellant must file submissions 14 calendar days prior to the hearing date. The Crown must file submissions seven calendar days before the hearing.
   ii. For a Court of three Judges the appellant must file submissions seven calendar days prior to the hearing date. The Crown must file submissions three calendar days before the hearing.
4. Submissions must be concise, tightly focused and properly cross-referenced to the Case on Appeal and the authorities to which the Court is referred.
5. Submissions should avoid lengthy quotations from authorities and instead identify the principle and passage of the authority to be relied on.
6. A bundle of the authorities to and legislation must be filed with written submissions and that bundle must contain a first page with the list of authorities, including their citations.
7. Care should be taken with copying cases to make sure all details are recreated on the page.
8. Cases copied across two pages should be arranged facing out from the bundle of the spine.
9. Any applications for leave to tender fresh evidence must be filed three weeks before the hearing date together with supporting affidavits.
10. Leave must also be obtained to cross-examine on fresh evidence.
11. Details of the fresh evidence must be supplied to the Crown three weeks before the hearing date.
12. Appeals based on complaints against trial counsel, the Police, the Crown or trial Judge must require details of the allegations being supplied to the Crown three weeks before the hearing date. Also to be

included is a waiver of privilege addressed to the practitioner concerned. This is to enable the Crown to approach the practitioner and secure any response seen as appropriate for the purpose of assisting the Court.

13. If counsel for the appellant and Crown cannot agree to a written account of any incident referred to in the course of the appeal advice of this must be given to the Registrar three weeks before hearing to enable a report to be called for from the trial Judge.
14. If an appeal is based on disparity of sentences counsel must ensure –
    i. Sentencing files of other co-offenders are available for the Court.
    ii. A statement of facts, references, the victim impact report, the pre-sentence report, the appellant's previous record, the Judge's sentencing remarks and any other documents the sentencing Judge had, are before the Court.
15. At hearing counsel will be expected to speak to their submissions, not simply to read through them and to respond to questions from the Bench.
16. Note, submissions will be available to the media when presented subject to any suppression orders.
17. Adjournments will only be granted in exceptional circumstances.

CASE COMMENT

SENTENCING

Sargeant v Police (HC Hamilton, AP 130/97, Hammond J, 28 November 1997)

The appellant argued that the sentence he had received in the District Court on charges of careless use of a motor vehicle causing death and bodily injury was manifestly excessive. He had been ordered to pay $13,270 reparation and was disqualified from driving for 12 months.

Justice Hammond made some comments about reparation in cases such as these which are well worth noting:

1. (pp 3, 4) The sentencing Judge utilised lengthy passages of the victim impact reports verbatim in her sentencing remarks. Justice Hammond stated that such a course was most unusual and (p 5) although "to bring home to the offender what he had done" was a proper objective, "the extensive reading of the victim impact reports gave this sentencing a quite unbalanced aspect".
2. (p 4) A victim impact report should serve at least four purposes:
    i. Court may be assisted with further information.
    ii. It provides the Court with information about the effect of a crime on a victim and helps to balance the information in the Probation Service report on the offender.
    iii. The victim is given input into the administration of justice.
    iv. The offender is forced to recognise what he or she has done, which may advance the rehabilitative process and prevent further offending.
3. (p 7) The term "emotional harm" is not defined in the Victims of Offences Act 1987 and thus is very broad. "At the lowest end of the scale, it could mean simply 'mental anguish' occasioned to a victim by a crime; at the other end of the scale, the particular harm might be manifested in identifiable, long-term, clinical conditions such as traumatic stress disorders or even psychotic conditions." The difficulty for a sentencing Judge is the practical mechanics of assessing the loss and in attempting to quantify it. At p 8 of the judgment Justice Hammond states –

    > Then too, the quantification of loss of this kind is inherently intractable. What the Court has to quantify is the grief, the bereavement, the anxiety, and the mental pain and suffering. And, in this connection, in death cases, it does not demean the victims to recall that death is inevitable, and grief will eventually be experienced anyway. Further, it would be wrong in principle to conflate mental anguish with loss of society, or loss of support. The former represents an assessment of an emotional response to a wrongful death; the latter represents an economic loss of a positive benefit. Finally, it has long been recognised that full compensation or reparation is not affordable, whether by society at large, or individuals. The law and economics learning identifies the reasons. As Posner, *Economic Analysis of Law* (2nd ed 1997) put it, at p 155:
    >
    > > Most people would not exchange their lives for anything less than an infinite sum of money if the exchange were to take place immediately ... it cannot be correct that the proper award of damages [or reparation] in a death case is infinite ... it is plain that people are unwilling individually or collectively to incur the costs necessary to reduce the rate of fatal accidents so drastically.
    >
    > Empirically, what tends to happen in common law systems, whatever the compensatory or reparative system, is that Courts slowly evolve conventional, and of course, arbitrary limits to subject matter that cannot be treated with anything approaching scientific precision.
    >
    > Finally, on the question of general approach to reparation, the legislation, and the decisions of this Court, and the Court of Appeal, are plain enough that full regard must be paid to the ability of the reparator to pay.
4. In this particular case the reparation order was overturned because the exercise of the discretion to award reparation was conducted in such an unsatisfactory manner – namely: that the sentencing Judge had made no assessment in terms of actual losses and allowed what appeared to be some consequential losses. The sentencing Judge did not make or cause to be made any inquiry into the means of the reparator and no attempt was made to identify and quantify the emotional harm to the victims.
5. The appellant was remitted back to the District Court for re-sentencing. ❑

LITIGATION

edited by
Andrew Beck

EQUITABLE DISCOVERY

The process of discovery was developed in the Courts of Chancery to supplement the very limited forms of disclosure of pretrial information permitted by the common law. The purpose of a bill of discovery was to enable a plaintiff to elicit information from the defendant which could, if sufficiently damaging, put an end to the dispute: see Simpson Bailey & Evans *Discovery and Interrogatories* (2nd ed 1990) 12-13. Discovery in its modern sense has long been provided for in the Rules of Court. In a number of recent decisions, however, the Courts have had occasion to demonstrate considerable flexibility in deciding on the applicability of the Rules of discovery, reflecting something of a modern application of the equitable origins of the process.

IDENTITY OF WRONGDOERS

In *P v T Ltd* [1997] 1 WLR 1309, an employee had been dismissed for gross misconduct, based on allegations made by a third party to his employer. The employer refused to provide any details of these allegations to the employee, who then brought a claim in an industrial tribunal for unfair dismissal. The employee subsequently commenced an action in the High Court, pleading breach of contract and conspiracy. One of the specific items of relief sought by the employee in the High Court action was an order requiring the employer to disclose the precise nature of the allegations which had been made against him, as well as the identity of the complainant. This was brought on as a separate application, seeking an immediate order.

The Court was not satisfied that such discovery could be justified in respect of either cause of action which had been pleaded, but accepted that the pleadings were adequate to justify an application based on *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133(HL).

In *Norwich Pharmacal*, the House of Lords updated the bill of discovery procedure, accepting that it is permissible for a plaintiff to make a substantive claim for discovery which is necessary in order to enable a claim to be brought against a third party. The basis for such discovery is the idea that justice requires a person mixed up in the tortious acts of others to assist the person wronged: *Upmann v Elkan* (1871) LR 12 Eq 140.

The situation in *P v T* was not as clearcut as that in *Norwich Pharmacal*, where the only question was the identity of the wrongdoer. All the proceedings to date had been directed at the employer rather than the third party making the complaint. It was suggested in the course of argument, however, that proceedings could be taken against the third party based on defamation or malicious falsehood. One of the questions which would ultimately have to be decided was whether the third party had in fact committed any tortious act at all.

Notwithstanding the uncertainties, the Court considered that the employee should be placed in a position to be able to clear his name. Sir Richard Scott V-C said:

> It seems to me intolerable that an individual in his position should be stained by serious allegations, the content of which he has no means of discovering and which he has no means of meeting otherwise than with the assistance of an order of discovery such as he seeks from me. (at 138)

The Court was accordingly prepared to grant a *Norwich Pharmacal* type order.

The type of discovery order contemplated by *Norwich Pharmacal* has largely been superseded in New Zealand by the introduction of R 299 of the High Court Rules. That Rule allows for precommencement discovery where a plaintiff "is or may be entitled to claim" but cannot formulate the claim without the documents concerned. It may be noted that it was the inability to lay a sufficient foundation for a claim which led to the failure of the applicant in *Exchange Commerce Corporation Ltd v NZ News Ltd* [1987] 2 NZLR 160(CA).

The facts of *P v T* bear some resemblance to those in *Nelson v Dittmer* (1986) 2 PRNZ 171, where a third party had apparently made a statement to an insurance company, resulting in the cancellation of the applicant's policies. The Court ordered discovery, mentioning the desirability of allowing such an applicant to reflect on the advisability of a claim in the light of the full information provided. Although *Nelson v Dittmer* was thrown into some doubt by the *Exchange Commerce Corporation* case, those doubts now appear to have been removed by the Court of Appeal decision in *Hetherington Ltd v Carpenter* (1996) 10 PRNZ 1(CA), which approved a wider approach to R 299.

The decision in *P v T* suggests that the approach of the English Courts to this type of situation is essentially the same. While a foundation must be laid for the trouble and intrusion caused by a discovery order, it seems that serious consequences for an individual, such as those in *P v T* and *Nelson v Dittmer* are a relevant factor for the Court to take into account when deciding to order discovery. The Courts will not permit a

potential wrongdoer to escape liability by hiding behind the difficulties faced by a plaintiff attempting to formulate a case without access to the relevant information.

DISCOVERY TO ESTABLISH JURISDICTION

In *Canada Trust Co v Stolzenberg* [1997] 1 WLR 1582, a rather different problem arose. The case was brought by Canadian trustees, who claimed that the funds they administered had been defrauded over the years by the first defendant and others. In order to bring the claim in England, it was necessary for them to establish that the first defendant was resident there at the time the proceedings were instituted.

The plaintiffs knew that the first defendant had sold his London residence, but did not have sufficient information to be able to say conclusively whether he was resident in England or not at the relevant time. They accordingly made an application for discovery (under RSC O 38 R 13: requiring a person to appear and produce any necessary document) against banks and other persons who had had dealings with the first defendant.

At first instance the application was dismissed, essentially on jurisdictional grounds. The Court held that there could not be jurisdiction to make such an order in a case in which the plaintiff did not have at least prima facie evidence establishing jurisdiction to try the proceeding. On appeal, the Court of Appeal held that the High Court had confused two jurisdictional issues: jurisdiction to hear the proceedings, and jurisdiction to decide the limits of the Court's jurisdiction. It was jurisdiction of the latter kind which was at issue, and there was accordingly no legal barrier to the Court entertaining the application.

The Court of Appeal also dismissed the argument that the documents sought were not "relevant to any issue at trial". The question of relevance had to be determined in relation to the proceedings for which the documents were required, in this case, the application to establish jurisdiction. Although the Court of Appeal did not decide the application, it made it clear that there is a basis for such discovery.

It also emphasised that such discovery will rarely be granted, as in the case of an application to set aside a writ for irregularity of service: *Rome v Punjab National Bank* [1989] 2 All ER 136. It is obviously undesirable for such interlocutory matters to develop into mini-trials, and it must therefore be shown that discovery is essential for the fair disposal of the application.

There do not appear to be any New Zealand examples of discovery used to establish jurisdiction; the wide variety of grounds in R 219 allowing service outside the jurisdiction probably makes it less likely that such an application would ever be required. It is possible, however, to imagine situations where vital facts linking defendants to New Zealand would not be known to the plaintiff. A case such as *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1989] 2 NZLR 50, [1990] 3 NZLR 513 might well have entailed such problems.

Such an application would not fall within the wording of R 299: it would not be impossible or impracticable for the plaintiff to formulate its claim without reference to certain documents. If the proceeding had already been served, however, application could be made under R 300 or R 301 for discovery of a document relating to a "matter in question in the proceeding". Following *Canada Trust Co*, the issue of jurisdiction would be a "matter in question".

IDENTITY OF PERSONS FUNDING PROCEEDINGS

Hamilton v Papakura District Council unreported, Hammond J, 15 August 1997, HC Auckland CP 391/95 was chiefly concerned with security for costs. At the same time as making the application, however, the defendant applied for an order that the plaintiff disclose the identity of parties funding the proceedings.

There was evidence of newspaper reports that a growers' cooperative was assisting with the funding of the litigation, and the defendants sought confirmation of such involvement so that they could possibly take action relating to security for costs, or for actual costs. The Court had no difficulty accepting that there is jurisdiction to award costs against non-parties: *Carborundum Abrasives Ltd v BNZ (No 2)* [1992] 3 NZLR 757. The application for disclosure was, however, acknowledged to be a novel one in New Zealand.

Hammond J relied on the English authority of *Singh v Observer Ltd* [1989] 2 All ER 751 and *Abraham v Thompson* Lloyd J, *The Times* 15 May 1997, to hold that the Court does have power to order such disclosure. Although no specific jurisdiction was referred to, there are obvious parallels with the *Norwich Pharmacal* situation. Where maintenance or champerty is involved, there is little difficulty in applying the reasoning. However, in *Abraham v Thompson*, Lloyd J accepted that, even where no tort is involved, the Court may stay a proceeding funded by a third party who would not be able to satisfy an adverse costs order. This is presumably part of the Court's inherent jurisdiction to control its own proceedings. A similar type of jurisdiction was exercised in *Alan H Reid Engineering Ltd v Ramset Fasteners (NZ) Ltd* (1990) 3 PRNZ 676. That was a claim of misleading advertising; the Court granted an order requiring disclosure of the names of the recipients of the circular in question. The Court justified its jurisdiction as seeking

> to do justice between the parties by assisting a party to arrest what is said to be serious commercial harm pending determination of proceedings. (682)

Hammond J stated that any order of disclosure would be discretionary and approached cautiously. He nevertheless considered such an order to be appropriate in the case before him. The prima facie evidence of third party funding entitled defendants to proper information so as to be able to assess their best course of action. His Honour therefore ordered disclosure of the information by way of affidavit.

There is no Rule of Court on which such an order could be based, but it is clear that such jurisdiction is necessary if the Court is to be able to make proper decisions relating to costs. It is also apparent from the decision that the disclosure which may be ordered is not limited to documentary evidence, but may require the provision of oral information as well.

CONCLUSION

Each of these situations demonstrates the importance and flexibility of the Court's discovery processes. The impression gained is that the Courts will not hesitate to adapt the procedures to novel situations where justice requires it. The modern trend towards openness in litigation, and a dislike of persons sheltering behind a technical facade is evidenced beyond doubt.

HIGH COURT AMENDMENT RULES 1997

The principal purpose of the High Court Amendment Rules 1997 (SR1997/350) is to incorporate the former Admiralty Rules as part of the High Court Rules. A number of other matters included in these amendment Rules merits some comment.

ALTERNATIVE DISPUTE RESOLUTION

Under s 15 of the Arbitration Act 1908, the Court had the power to refer matters to arbitration where the parties consented, where the taking of account was involved, or where there would be prolonged examination of documents. No similar power is accorded to the Courts under the Arbitration Act 1996.

A new R 383A has gone some way to remedying the situation. The Rule provides that, if the parties agree to arbitrate part or all of their dispute during the course of a proceeding, the Court must stay the proceeding to the appropriate extent. The Rule is limited to situations where the parties have reached agreement, and does not provide for a Court-appointed arbitrator. The parties must therefore agree on their own arbitrator. The previous practice of appointing Masters as arbitrators will no longer be possible.

Rules 437(8) and 438(5) now permit the Court to order that parties attempt to settle their dispute by mediation or some other specified form of alternative dispute resolution. Such orders may, however, only be made with the consent of the parties.

Both of these provisions are rather half-hearted, and it is doubtful whether they will have much effect. Because they depend on the agreement of the parties, it is hard to see why the parties could not in any event proceed to do as they wish. If any headway is to be made in effecting dispute resolution by alternative means, the Courts must have the power to make orders regardless of the parties' consent. This will obviously only work in particular cases, but as the Rules stand they are unlikely to change anything.

Rule 442 has been amended to allow a Judge to convene a settlement conference during the trial; the Rule previously allowed this only up until the time trial had commenced. As in the case of the Rules discussed above, this power may only be invoked where the parties consent. It is of interest to note that R 442 was amended as from February 1996 to permit a Judge to convene a settlement conference before trial without a request from the parties. It is not clear why there should be a change in policy simply because trial has commenced.

AFFIDAVITS

Rule 521 provides for the persons before whom an affidavit in Court proceedings may be sworn. In the past, affidavits could only be sworn before Justice of the Peace if no solicitor or Registrar was available locally. This restriction has been removed: any affidavit may be sworn before a Justice of the Peace. The definition of "solicitor" has also been widened to include a legal practitioner holding a practising certificate as a barrister only. It also makes it clear that a solicitor must hold a current practising certificate in order to take affidavits; this is generally how the Rule has been understood in the past.

Rule 521(1) now provides that an affidavit in a contentious proceeding may not be sworn before a party's own solicitor, or any solicitor who is an agent or a partner of, or engaged or employed by that solicitor. This reflects the existing practice, but is a helpful clarification.

EXTRAORDINARY REMEDIES

Part VII of the High Court Rules makes provision for the prerogative writs and injunctions. This part has been little used because the vast majority of matters which it covers are now dealt with under the Judicature Amendment Act 1972. For some reason, however, it has been thought necessary to recast these Rules. References to any duty to act judicially have been removed, as have some statements concerning the extent of orders which may be made by the Court. Tribunals no longer have to be constituted under an Act in order to be susceptible to the jurisdiction.

What is most extraordinary, however, is that a new Rule 627A, relating to death, resignation or removal of a party has to be read alongside the existing R 631. Likewise, R 627B, dealing with interim orders has to be read with R 630. Whether it was intended to repeal RR 630 and 631 is not clear, but as the Rules stand they are highly confusing. Furthermore, R 627B does not exempt Judicature Amendment Act proceedings from the requirement for an undertaking as to damages. This would represent a significant change from the existing law.

It is far from clear what this tinkering was designed to achieve. The effort would have been far better devoted to making the Judicature Amendment Act 1972 a comprehensive way of dealing with all applications for public law remedies, and putting in place a proper procedure for such applications. The anachronistic Part VII could then happily be laid to rest.

NOTICE OF APPEAL

Rule 706 governs notices of appeal in respect of civil appeals brought under Acts other than the District Courts Act 1947. The Rule has been amended to require the notice to have a heading referring to the Act under which it is brought and the body whose decision is under appeal. The Rule also provides that such body or person is not to be named as a respondent. This gives effect to the decision of McGechan J in *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335.

The appropriate heading for an appeal is therefore as follows:

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

	APXX/98
UNDER	The BROADCASTING ACT 1989
IN THE MATTER OF	An Appeal from a Decision of the Broadcasting Standards Authority
BETWEEN	TELEVISION PRODUCTIONS LTD a broadcasting company of Auckland
	APPELLANT
AND	SANDRA PATRICIA SMYTHE, of Wellington, Doctor
	RESPONDENT

ADMIRALTY RULES

The High Court Rules now contain a new Part 14 (the only part of the Rules which is not accorded a roman numeral!), "Proceedings in Admiralty". This part replaces the Admiralty Rules 1975, and brings a number of items of admiralty practice into line with the existing procedure of the Rules. Traditionalists will no doubt be sorry to note that the one feature of admiralty law which is known to all lawyers – commencement of an action in rem by nailing a writ to the mast of a vessel – has been rather watered down. Proceedings are commenced by a notice of proceeding, which is still required to be attached to a conspicuous part of the ship. It no longer has to be attached "for a short time". It remains to be seen whether the District Courts (Admiralty) Rules (SR 1976/195) are replaced in a similar fashion.

RECENT CASES

LITIGATION PRIVILEGE

In *Dinsdale v Commissioner of Inland Revenue* unreported, 15 December 1997, CA187/97, the Court of Appeal dismissed an appeal from the decision of Eichelbaum CJ in the High Court (*Dinsdale v CIR* (1997) 18 NZTC 13,244) discussed at [1997] NZLJ 277.

The question to be resolved in *Dinsdale* concerned the privilege to be attached to notes made at interviews by a firm of accountants engaged to prepare a report for a bank threatened with prosecution by the IRD for non-disclosure of information. The High Court held that no litigation privilege attached because litigation was not the dominant purpose for which the documents had been brought into being. Dominant purpose has been an essential ingredient of the privilege since the decision of the House of Lords in *Waugh v British Railways Board* [1979] 2 All ER 1169, and *Dinsdale* demonstrates once again how easy it is to fall on the wrong side of the line.

The decision was delivered by Blanchard J, and is a model of conciseness and lucidity. The Court began by stating that litigation privilege

> protects the process of gathering evidence for consideration by a lawyer acting for a party in civil or criminal litigation or threatened with such litigation.

It was stressed, however, that the work must have been carried out with the dominant purpose of conducting or advising on litigation.

The Court was satisfied that there was an evidence gathering purpose, and was content to assume that persuading the IRD not to prosecute could fall within the scope of litigation privilege. It nevertheless concluded that, at best, this had been one of two equal purposes, the other being the identification of documents and the provision of an explanation to the IRD.

The Court considered as significant the stated objective of the report, which was to ascertain that all relevant material had been disclosed to the IRD, and the disclaimer in the report which provided that it was for the use of the bank and the IRD, and not to be used for other purposes without prior approval. Other factors considered relevant were that the report was made to the bank rather than to its solicitors, and the absence of any evidence that the report was intended for use in any litigation which might eventuate.

These matters are obviously all relevant, but to my mind they still do not answer the point that the whole review was being conducted because of the the threatened prosecution and in the clearly understood anticipation that it could become a reality. The initial instructions to the accountants made it clear beyond doubt that there was a threatened prosecution, and this report would be highly relevant to any such prosecution. The final report cannot be seen in isolation from this context.

From the point of view of legal advisers desiring to keep opinions confidential, there is an important lesson to be gained in hindsight. Where third parties are consulted in situations where litigation is a possibility, it should be made clear that their opinion is sought for use in possible litigation. It is important to avoid the "dual purpose" classification, and use in potential litigation should therefore be expressed as the general purpose in the instructions requesting the report. Any more specific instructions should be listed as subsidiary guidelines or questions to be addressed. Where possible, its intended use in litigation should be stated in the report as well. The report should, where possible, be made to the solicitor rather than to the client, and should not contain any disclaimer which might be able to be read as preventing use in litigation.

As the Court pointed out, dominant purpose is a question of fact. One gets the impression, however, that juggling with words may have contributed to a different outcome in this case, one which would perhaps have been closer to the real intention of the parties concerned.

TAX APPEALS

In *Ivan Hyslop Ltd v CIR* [1998] 1 NZLR 145, the taxpayer sought to appeal a ruling of the Taxation Review Authority, and filed a case on 1 March 1996. A copy of the case was served on the Commissioner 11 weeks later. The Commissioner claimed that the matter was governed by R 724F High Court Rules, and that the case had been served out of time. This contention was upheld by the Master, and the taxpayer applied for review of the Master's decision.

On review, the Court held that Part XI of the High Court Rules was inapplicable. Part XI is expressly confined to cases stated on a question of law only, and the appeal involved questions of fact and law. No other provision required service of the case on appeal, and the taxpayer was therefore not out of time.

The interesting question which arises is whether such an appeal falls under Part X of the Rules. Rule 701(2) excludes appeals by way of case stated, which means that tax appeals on fact and law could end up being governed by neither Part X nor Part XI. Salmon J did not find it necessary to decide this issue, but preferred an interpretation making Part X applicable. That would involve a conclusion that such appeals are not by way of case stated, which is at odds with s 26 Taxation Review Authorities Act 1994.

Salmon J suggested that there is a need for Parts X and XI of the High Court Rules to be reviewed, and one cannot help but agree. It is important for the Rules to contain a comprehensive procedure for all appeals. At the same time, it would seem sensible to include provision for appeals from the District Courts, and to make the procedure in all appeals as similar as possible. ❑

WTO DISPUTE SETTLEMENT

Victoria Hallum, Ministry of Foreign Affairs and Trade

argued at the ILA Conference "The WTO: Law Meets Business" that the new trade dispute mechanism is no paper tiger

INTRODUCTION

Although I am employed by the Ministry of Foreign Affairs and Trade, I have never worked on WTO Disputes and my comments here are purely personal ones.

The title of this conference is "The WTO: Law Meets Business". This title focuses on the interface between the legal and institutional framework of the WTO, and the traders and consumers who are the end users of the system.

The title of this conference could just as aptly been WTO: Law "Means" Business. For the WTO is a legal framework that means business in both senses of the word. First, it is a system set up for the express purpose of promoting trade and economic growth – "it means business". Secondly, the WTO is a much stronger, more comprehensive, more effective, and more enforceable system of rules than that the previous system – "it means business".

Nowhere is this more evident that in the new dispute settlement system, one of the major triumphs of the new WTO. Following the reforms of the Uruguay Round it can now be said that the WTO has one of the strongest and most effective dispute settlement systems of any international treaty regime.

A strong dispute settlement process is vital to the health of the rules-based multi-lateral system. It underpins the whole system – safeguarding the integrity of the substantive trading rules agreed upon by members and ensuring that members can rely upon these rules and, if necessary, have them enforced. Put another way, if the substantive rules and obligations contained in the WTO agreements are considered the framework or the skeleton of the system, the dispute settlement process is its suit of armour.

Like the rest of the system the disputes process has become increasingly legalised over the years.

The new disputes process has now been operating for a little over two years. As an, international lawyer, I saw the shift to a more rules-based system as a positive development and considered the Dispute Settlement Understanding (DSU) – the document which sets out the new disputes process – to be a considerable improvement on the previous system. However, the proof of a treaty is in its implementation.

I shall look first at the main features of the new system and explain why it is such an achievement. Then I want to look at how the system has been operating over its first two years.

THE NEW SYSTEM

The main features of the new system can be summed up in six bites.

First, the dispute settlement system is compulsory. A State that wants to be part of the WTO and reap its benefits – and to date 132 States have shown that they do – have to be party to the dispute settlement system as well.

Secondly the system is integrated and comprehensive. Subject to a few minor exceptions of no great consequence, there is only one system for all of the WTO agreements and all aspects of those agreements are amenable to challenge under the same system. Thus a dispute arising anywhere in the WTO system is subject to a single dispute settlement process.

These first two points may sound fairly basic and unremarkable but that is not so. Compulsory dispute settlement is not necessarily the norm in international relations by any means. In the UN system for example the jurisdiction of the International Court of Justice is optional unless States make a declaration otherwise, and even then most States do so only subject to a raft of significant exceptions. Further, even when dispute settlement is obligatory, States often have a lot of discretion about how they go about it. The Law of the Sea Convention and its dispute settlement process is a case in instance. While recourse to dispute settlement itself is compulsory, States have a range of different fora available to them, and different rules apply to different parts of the Convention.

The next point is that the new system is quick and automatic. Previously, the parties were in the driving seat. A recalcitrant party could delay or stall indefinitely by failing to reach agreement on the necessary procedural steps. The new system, by contrast, is like a train which once has left the station can not be stopped by the parties unless the dispute is resolved. Changes have been made to the procedural side of things to ensure that time limits are set for each phase of the process and that the absence of agreement on procedural issues is not able to be used to stall the process. The result is that the whole process moves on a what can only be considered a "cracking pace", and one that compares favourably with both national Courts and other international dispute processes such as the ICJ.

The fourth point, and a major innovation of the new system, is the introduction of appellate review of first instance decisions. The DSU sets up a new tribunal, the Appellate Body, to consider appeals from panel cases on points of law.

The Appellate Body has been described by the Director-General of the WTO as "the guardians of the WTO disputes settlement system". The members of the Appellate Body must be "individuals of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements". The Appellate Body may "uphold, modify or reverse the legal findings of the panel" and it is required to use the customary rules of interpretation of public international law in reaching its decisions.

The Appellate Body is groundbreaking in a number of respects. While appellate review is common in domestic legal systems, it is most unusual in the international arena.

The Appellate Body is quite a contrast to other international dispute settlement bodies. Whereas the Appellate Body is limited to seven members of which only three sit on a particular case, other bodies are much larger: The ICJ has 15 members, the Law of the Sea Tribunal 21 and the Human Rights Committee 18. The members of the Appellate Body are selected by an expert Committee and then endorsed by the WTO member States. The members or Judges of the other tribunals mentioned are all directly elected by member States.

In my view the Appellate Body is much better off for these differences. Experience has shown that the larger bodies tend to be cumbersome and unwieldy and have great difficulty producing decisive results. In addition the large membership and direct voting tends to produce an expectation that each UN bloc has its "rights" to a certain number of seats on the tribunal in question, with the result that members are chosen along national and political lines rather than merit, and are subject to capture by political and national interests. While the Appellate Body will not necessarily be totally immune from these pressures, its small size and less politicised appointment procedures mean that it is less likely to suffer the same fate as many of the UN bodies.

Refusal by one or two of the major players to comply with the result of a case would be very serious, causing the system, in the words of one eminent commentator, to "atrophy and decline"

The composition of the first Appellate Body, incidentally, is as follows:

Mr James Bacchus of the US
Mr Christopher Beeby of NZ
Professor Claus Ehlermann of Germany
Dr Said El-Naggar of Egypt
Justice Florentino Feliciano of the Philippines
Mr Julio Larcarte Muro of Uruguay
Professor Mitsuo Matsushita of Japan.

The fifth important feature of the new system is that its results are binding on the parties to a dispute. Under the GATT system the panel issued recommendations which were considered by the membership as a whole. The decisions were only adopted by the parties, thus becoming binding, if there was a consensus amongst all members. As the members inevitably included the losing country such a consensus was often lacking and as a result many decisions languished unadopted. The new system turns this process on its head. The results of the panels or (where a decision is appealed) the Appellate Body are still strictly speaking only recommendations, but the crucial difference is that these recommendations must be adopted by the WTO parties (with the result that they become binding) unless there is a consensus otherwise.

The final feature of the system that I wish to stress is that the results of the dispute settlement process are (at least to a certain extent) enforceable. There is usually no method of enforcing decisions of international tribunals even when they are binding at international law. The WTO dispute settlement process, however, specifically incorporates measures to encourage losing parties to comply with its decisions. If the losing party fails to bring its offending measure into compliance within a reasonable period, it is required to negotiate a mutually acceptable compensation package with the complainant. If this does not eventuate the complainant can seek authorisation from the Dispute Settlement Body to impose retaliatory trade sanctions against the non-complying party.

EXPERIENCE SO FAR

The shift from a negotiation-oriented process to a more legally oriented process was a big one, requiring a shift in mindset from all those involved. At the outset commentators raised a number of fears and concerns about the new process.

First: would the new system be used? It was important that the new system be used with sufficient frequency that taking a dispute was seen as a matter of course in the relations between members. Small member countries had to have the confidence to take cases when they considered their rights were being abused. Large and powerful countries had to be prepared to use the system instead of resorting unilateral retaliation.

The other main concern raised was would the parties comply with the outcomes? This was important not only for the credibility of the system but also for the credibility of the substantive WTO obligations that the dispute settlement system was invoked to protect. Refusal by one or two of the major players to comply with the result of a case would be very serious, causing the system, in the words of one eminent commentator, to "atrophy and decline". The first Appellate Body case, the *Gasoline* Case, was particularly worrying in this regard as it involved high profile environmental issues and had the United States as the respondent. There was concern that if the case went against the US and the US refused to accept it that the whole system would be nobbled before it even got off the ground.

In fact the system has been well used. To date 104 disputes have been filed on 72 distinct matters. This is a great increase on the previous system. The disputes which are being raised involve the range of the WTO agreements and include many of the new areas such as trade related aspects of intellectual property, trade in services and trade related investment measures.

The second point is that there has been a notable and welcome increase in use of the system by smaller and developing countries. New Zealand is a case in point. Whereas we were only involved in a handful of disputes over the whole four decades of the previous system's operation, in the short time since the new system has been up and running we have already become involved in four: three as co-complainant (*Hungary-Export Subsidies, India-BOPs and EC-Butter*) and one (*EC-Hormones*) as a third party. Turning to developing countries, the figures show that there have been 31 disputes filed by developing countries on 22 distinct matters. This is a sharp contrast to previous practice where approximately 90 per cent of cases involved the Quad countries, particularly the EU and the United States.

Another notable success is the increase in the number of disputes being resolved between the parties at the consultation stage. The estimates that I have seen indicate that somewhere between twenty and twenty five per cent of all disputes have been settled so far.

The most important point of all, however, is that member countries are accepting the outcomes of the process and implementing the recommendations of the Appellate Body, rather than seeking to pay compensation or forcing the other party to take retaliatory trade action. The US did lose the first case, but accepted this result and implemented it. To date the Appellate Body has issued decisions in seven cases and in all seven the countries' representatives have indicated, albeit with some grizzling, that they plan to abide by the ruling and bring their measures into compliance.

So why has the new disputes settlement system been working so well? I think there are a number of reasons, all connected. First, the system is sound with considerable institutional strength. Secondly, and most importantly, the Members of the WTO are clearly committed to the system and prepared to use it and abide by its results. Without that commitment the system would fail no matter how good it was in theory. The final reason relates to the performance of the Appellate Body. It was acknowledged beforehand that its performance would be crucial to the success of the system and that it would have delicate and significant decisions to make. As one commentator said "the whole concept [of the new dispute settlement process] may well fall or stand on the prestige of the first generation of members of the Appellate Body". In my view the Appellate Body has been doing a very good job and has been living up to its role as the "guardian of the disputes system".

The Appellate Body has also made an important finding on who can represent governments in dispute settlement proceedings. The Appellate Body granted the request that private lawyers, who were not government employees be allowed to participate in the oral hearing

When I first looked at the Appellate Body early last year I concluded that its success would depend on its ability to meet and balance six different needs. These were:

- The need for its decisions to be clearly written, well reasoned and as transparent as possible.
- The need for its decisions to contain clear statements of the applicable principles which are correct at international law and provide useful guidance to WTO members and panels.
- The need to have regard for the principles of fairness and due process.
- The need to exercise judicial caution and not overstep its role.
- The need to ensure that its interpretation of the WTO agreements is consistent and coherent while still being appropriate in the particular circumstances of each case.
- The need to scrupulously guard the Appellate Body's independent and non-political nature.

The Appellate Body has now had sufficient time to really find its feet, and my conclusion from looking at its decisions is that it is meeting these criteria.

The first point, the need for decisions to be clearly written, well reasoned and as transparent as possible is particularly important in view of the fact that the process is confidential and that hearings are closed to all but the parties.

In my opinion the Appellate Body's decisions have been fairly good in this regard. The decisions have been set out in a judicial manner and follow the logical and orderly structure usual in appellate judgments, separating procedural issues from substantive issues. The Appellate Body has done its utmost to make its judgments as transparent as possible by clearly identifying the issues, providing good summaries of the arguments of the parties and attempting to expose its own reasoning. The decisions of the Appellate Body compare very favourably with International Court of Justice decisions in this regard.

My second point was the need for decisions to contain clear statements of the applicable principles which are correct at international law and provide useful guidance to WTO members and panels.

I think the Appellate Body has done a reasonably good job in setting out clear statements of the applicable principles. This has been particularly evident in the area of interpretation. The Appellate Body made clear in its first decision the *Gasoline* case that the WTO agreements should "not be read in clinical isolation from public international law". Since the first decision the Appellate Body has taken pains to ensure that the agreements are interpreted in accordance with the correct rules of interpretation of public international law. An example of this can be found in the *Japan-Taxes on Alcoholic Beverages* case where the Appellate Body goes into considerable detail on the rules of treaty interpretation.

The Appellate Body's decisions have also contained useful statements on substantive principles such as the scope of the environmental exception (*US-Gasoline*) and the rules on like products (*Japan-Alcoholic Beverages*).

It is interesting to note here that while the Appellate Body was intended as an additional safeguard to ensure that panel decisions were not faulty, to date all panel cases have been appealed to the Appellate Body. If this practice were to continue it would mean the Appellate Body would have an intolerable workload and would end up putting considerable strain on the system. It seems more likely, however, that the current practice of appealing every panel decision is just part of the settling in process and that States will begin to pick and choose which cases they take on appeal.

I would like to look now at my third point: the need to have regard for the principles of fairness and due process in running its proceedings.

The Appellate Body has paid considerable attention to this issue. This started with the adoption of its rules of procedure prior to its first case. These rules are notable for the stress they place on due process and fairness requirements. The concern for due process has also been evident in the Appellate Body's decisions in which it has taken a strict approach to issues such as the terms of reference for the dispute (*Brazil-Desiccated Coconut*), the structure of the original request (*EC-Bananas*), the scope of the appeal (*US-Gasoline*), and burden of proof (*US-Woven Wool Shirts and Blouses from India*).

The Appellate Body has also made an important finding on who can represent governments in dispute settlement proceedings. In the *EC-Bananas* case the Appellate Body granted the request of St Lucia, a third participant in the case, that its private lawyers, who were not government employees be allowed to participate in the oral hearing. This

was in the face of objection from both the EU and the US who supported the past practice of allowing only Government lawyers to participate. In reaching this decision the Appellate Body stressed the importance that governments be represented by qualified legal counsel in Appellate Body proceedings and noted that the right to be represented by outside counsel might be important factor in enabling members to participate fully in dispute settlement proceedings.

The next point is the need to be judicially cautious.

What I mean by this is that the Appellate Body must take care that it does not exceed the scope of its authority. The DSU makes this clear in Art 3.2 which says that dispute settlement decisions "cannot add to or diminish the rights and obligations provided for in the covered agreements". It is well-known that Courts, particularly domestic Courts, often make law, although this function is not always universally welcomed. The Appellate Body, however, can not afford to slip into a law making role. That would not be tolerated by WTO members.

To date it appears that the Appellate Body has been most careful to this pitfall. It has expressly considered the issue in one of its cases: *US-Imports of Woven Wool Shirts and Blouses from India*. In that case the complainant India had argued that it was entitled to a finding on each of the issues it raised in the dispute. The panel had disagreed with this on the basis that it was not consistent with the GATT panel practice of judicial economy under which the panel addressed only the legal issues which it considered were necessary to reach a result. The Appellate Body upheld the approach of the panel and specifically said:

> we do not consider that Art 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute.

The fifth point involves a balancing act by the Appellate Body. While the Appellate Body is not bound by its own decisions and needs to ensure that it considers each case on its own merits its is also vitally important if it is to fulfil its role that its decisions as a whole are coherent and consistent.

The Appellate Body's collegiate approach, adopted as part of its rules of procedure, has been very helpful. The DSU provides that three members will sit on any given appeal. This might have lead to a fragmentation of decision making but the Appellate Body had avoided this by deciding that before these three members reach their decision they will "exchange views" with the rest of the Appellate Body. In practice this involves all seven members of the Appellate Body meeting in Geneva during the deliberation phase. The collegiate approach seems so far, to be working well and so far there have been no noticeable problems with consistency.

One point that is interesting to speculate on is what would happen if the Appellate Body fails to agree at some point. The DSU seems to assume that decisions will be unanimous but does not actually spell this out, which leaves the possibility that a member of the Appellate Body will try to issue a dissenting opinion.

The final point the need to scrupulously guard the Appellate Body's independent and non-political nature is particularly important.

There was, it must be admitted, considerable politicking over the appointment of the first Appellate Body, with the European Union trying to argue that it had a "right" to two members on the Appellate Body, based on its share of world trade. To many other members such an outcome would have been extremely unbalanced. Fortunately the EU backed down and accepted the slate put forward by the selection committee.

This bumpy start seems to be well behind the Appellate Body and it seems to be maintaining its independent and non-political nature well. The collegiate approach to decision making is helpful in protecting the Appellate Body's independent nature.

The DSU seems to assume that decisions will be unanimous but does not actually spell this out, which leaves the possibility that a member of the Appellate Body will try to issue a dissenting opinion

One interesting point is that unlike panels, members of the Appellate Body are able to sit on cases involving their own countries. This has already happened in a number of cases (*Brazil-Desiccated Coconut and US-Woven Wool Shirts and Blouses from India*) but does not seems to have caused any problems.

CONCLUSION

I have focused in some detail on process. That is because I think it is an important process, with important consequences – and it is useful to have a better understanding of how it works. It has not been possible in the time available to go into any of the substance of the Appellate Body's cases, although there is a lot of interesting material in them for those interested in international trade. There is now a wealth of information available on the dispute settlement system and specific disputes. In particular I would recommend to you the information made available on the internet by the WTO Secretariat, which includes summaries all current disputes. The address for this is:

http://www.wto.org/wto/dispute/bulletin.htm

Turning to the future, the dispute settlement system is due to come up for review in 1999, four years after its inception. The purpose of this review is to "take a decision ... whether to continue, modify or terminate" the system. At this stage there is general satisfaction with the system and it does not appear likely that there will be any major upheaval of the system. The review is likely, therefore, to be limited to relatively minor changes.

One which I personally would like to see the WTO tackle is the issue of transparency. Since the inception of the system a number of minor improvements have been made in this direction, however I would like to see the WTO go much further than this. While the confidentiality requirements might have been justified in the past, the increasingly judicial nature of the process must surely bring this aspect into question. There is a strong presumption in domestic legal systems that judicial decision making – particularly on issues of public importance – will be conducted in public. In international law there is also a strong tradition of open hearings and availability of pleadings and other documents. I would like to think that by 1999 the WTO has reached the stage where it is sufficiently confident in the integrity of its processes to make these more transparent to the public, which is increasingly demanding to know more about international, intergovernmental processes. In the long run I do not think the system has anything to lose from such a move, and possibly much to gain. ❑