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GOVERNMENT, LAW AND BUSINESS

The government expresses bewilderment that business regards it as unfriendly. Most of us regard ourselves as spectators in this battle, between an interest group and the government. We are not, because what business wants is just the legal framework and standards that are the characteristics of a free society and which reward anyone who effectively serves the needs of others.

Unfortunately, in the past, businesses have been guilty of asking for special privileges and protections, which made the business world appear as an interest group pursuing its own narrow interests (usually the interests of established manufacturers in symbiotic relationship with their unions). Today it is the left, including this government, that wants to apply special regulations, or benefits to this part of business or that.

In the same way it is the left, including this government, that wants to put restrictions on the alienation and use of land. This is the surest way to create fixed groups of landowners and landless with opposing interests, which is the way the left believes the world to be.

A free society and a free market is demonstrably not composed of classes with opposing interests. The Marxist analysis of the world is therefore demonstrably false, but we now have a government led largely by people whose only other experience is propagating this false model at university.

A feature of this model is that law is simply an instrument of power wielded by the ruling classes in their own interests. Hence the attitude of the leading ministers of this government to the law: they are now the ruling classes.

Some of the most egregious indicators of the government's attitude to law would be:

- the use of its power as shareholder of an SOE to abort legal proceedings the outcome of which might have proved embarrassing to the government;
- the abrogation of a contract to allow sustainable logging in the South Island while continuing to allow the government's Maori supporters to engage in clear felling;
- an Act of Parliament expropriating property rights of South Island logging businesses without compensation;
- an Employment Relations Bill which commits numerous atrocities against the rule of law, individual freedom and access to the Courts, such as the nature, and powers of the ERA and provisions such as cl 154;
- the promotion of industry specific regulation in the telecommunications industry;
- the announcement that we will freeze the assets of foreigners the government does not like, and will just change the law to enable it to do that;
- the proposal to reverse the burden of proof in Commerce Act proceedings;
- an Act of Parliament to prevent the NZQA considering a specific application for university status (which Act is also clearly in breach of Art 13(4) of the International Covenant on Economic, Social and Cultural Rights by which this government sets so much store).

And more is on the way. The farrago of inquiries set up by this government has not nearly come to a conclusion yet. Others emboldened by the atmosphere, have called for yet more regulation of this or that.

Industry specific regulation should be condemned. It enables regulators to pick off soft targets without arousing opposition from others who believe that they are not directly affected; to divide and rule. So far as telecommunications is concerned, the consequentialist arguments are so finely balanced that whether consumers in countries such as New Zealand, Finland and Sweden, which leave regulation to the general law, or Australia, Britain and others with industry specific regulation, have benefited more can depend upon precisely which exchange rate one uses. So one may as well stick to principle, which is that the law is composed of general rules applicable to all.

After telecommunications comes another ridiculous report from a dentist calling for the regulation of food supplements. A moment's thought will reveal the absurdity of this which would logically require the bureaucratic approval of just about all consumer information about food. Needless to say, an interest group which has an interest in regulation and protection has asked completely the wrong question. The real question is, given the Consumer Guarantees Act, why do we need the Medicines Act with its bureaucratic procedures? (And the answer is not safety, the Medicines Act largely regulates the claims that can be made rather than what can be sold.)

We are not helped, of course, by having an Opposition led by a party which, when in power, itself countenanced numerous breaches of property rights and process values.

Lawyers and their representative organisations have been disgracefully silent during this period, with some notable individual exceptions. It has been left to economists to publish articles condemning the expropriation of property rights and for business leaders to call for respect for the values of the legal system.

Even many businesses have been lulled into quiescence, either by the little dollops of government money that might come their way, or by the thought that what has been done so far may not impact directly upon them. But when you see property rights being expropriated from specific businesses and specific sectors being subjected to Draconian regulation, do not ask for whom the bell tolls. It tolls for thee. ❑

CORONERS

Denese Henare and Meika Foster, The Law Commission

introduce the Commission report

The coroner's work affects our lives in innumerable ways. Coroners have the extremely difficult task of balancing their legal responsibilities and the wishes of the deceased's family. They must be aware that people have differing views and practices regarding death and be sensitive to the fact that the family will be absorbed in the emotional trauma of the grieving process. Yet they must also ensure that families receive clear information about post-mortems and inquests. And perhaps most importantly, the coroner's role is increasingly recognised as one in which the thorough investigation of deaths can lead to a reduction in future injury and preventable deaths.

However, the ability of coroners to fulfil their many functions has been limited by the systemic problems identified in our preliminary paper (*Coroners: A Review*, NZLC PP36) and confirmed in submissions. With no exception, submitters emphasised that the coronial system is patchy, unsystematic and inadequate. The consequences place heavy burdens on coroners, cause frustration to all those who currently administer or who provide services in the coronial system, and draw criticism from the community. Ultimately, the effectiveness of the coronial system is diminished.

The Law Commission has now published its final report, *Coroners* (NZLC R62). The report's recommendations are intended as a package to enhance the status of coroners and to improve the systems of protection from unnecessary illness, injury and death. While recognising that determining the cause of death is the important function of the coronial system, they seek to give weight to cultural values, particularly Maori, and to ensure that the state intervenes to the minimum extent necessary.

A critical recommendation is the appointment of a Chief Coroner, suitably resourced, to devise and maintain support systems for coroners, to oversee coroners, and to monitor the implementation of coronial recommendations. A Chief Coroner is appointed in most territories in both Australia and Canada. The need for a similar appointment in New Zealand was emphatically underscored in submissions. The general view is reflected in a comment made by the Wellington Coroner, Mr Garry Evans, at the 1999 National Coroners' Conference, that:

> The establishment of an office of Chief Coroner for New Zealand is urgently needed if the dignity, usefulness and effectiveness of the office of coroner is to be preserved, developed and enhanced .... Until such time ... coroners will continue to act in a fragmented and uncoordinated way.

The report sets out a broad range of functions of a Chief Coroner, including:

- research and planning to ensure coroners are equipped to perform their functions systematically and properly;
- ensuring that reports from coroners are properly appraised and that they are publicly available;
- maintaining an overview of patterns of sudden deaths and their fundamental causes and considering whether additional inquiries are required;
- reporting regularly to the Ministers of Justice and Health with particular emphasis on patterns of circumstances leading to death or risk of death and the steps needed for their prevention or reduction;
- ensuring consistency in terms of coronial findings, recommendations and processes; and
- monitoring investigatory standards of coroners.

A Chief Coroner would have difficulty in fulfilling these functions in the absence of a national coronial database. The Law Commission supports the establishment of such a database and considers that a Chief Coroner could be responsible for overseeing it.

The Commission makes a number of recommendations concerning the procedures for the appointment and training of coroners, and the number, location and workloads of coroners. Inquests are becoming increasingly complex and legalistic, with parties often represented by counsel, so the report recommends that coroners be legally qualified.

In its preliminary paper, the Law Commission explained that the Coroners Act 1988 is inadequate to regulate the removal and retention of body parts. As the law stands, neither coroners nor pathologists have an express statutory power to control the body or body parts of the deceased. Also, the Act does not require coroners or pathologists to notify family members that a body part has been retained. Neither does the Act clarify who has the right to possession of retained body parts.

The recommendations intended to give weight to cultural values include that:

- more Maori and persons of other cultures and backgrounds be appointed as coroners;
- a Chief Coroner's Office establish a kaiwhakahaere (coordinator) position;
- the Act give the deceased's family, with the consent of the coroner, the option of viewing and touching the deceased prior to post-mortem examination; and
- that the deceased's family be given the option of having a representative or kaitiaki remain with the body while it is under the coroner's control.

The report also recommends a wide variety of more technical amendments to tidy up the Coroners Act.

The report has had substantial input from a number of individuals, organisations and communities with an interest in the workings of the coronial system, including coroners, pathologists, police, Maori and other cultural organisations, and administrative and government agencies. We believe that the recommendations are both sensible and long overdue. ❑

TIDYING THE LIMITATION ACT

Louise Symons, the Law Commission

introduces the Commission's latest report

This report is not a comprehensive review of the Limitation Act. In October 1988 the Commission published a report (*Limitation Defences in Civil Proceedings* NZLC R6) which did contain a complete review of the Act and a replacement statute, but that did not find legislative favour and was not acted upon. This report addresses a small number of specific issues upon which action is urgently required.

Undiscovered claims

The rule in s 4(1) of the Act, that the limitation period for most common classes of claim, including those founded on simple contract or tort, runs "from the date on which the cause of action accrues" can lead to unfairness in cases of latent damage. Because of this, the Court of Appeal has ruled (*Invercargill City Council v Hamlin* [1994] 3 NZLR 513) that where the defect in the construction of a building on which a negligence claim is based is latent, the cause of action does not accrue until the damage is either discovered or reasonably discoverable. This principle has been extended to cases of bodily injury (*S v G* [1995] 3 NZLR 681; *G D Searle & Co v Gunn* [1996] 2 NZLR 129), but it is not clear whether it has a more general application. A "reasonable discovery" test is favourable to plaintiffs but the lack of a long stop (except in building cases under s 91 Building Act) puts defendants at a disadvantage. The Commission proposes an amendment to the Act to re-establish accrual rather than reasonable discovery as the basic test, but to allow the time period to be postponed where the plaintiff could not with reasonable diligence have discovered the relevant facts, the onus being on the plaintiff to show this. To balance the rights of plaintiffs and defendants, the Commission proposes a long stop of ten year absolute limitation.

Fair Trading Act

The time limit for Fair Trading Act claims is three years "from the time when the matter giving rise to the application occurred" (s 43(5)). The Court of Appeal has declined to interpret this as a "reasonable discovery" test (*Murray v Eliza Jane Holdings Ltd* (1993) 5 TCLR 272). While it is impractical to put an identical test in the Fair Trading Act to the one in the Limitation Act, we recommend that s 43(5) be amended to provide that an application may be made within five years from the time when the matter giving rise to the application occurred, or within three years after the date on which the loss or damage, or likelihood of loss or damage, was discovered or ought reasonably to have been discovered, whichever period expires first.

Personal injury: exemplary damages

Particular problems arise in cases of historical sexual abuse. The current limitation period for personal injury claims of two years may at the Court's discretion be extended to six years (s 4(7)). If the plaintiff was a minor at the time of the abuse, time does not begin to run until they attain the age of 20 (ss 2(2) and 24). In some cases stress disorders may prevent a plaintiff from realising the extent of harm suffered, or the causal link between the abuse and later problems. The Commission recommends extending the definition of disability to include a person who is unable, by reason of some or all of the matters on which an action is founded, to make reasonable judgments in respect of matters relating to the bringing of such action.

Equitable claims

The general provision described above for extension of time where claims could not reasonably have been discovered means that the special provisions for postponement of the limitation period in cases of fraud or mistake (s 28(a) and (c)) are no longer required. Fraudulent concealment of a cause of action (s 28(b)) should remain, as the long stop provision should not assist such a defendant.

Separate provision for limitation periods in equity and common law is inappropriate more than a century after the fusion of those two systems. We recommend that the general provisions of s 4(1) should be extended to all civil claims for which no other provision is made by the Act.

Third party claims

Section 14 of the Act provides:

> For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

Because "the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim" is often the obtaining of a judgment against the claimant to the contribution or indemnity, these claims can be brought a very long time after the relevant events. We recommend that there be added to the end of s 14 words to the effect of:

> and such a claim shall not be brought after the expiration of two years from the date on which the cause of action accrued. ❑

SWAPS AND RESTITUTION

Charles Rickett, the University of Auckland

reviews Lessons of the Swaps Litigation, *Birks and Rose, eds LLP London*

When the House of Lords declared in *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1, that local authorities in England and Wales had no capacity to enter into the range of swaps agreements that they had been undertaking for some considerable period, the stage was set for far-reaching litigation to deal with the private law consequences of that public law decision. The full extent of that litigation's impact on both the doctrinal and practical dimensions of the law of restitution has remained largely hidden in the muddle of the variety of decisions. The concept of an examination of the complete range of issues raised in the litigation within one volume, drawing on the talents and experience of a number of leading scholars, is therefore a most welcome one. Unfortunately, the execution does not reach a uniformly high standard.

There are perhaps four types of papers in the volume. First, some maintain a focus on the collection's purpose, and are important contributions to the conceptual literature about the structure of restitution. Peter Birks, in his characteristically analytical manner, gives an "overview" of the restitution issues in the cases, being careful not to tread on the toes of those whose more detailed examinations of various areas follow. He also sees much that others do not, and at times his essay exceeds an introduction or even a summary. Although Birks' taxonomy of the private law and his articulation of the central features of the law of unjust enrichment are widely touted, their subtleties are not always appreciated. This "overview" cannot be treated therefore, by those who are new to the model of the law of restitution propounded by Birks and his disciples, as an easy way into the subject, no matter its lucidity.

Ewan McKendrick's essay deals with the various "unjust factors" which have surfaced in the swaps cases. It is a model of fine scholarship. McKendrick discusses in particular the judicial abolition of the bar to recovery on the basis of mistake of law, and the failure of consideration or basis foundation of a claim to recovery. The latter is clearly relevant in New Zealand. While the former issue might appear not to be of much interest in New Zealand because of s 94A Judicature Act 1908, it is far from clear that the Courts here will not in future simply adopt the "new" common law position, and sidestep s 94A, as they appear ready to do in favouring a common law change of position defence over the statutory version in s 94B of the same Act (see *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211).

William Swadling examines the consequences for the law of equitable property of the reasoning employed by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669. The prominence given by His Lordship to knowledge and/or conscience in establishing trusts has raised many eyebrows, and Swadling demonstrates the deficiencies in the approach. It is perhaps of comfort now to compare His Lordship's recent speech in *Foskett v McKeown* [2000] 2 WLR 1299 with his utterances in *Westdeutsche*. It appears that equity does have "hard nosed property rights" (p 1305) which persist even in the face of innocence! Eion O'Dell, argues at length that incapacity should be a recognised "unjust factor" in the law of unjust enrichment, supportable by the fact that "the thread linking the [paradigm] unjust factors of duress, mistake and failure of [basis] is that ... the plaintiff had no real intention to enrich the defendant, so that the payment was unintended, non-consensual or involuntary" (p 116). Sonja Meier's chapter "Restitution After Executed Void Contracts", although rather difficult to read with ease and not limited to the swaps cases, is a scholarly and comprehensive account of the issue.

A second type of contribution is the two essays by Nicholas Bamforth, on "Public Law", and Alistair Hudson, on "The Law of Finance", which examine issues beyond the law of restitution. Bamforth's essay is an analysis of varying approaches to judicial review as evidenced in and beyond *Hazell*, and its power to create far-reaching consequences. Hudson's confusing paper appears essentially to be a complaint that Judges are not applying equity in a flexible enough manner to deal with the requirements of modern financing. Hubert Picarda's essay on "Contract and Tort" is also a candidate for this category, although it strays into mistake of law.

A third category is those which struggle to achieve a critical mass. Lionel Smith's paper on tracing is necessarily short and seems to scratch around for things to say. The fact that he manages to hold the reader's attention is testimony to his ability, rather than to there being any profound lessons for tracing from the swaps litigation. Michael Jewell examines change of position, or, more accurately, the single issue whether an expenditure made in anticipation of receipt of a payment can amount to a change of position. More than half the paper centres on the German law, which, while of general interest, is not really put to effective use as part of an argument. Robert Stevens's "Conflict of Laws", analyses two decisions: the House of Lords decision in *Kleinwort Benson Ltd v Glasgow City Council* [1997] 3 WLR 923, and a Scottish decision, *Baring Bros & Co Ltd v Cunninghame District Council* [1996] TLR 538.

Fourthly, there are two essays, on "Interest" and on "Lapse of Time: Limitation", dealing in a very interesting and thorough manner with two dimensions of the law of restitutionary claims of enormous practical significance, but often left untouched in the academic literature. Both are easily translated to New Zealand, and could be of considerable benefit to local litigators.

The cognoscenti of the law of restitution will obviously purchase the book. Many will copy a few of the papers. Libraries should buy it. But the good idea, explicit in its title, has not resulted in a collection of great essays. ❑

WORLD TRADE BULLETIN

Gavin McFarlane of Titmuss Sainer Dechert and London Guildhall University

reviews the latest international litigation and sounds the last post for tax havens

FRAGILE DIPLOMACY

Of the fiercely contested cases in the WTO dispute resolution forum between the United States and the European Union on which this column has commented, the recent decision on Foreign Sales Corporations involves the largest amounts in financial terms. This is as a result of the enormous sums saved by the device of passing US produced goods through the FSCs located in offshore tax havens, as a consequence of which the parent companies in America avoid the payment of corporation taxes on these goods. The decision of the WTO that this scheme is a form of trade subsidy which is in breach of the GATT agreements has not been well received on the other side of the Atlantic, particularly as a large proportion of the material which is exported in this way consists of agricultural products which when routed through the FSCs have now been held to be breaking the special rules which relate to farm produce.

The FSC complaint appears to have been lodged by the EU as a kind of bargaining counter. There is no doubt that the most significant development since the introduction of the dispute resolution scheme after the Uruguay round of GATT has been the bitterness of the cases involving the two great economic groupings of the USA and the European Union. The most prominent among these has been the banana altercation, still unresolved despite the two rulings in favour of Washington which have been handed down by the WTO. The other is the continuing opposition of Brussels to the admission of beef products from North America which have been treated with growth promoting hormones. Despite the ruling of the WTO that Europe has no grounds for the continued exclusion of such material, Brussels continues to maintain its ban on their importation, and is continuing research with the objective of coming up with conclusions which will support this prohibition As a result, in both cases trade sanctions in the form of 100 per cent duties have been imposed by the United States on selected European exports, and these have been approved within certain parameters by the WTO. In reality the FSC dispute has been going on in one form or another for some decades. It seems to have been brought off the shelf and dusted down in order to be used as a negotiating tactic with Washington. The thinking is that if the Americans will agree to back off in bananas and beef hormones, then the European Union would reciprocate by dropping the FSC dispute.

Sadly for the Commission, the Americans do not appear to be disposed to play ball. When the ruling on the FSC issue was published by the WTO, a criticism made by the adjudicators was that the system of foreign sales corporations only extended their scheme of tax avoidance to goods which had actually been manufactured in the United States. It does not include goods which have been made outside the USA by American owned companies. Now Washington is proposing to extend the tax breaks to these goods as well, and hopes by this means to achieve the blessing of the WTO so that the FSC system can continue. A witches' brew is now boiling up. Brussels has stated in terms that it does not accept this solution, and it is true that there are obvious difficulties about the proof of origin of goods. The United States has intimated that it might bring a complaint to the WTO about the preferential treatment built into the EU's value added tax system, arguing that if the FSC scheme is an illegal subsidy, the VAT scheme is constructed on the same basis. Another drawback from the EU standpoint is that European companies established in the United States benefit from the FSC scheme when they export their products made in the US to overseas destinations. A scarcely veiled threat which is being made on the other side of the Atlantic is that if the row continues to build up, this might adversely affect the vote in Congress when the members of that august body come to debate whether the United States should continue its membership of the WTO. Once again a transatlantic dispute is spinning out of control, with the almost incredible result that a full blown trade war between Europe and America might at some not too far distant time become a reality. The consequences of this would have the most damaging effect on the economies of both locations, and could well drag the whole world down into another slump. It is difficult to escape the conclusion that the quality of those involved in trade negotiations in both Europe and America is simply not of the standard which the job demands. It is quite unacceptable that matters should be conducted in an atmosphere of brinkmanship reminiscent of the cold war at its height. A diplomatic solution to the whole issue of transatlantic trade needs to be worked out, and this should be treated as a priority.

LAST CALL FOR TAX HAVENS?

One of the consequences of the ending of restrictions on currency movements has been the rapid growth in the number and activities of tax havens. In the United Kingdom the exchange control legislation was repealed twenty years ago, and with the advent of the European single market, the era of free movement of currency has also arrived, as well as free movement of goods and to some extent persons. This is of course good for business in these exotic locations, and there is a substantial proportion of business activity which finds tax havens a convenient option for the movement of funds. But increasingly the governments in the major nation

states are coming to view tax havens as a drain on their resources. Tax havens will typically have low or even nil rates of taxation; this attracts commercial activity to their shores, but the absence of tax revenue also postulates a very low level of welfare for the populations of such territories. This is not the matter which motivates the criticism in the large nation states however. These are finding increasingly that their own tax revenues are shrinking, as more and more funds are moved offshore; thus their ability to maintain their welfare commitments is diminished. This has suddenly become a matter of concern, at a time when other threats to tax collection have appeared, such as e-commerce and the ability to trade over the Internet. The Organisation for Economic Cooperation and Development has long had the tax havens in its sights, but up till now, the OECD has done little more than bluster. Now however it looks as though sterner action is on the agenda. The organisation has just published a list of 35 tax havens as a kind of warning; these are to be found in the Caribbean, the South Pacific, and even in Europe, for the Isle of Man, Lichtenstein and Monaco are among them. It must be recorded that a proportion are former British colonies, and some still maintain links with the UK, although Westminster does not exercise control over the tax affairs of any of them.

The OECD has stated that if these miscreants do not alter their ways of doing business within the next twelve months, then the OECD member states, which include all the major economic powers of the area, will impose sanctions against them. In Britain, the Inland Revenue has welcomed the move, and Dawn Primarolo, Paymaster-General, has referred to the announcement as a vital step forward. According to figures produced by Oxfam, in the underdeveloped states of the world alone, some £33 billion annually is moved into tax havens. The issue is linked to growing concern about the use of tax havens for money laundering; it is this factor as much as any other which has made the member states of the OECD make their announcement. It remains to be seen whether in a year's time they will be prepared to back their words with action.

THE EU AND NAFTA

Suggestions of a two speed Europe are causing concern in some circles. The prospect of being located in the equivalent of the Third Division North with small states the location of which can only be found in an atlas with difficulty is unappealing to serious politicians. This is all the more the case when the original six members of the old Common Market are making noises about forming their own fast track club, with a view to ever closer association. In western Europe, only Norway, Iceland and Switzerland remain outside the EU (although the first two are in the EEA). The UK seems more sceptical about further commitment to the EU than the other member states, including Denmark and Sweden. Interestingly an unofficial delegation of US politicians has recently visited the UK to talk about the North American Free Trade Area (NAFTA); this raises the prospect that a European state which found itself outside a closer EU seemingly moving towards federation might consider NAFTA as an alternative.

The permutations are endless, but one factor which will have to be thrown into the equation is the prospect that there will be an increasingly close relationship between NAFTA and the EU. This assumes that the trade disputes discussed earlier will be satisfactorily resolved, and that both economic groupings will appreciate the sense of moving forward together and in harmony. But already an increasing number of steps are being taken along the road towards greater EU-NAFTA cooperation. Recently on 1 July, the EU signed up to an important new preferential trade agreement with Mexico, a NAFTA member state. Under this, Mexico will continue to take advantage of the EU's scheme for generalised system of preference (GSP), under which Mexican products will be able to enter the European single market at a lower rate of duty than would otherwise be the case. Under the agreement there will also be wider opportunities for EU products to obtain entry to the Mexican market at favourable rates. In both cases proof of origin will be required, and it must be said that Brussels continues to drag its feet over the vexed issue of introducing a satisfactory system of protecting innocent importers where fraud is subsequently discovered to have been committed in connection with the origin documentation in the country of exportation. The scheme continues to be based on an archaic system of stamping, and the Mexican authorities have still to provide satisfactory examples of the stamps which they will use. But there is a quickening of the pace at which NAFTA and the EU are coming together, both between the two economic groupings as a whole, and by more limited relationships between particular locations. ❑

TAX UPDATE

Jan James and Raymond Yee, Simpson Grierson, Auckland

discuss taxes on children, Australian GST and golden handcuffs and hellos

TAX ON CHILDREN

The government has announced that it will introduce legislation to tax distributions of beneficiary income from trusts to children under the age of 18 at the flat trustee rate of 33 per cent.

Under current tax law income derived by a trust is separated into two classes: beneficiary income and trustee income. Beneficiary income is all income earned by a trust in an income year which vests absolutely in the beneficiary, or is distributed to the beneficiary during or within six months after the end of the income year. Trustee income is income derived by the trust which is not beneficiary income for that income year.

Beneficiary income is taxed at the beneficiary's marginal tax rate. This can be as low as 19.5 per cent. Trustee income is taxed at a flat rate of 33 per cent.

The government considers this situation can encourage parents who are taxed at 33 per cent or 39 per cent marginal tax rates to settle income-earning assets on a family trust, the income from which is then distributed as beneficiary income to children, and taxed at the children's marginal rate. The government's view is that such income, in substance, is often not the children's and should not qualify for a tax rate set to apply to lower income earners.

The proposed rule is based on Australian legislation, and some limited exceptions to the rule are proposed where income splitting is not at issue. For instance, a minor who is employed full time, disabled or an orphan may be excluded from the rule, as may income from trusts arising from wills, Court orders, damages claims or public funds.

Predictably the proposed rule has drawn widespread criticism from taxpayers and their advisers for a number of reasons. First, the rule does not target spouses who can also receive tax benefits from income splitting – the rationale being that the government views such income as more likely to be in substance the spouse's. Even if this were a valid distinction, it will not apply in all cases, and highlights the "sledgehammer" character of the rule.

Secondly, it assumes that the child beneficiary is receiving income to which he or she is somehow not entitled, or which in reality is derived by his or her parents – this ignores fundamental and long-standing legal principles.

Thirdly, the Revenue has successfully challenged distributions of beneficiary income to a child, without the need for the proposed rule, where the income is used to meet expenses for which a parent would normally provide, eg food, clothing and state school fees. If a beneficiary does not benefit, there is no distribution to that beneficiary.

Fourthly, it creates a disadvantage for the sometimes more prudent approach of setting up a trust for minors, over the option of a straight-out gift. Income from the latter will be taxed at the minor's marginal rate, whereas income from the former will be taxed at 33 per cent. This may discourage the establishment of trusts in favour of gifts.

Fifthly, it ignores the principle that individuals be taxed at a rate determined by the level of income received, rather than the source of that income. This principle has not been abandoned altogether, however, as if the minor beneficiary earns in excess of $60,000, the highest marginal tax rate of 39 per cent, rather than the 33 per cent trustee rate, will apply to distributions.

The legislation, once enacted, will apply to income derived from 1 April 2001, or for the equivalent income year.

AUSTRALIAN GST

On 1 July 2000, Australian GST came into effect.

The Australian GST system is essentially similar to New Zealand's GST system but has more categories where GST is not charged on goods and services. For example, unprepared food, childcare, education and healthcare do not attract GST in Australia.

There are potential issues that New Zealand businesses should be aware of when dealing with Australian residents.

Imports

If New Zealanders import goods into Australia they will potentially be liable for two amounts of GST on the same goods. First, the GST on the supply of goods to the Australian customer, and secondly the "import" GST levied on the goods when they enter Australia. New Zealanders will be able to claim back the import GST as an input tax deduction if they are registered for GST in Australia.

New Zealanders must register and account for Australian GST (at ten per cent) on supplies of goods if they import goods into Australia, or install or assemble the imported goods in Australia, and their annual turnover for the supplies is (or is expected to be) greater than A$50,000. An "importer" is the person responsible for Customs clearance, including payment of Customs duty.

Import GST on the other hand is charged when goods enter Australia regardless of whether the importer is registered or required to be registered for Australian GST, and is collected like Customs duty.

Goods which do not attract GST in Australia will not be subject to GST if they are imported into Australia. For instance, New Zealand suppliers of basic food items will not need to account for GST on the goods imported into Australia because they are GST-free.

Reverse charge rules

Unlike New Zealand, Australia has adopted a reverse charge rule for services by overseas (non-Australian) suppliers. If an Australian GST registered customer acquires services from an overseas supplier not required to charge GST, and the customer could not claim an input tax credit if GST was charged on those services, the customer is liable to account for GST on the supply of the services.

This is designed to ensure that non-Australian service providers do not have a GST fuelled competitive advantage over Australian counterparts.

Telecommunications

Telecommunication services supplied to Australia will attract GST regardless of the location of the supplier. The supplier will be liable to account for the GST, but for practical reasons, it will be difficult for the Australian Tax Office to enforce the obligation on overseas suppliers.

Australian Business Numbers

If an overseas supplier carries on any enterprise through a permanent establishment (ie a place where the supplier carries on business) in Australia, and makes a supply to an Australian customer in the course of that enterprise, the overseas supplier will need to quote an Australian Business Number ("ABN") to the recipient. For overseas suppliers required to register for GST in Australia, the ABN will be the same as the GST number.

If no ABN is quoted in such a case, the payer must withhold 48.5 per cent from that payment.

However, some overseas suppliers cannot obtain an ABN because they do not have a permanent establishment in Australia, and cannot register for GST because they do not import goods into Australia. An example would be a supplier operating out of New Zealand whose Australian customers do the importing. This does not give rise to an Australian tax problem, but some Australian businesses have threatened not to do business with New Zealand suppliers who do not quote ABNs. These New Zealand suppliers then faced problems when they tried to register for an ABN without an Australian address. The Australian Tax Office ("ATO") has recognised the problem and is now accepting New Zealand addresses for ABNs.

The high number of applications for ABNs has stretched the ATO's resources. As an interim measure, the ATO is issuing waiver letters on request. This allows New Zealand businesses which have not been able to obtain an ABN to conduct business in Australia without losing 48.5 per cent of their receipts to Australian withholding tax.

GOLDEN HANDCUFFS AND HELLOS

The government has announced that it plans to make restrictive covenant payments and exit inducement payments subject to tax. The government's concern is that these payments could easily be substituted for taxable salary and wages, thus reducing tax revenue. The classification of these payments as capital in the hands of recipients, especially with the introduction of the higher marginal tax rate of 39 per cent, is seen by the government as a threat to the tax base.

Given that in some cases this non-taxable capital receipt may be combined with deductible expenditure in the hands of the employer payer, the government wants to render such payments taxable by legislation. Even if such payments are not deductible to the payer, the government views this as a "sacrifice" of 33 per cent in the case of a corporate payer against a "gain" of 39 per cent in the hands of the recipient.

Restrictive covenants

A restrictive covenant payment is a payment made in consideration for restricting one's activities or ability to perform services. For example, a celebrity might receive such a payment in return for limiting his or her advertising activities to endorsing a single producer.

The proposal is based on UK legislation, and will tax payments made to restrict the ability of a person to perform as an employee, office holder or independent contractor.

The government is also preparing a specific anti-avoidance rule to prevent arrangements to circumvent the new rule. For example an employee could enter into a restrictive covenant with a wholly owned company and then sell the shares in the company to his or her employer. The anti-avoidance provision will presumably ensure that no tax advantage will result from this type of arrangement.

At this point, the government is proposing that the new rule will also apply to restrictive covenant payments associated with the sale of a business. Such payments are generally intended to preserve the goodwill being transferred – for example the vendor of the business might agree not to compete with the purchaser for a certain period of time. However, the government is open to submissions on this.

Exit inducement payments

An exit inducement payment is a payment made in consideration for someone to give up a certain position or activity. For example, an employer may pay a prospective employee to leave his or her current firm and join the employer's firm.

Exit payments from prospective employers are apparently becoming more frequent, especially as an incentive for an employee to change firms within the same occupational area. Such payments are generally non-taxable capital receipts. It is proposed to tax any payment for loss of vocation, position or status, or for leaving a position.

Comment

This response to restrictive covenant and exit inducements represents a serious erosion of the capital/revenue boundary.

Although in some cases these payments may be used to deliberately reduce the taxable income of the recipient, there will also be many instances where the payment is over and above any salary or wages the recipient may receive, and genuinely represents consideration relating to a capital asset – for example the curtailing of a right to undertake such activities or accept such employment as one chooses. In these latter cases the payment is for something other than the performance of personal services.

Instead of adopting a specific anti-avoidance rule for restrictive covenant and exit inducements which are in effect substitutions for taxable salary, the government is making all payments taxable regardless of their true nature. Again this is a "sledge- hammer" approach.

The government has, however, made a concession in that in the event restrictive covenant and exit inducement payments become taxable to the recipient, special legislation will also be enacted to ensure that such payments are deductible to the payer (on the same basis as salary and wages).

The government intends to introduce the provisions in the next Tax Bill, with effect from the date of enactment. ❑

THE HARASSMENT ACT 1997 AND PROPERTY RIGHTS

Ray Mulholland, Massey University

finds the Harassment Act extending from malicious intent to property rights

The decision of Judge R L Kerr in the District Court in *Irvine v Edwards* [1999] DCR 171, raises some very interesting points as to the relationship between the Harassment Act 1997, and traditional common law rights in real property.

The contention of this article is that the decision in *Irvine* could mean that the Harassment Act may significantly extend rights in real property.

It is significant that the word "tort" appears in the headnote of the report. But the clear intention of the legislature was not to extend the scope of common law torts. The Act was intended to provide a singular and well-defined remedy to an immediate problem.

The Act provides a much more direct route to a solution to the problems it covers, than do common law torts. However, the practical effect of a restraining order issued under the Act can be similar to that of a tort, for example trespass cf s 4(1)(c), despite the fact that the Act is clearly directed against the person.

THE INTENTION OF THE ACT

The Harassment Act was passed in 1997 together with seven other Bills including legislation to curb the activities of gangs. It was originally intended to pass them all as one Bill, the Harassment and Criminal Associations Bill. The proposals dealing with gangs received the most attention by the legislators, NZPD Vol 565, p 5729.

During the Third Reading Debate, examples were put forward of situations where it was anticipated the harassment provisions would operate. Most had a clear connection with real property: a stalker continually standing outside a woman's place of work after the Trespass Act had been invoked to keep him away from her property, p 5734; leaving flowers on a woman's dining room table when she was absent from the property thus indicating that the culprit could gain access to her property at any time, p 5735; a gang member who entered a retail shop and walked up and down in front of a female shop assistant, left the shop and then returned to repeat the conduct for two hours, p 5740.

The manifest intention of the legislation thus was the sanctioning of sexual harassment.

At the same time the Act is not limited to sexual harassment and there is constant use of the expression "that person"; s 4.

The clear drift of the legislation is against the person. Thus in s 3 Meaning of "harassment" –

> ... a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person ... that includes doing any specified act ...

and s 5 is headed Meaning of act "done to" person.

But on the other hand, s 4 defining "specified act" includes the following act:

> (c) Entering, or interfering with, property in that person's possession.

MOVE TOWARDS PROPERTY PROTECTION

Irvine involved a mundane, endemic conflict between two neighbours over various activities in respect to their properties. The conflict inevitably built up over a period of time, with acts of vitriolic animosity following each other in quick succession.

The acts complained of in *Irvine v Edwards* were of themselves quite lawful but Judge Kerr held that s 17 of the Act, which provides that it is a defence to prove that the act was done for a lawful purpose, could be interpreted to mean that if a respondent's behaviour was lawful then on the fact of it harassment did not occur but acts lawful in themselves might nonetheless support the making of a restraining order if the manner in which those acts were performed or undertaken created harassment.

Thus the decision in *Irvine* makes a clear distinction between conduct which is lawful within itself and conduct which although lawful within itself is oriented towards an unlawful purpose.

It is contended that this is a dramatic shift and places a substantial gloss on the original intention of the legislation where it seems that specific acts, within themselves, were intended as harassment. Thus the deliberate undertaking of lawful activity for the purpose of harassing another, provided the other elements required by the Act are established, could be sufficient.

Acts relied upon as harassment

Specific incidents relied upon in *Irvine* included the defendant approaching the fence line of the two properties and launching an unprovoked verbal assault on the plaintiff. This involved screaming at the plaintiff and violently shaking the boundary fence as well as making various demands on the plaintiff. He also referred to the plaintiff in derisive terms such as "arsehole".

The Judge emphasised the approaching of the boundary fence but this of itself would probably not have been adequate to amount to harassment without the totality of the other conduct of the defendant. A fundamental incident of the fee simple is the right to pass or repass over one's over property. It seems unlikely that this conduct would have supported a common law action in nuisance.

Also emphasised by the Court was "a watching by Mr Edwards of the Irvine property" (p 180). This "watch-

ing" seems to have been implicit in the entire conduct of the defendant. A mere watching of a neighbour's property would probably not be actionable under the common law. Again, this of itself, would not be sufficient to amount to harassment. Also considered relevant was the placing of a theodolite by the defendant, who was a registered surveyor, on his own property but only some two meters from the plaintiff's bedroom window, which was not curtained. Conduct of this nature could probably be the subject of a restrictive convenant.

The conduct in context

Thus, otherwise lawful acts have to be viewed in their context and, it seems an underlying state of mind is required. A specific mental state is required for harassment to exist. A personal relationship must exist between the applicant and the defendant. Section 6 of the Act recognises that behaviour that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context. The deliberate undertaking of conduct, otherwise lawful, for the purpose of harassing someone else, provided other elements required by the Act were established, could be sufficient.

This means that, otherwise lawful, acts have to be viewed in their context and, it seems, an underlying intention to harass is required. This is well illustrated in the survey work carried out by the defendant. Judge Kerr emphasised the lawfulness of such activity but that "it has to be done reasonably (p 180) ... The lawfulness, however, disappears when survey work seems to be carried out more often than one would generally expect". (p 130)

A similar argument was applied to the gardening activity of the defendant where the lawfulness of the activity is overridden if it obtrudes into the privacy of a next door neighbour because of the time taken to garden and the place where the gardening is done.

This can be seen as an overlay requirement, on any conduct specifically pertaining to property rights. Court will require the presence of such an intention to harass before property rights can arise. Any property rights arising will specifically derive from the acts of harassment.

This requires the Court to roam at large over the facts of any specific case and consider the conduct of the defendant in minute detail. The actual manner in which the acts were carried out, the accompanying shouting, shaking of fists, use of abusive language, their consistency, together with the shaking of the fence and the defendant expressing a desire for the plaintiff to leave, were all relevant.

What actually constitutes harassment in any particular case is very much at the discretion of the Court, and the discretion can be dispensed on a very fine assessment of the evidence.

In the two earlier decisions *P v H* [1988] DCR 715, and *C v G* [1988] DCR 805, which were relied upon in *Irvine*, the effect which the harassment had upon the applicant was considered relevant. But both those cases dealt with sexual harassment and can thus be considered to be within the mainstream of the intention of the Act.

The restraining order

The restraining order issued in *Irvine v Edwards* under s 20 of the Act was in the following terms:

1. That Mr Edwards is not to undertake any further survey work in the vicinity of the Irvine house unless he gives notice to the Irvines through Mr Edwards' solicitor of the date when the survey work is to be undertaken, the time at which the survey work is to be undertaken and the purpose for which the survey work is to be undertaken;
2. Mr Edwards is permitted to move along his side of the boundary fence to gain access to the rear of his property but, such access should occur on not more than two days per week – between the hours of 9.00 am and 5.00 pm;
3. Gardening on his property in the vicinity of the Irvine house by Mr Edwards should occur on not more than two days per week – between the hours of 9.00 am and 5.00 pm;
4. Any complaints of town planning or other breaches may only be directed in writing by Mr Edwards to the Irvines through Mr Edwards' solicitor.

Significantly no time limit was placed upon the order. This would presumably mean that the order would remain in force until formally discharged under s 23.

The practical effect of this order was that a series of restrictive covenants were set in place over the defendant's land. The defendant was quite severely restricted as to what he could do in relation to his own land. Conduct recognised as a general incident of the fee simple was denied the defendant, who was, in effect, turned into a servient owner.

PROPERTY RIGHTS ARISING FROM HARASSMENT

It was probably envisaged that restraining orders issued under the Act would be similar to a common law injunction, merely restraining the conduct complained of. But in *Irvine* the Court was faced with the problem of devising a restraining order which protected the plaintiff in terms of the land which was the ambience of the harassment.

As indicated above, the report editors have indicated the tortious element of this case. The restraining order issued in *Irvine* can be seen as a statutory extension of the common law tort of nuisance. The conduct of the defendant was impairing the enjoyment of the plaintiff in his own land.

Section 20 gives the Court a very wide discretion to impose special conditions in restraining orders. It is possible to envisage a situation in which, for example, rain water is flowing from a property onto the property of an adjoining neighbour who is on a lower level. This could lead to animosity between the neighbours especially where the offending neighbour, through sheer cussedness, refuses to remedy the water flow. Would the Court, in such a situation, be able to apply s 20 to order a drainage easement over the property of the offending neighbour? Assuming that is, that in the opinion of the Court such an easement is necessary to protect the aggrieved neighbour.

A frequent cause of conflict between neighbours is the use of an easement right of way. Two, or more, parties could centre a verbal abuse altercation on the use of a right of way. The offending conduct could amount to use not included in the terms of the easement or an excessive use of the easement terms. In such a case it is possible to envisage the issue of a mutual restraining order binding both, or all, parties. This could have the effect of extending or reinforcing the terms of the easement.

The Harassment Act is yet a further example of a statute, like the Privacy Act 1993, which has been adopted by the Courts to serve a purpose, which although immediately compelling, was never within the original intention of the legislature. ❑

MOOTING AND COMPETITIONS

R J Scragg, The University of Canterbury

discusses the place of skills competitions in legal education

Mooting enjoys a venerable position in legal education in common law jurisdictions. Its origins may be traced to the Middle Ages when moots were conducted in the Inns of Court as a requirement for practice at the Bar. In New Zealand today mooting is undertaken at all five of the country's law schools. It is mooting's competitive dimension, however, which gives mooting its high profile in the legal world. Mooting, though, is not the only competition which law students may enter. Over the last ten years or so, a number of other competitions have been introduced, all of which have proved immensely popular with law students, although they are voluntary activities and do not give rise to degree credits. Extra-curricular they may be, but the competitions enjoy a significant place in legal education today.

As all law practitioners know, a career in the law requires more than knowledge of legal principles. Over the last thirty years, there has been a clear recognition throughout the common law world that preparation for practice involves, at the least of it, three distinct elements: knowledge of the law, an ability to perform transactions and a capacity to apply skills in the performance of those transactions. In New Zealand, the focus of legal education has been the LLB degree. In 1988 compulsory instruction, conducted by the Institute of Professional Legal Studies, was commenced for all those law graduates seeking admission as barristers and solicitors. Under the Law Practitioners Act 1982, solicitors may not practise in their own right until they have had three years "legal experience" or "experience". There is, however, no formal programme of articles or pupillage within this period. In these circumstances, the competitions, albeit at an under-graduate level, play a very important part in the training of a lawyer.

Today, there are competitions in mooting, family law mooting, witness examination, client interviewing and negotiation. Each of these competitions is concerned with skills training. In addition, mooting and witness examination in particular also involve the knowledge element of legal education.

In mooting, the student is required to identify issues from a fact pattern; undertake research; determine how the existing law might apply to a novel situation; prepare a synopsis of argument; present argument orally within strict time limits; deal with questions from Judges and observe the required protocol of the Court. It is commonly remarked by Judges that the standard of performance in the Moot Courts is higher than that which is often observed in the District Court. For the purposes of the witness examination competition, counsel's questioning skills must be added to this list.

Client interviewing and negotiation are skills in themselves, or, better expressed, they represent a combination of individual skills, such as questioning and listening, combined in a particular structure.

These competitions introduce students to something beyond a pure knowledge of law. They help to put that knowledge into a context. This, in turn, assists with employment. Students often comment that the passport to a job in a law firm is an honours degree. This is not entirely accurate. Employers are invariably inundated with applications from graduates and the newly admitted for positions in law firms. What employers are looking for is a characteristic that marks out the applicant as having something special to offer. An honours degree serves this function but it is not the only distinguishing feature which does so. Participation, and certainly success, in competitions also indicates that an applicant has something additional to offer. The fact that the profession sets store by the competitions is indicated by the sponsorship offered by firms in support of them.

The negotiation competition is the newest of the competitions in New Zealand. This is its first year. Unfortunately, the paper presentation competition is currently in abeyance. Paper presentation is a valuable competition. Not all lawyers will make a career in litigation but all lawyers need to be skilled in the ability to present information and to do so persuasively. This was something the paper presentation competition fostered. It is to be hoped that it will be revived, something which, no doubt, depends on sponsorship. In Australia there is a paper presentation competition in sports law and New Zealand students participate in that.

All five New Zealand law schools conduct their own internal competitions. These lead on to the national New Zealand Law Students' Association (NZLSA) competitions and international competitions. This year the 1999 NZLSA champions, the University of Canterbury, represented New Zealand at the Philip C Jessup International Law Moot Court Competition, held in Washington DC at the beginning of April. Over 300 law schools were represented from all over the world. The New Zealand team finished ninth out of sixty-seven competitors, winning all four of their preliminary round moots and progressing to the octo-final. The team comprised Nick Flanagan, Genevieve Haszard, Allastair Mace and Jonathan Scragg. In addition, the University of Canterbury team, comprising Jonathan Scragg and Charles Young, won the New Zealand Family Law Mooting Competition held at Otago University before the Chief Family Court Judge, His Honour Judge Mahoney, in May. The Canterbury team will now represent New Zealand in the Trans-Tasman Family Law Mooting Competition held in Australia later this year.

The competitions look set to play an ever increasing part in the preparation of today's students to become tomorrow's lawyers. ❑

RESTRUCTURING PROFESSIONAL ORGANISATIONS

David M Brock, The University of Auckland

discusses a timely new book to which he contributed

Today's lawyers work in significantly different organisations from those of their colleagues a generation ago. Those who still work in law practices are likely to receive performance-related pay rather than straight salary, be in specialist teams rather than generalist practices, and in larger, more international, diversified organisations. In addition, an increasing proportion of lawyers work for accounting firms or corporations.

Our recent book (David Brock, Michael Powell and C R Hinings, *Restructuring the Professional Organization: Accounting, Health Care & Law*. London: Routledge, (1999)) blends the theory of professional firms with an analysis of international change trends in accounting, health care and law organisations. In this article I will:

- summarise the content based on the legal profession;
- detail some aspects of the change process relating to the professional organisation;
- explain some of the key themes of the new archetypes; and
- link some of the findings to New Zealand.

A CHANGING ARCHETYPE?

This book contributes to the growing body of research pointing to changes in the archetypal professional organisation. In previous writings the Alberta School have suggested the emergence of a new archetype for professional firms, the Managed Professional Business or MPB (Cooper et al "Sedimentation and transformation in organisational change: The case of Canadian law firms" (1996) 17 *Organization Studies* 623-647). Hinings, Greenwood and Cooper, in their chapter "The Dynamics of Change in Large Accounting Firms", provide further evidence for this emergent archetype and detail its characteristics, demonstrating how these differ from the traditional professional partnership (or P^2) archetype. While retaining certain traditional professional values and practices, the MPB signals a significant refocusing of the professional organisation towards the business and management values of efficiency, cost-effectiveness, central strategic control, and internally differentiated structures. Other chapters by Rose and Hinings, Flood, and Morris and Pinnington also provide support for the emergence of the MPB. Support for the MPB is more muted in the cases of Flood and Morris and Pinnington reflecting the more conservative UK legal profession. However, there is sufficient evidence to indicate that there is a new archetype of the professional organisation emerging that incorporates the disciplines and values of the business corporation whether or not there has been formal legal adoption of the corporate business form.

The chapter by John Flood, "Professionals Organizing Professionals", shows very different sets of organisational beliefs and expectations operating in two large law firms – separated only by the Atlantic Ocean and a common language! The British firm shows far closer adherence to the traditional P^2 archetype than does the US firm that, although studied a decade earlier, exhibits more corporate, managerialist tendencies. Analysis of the different legal structures in these two contexts reveals far more rigidity in the British system – eg the clear distinction between barristers and solicitors. This rigidity and traditionalism has undoubtedly contributed to the slowness of organisational change in the UK.

John Gray's chapter, "Restructuring Law Firms", is largely devoted to illustrating the "duality of structure and agency", in changing law firms and their fields. Gray emphasises that the manner in which influential partners interpret the script either limits or liberates the firm. Structure does not emerge independently of either the firm's historical background or the interests and philosophies of those who have power. In Gray's chapter the powerful are the influential founding partners. Leadership and values play a critical part in shaping the direction taken by both the new and the old law firms.

Gray reminds us of some of the other emerging forms of professional organisation, such as the specialist firm working in a niche market and the star firm composed of high-flying, expensive and creative professionals. The specialist form is pervasive among small professional partnerships such as tax accountants, psychiatrists and mental health professionals, specialised surgeons, physicians and lawyers. The star form, exemplified by Starbuck "Keeping a Butterfly and an Elephant in a House of Cards: The Elements of Exceptional Success" (1993) J of Management Studies 885, a study of the very successful New York law firm, Wachtell, Lipton, Rosen & Katz, combines technical excellence in its work, a high degree of specialisation, and considerable autonomy for its high performers. It attracts those clients who want, and are willing to pay for, the highest quality professional service. The star form combines the traditional professional values of excellence, creativity, and individual autonomy with rewards based on performance.

CONTINUITY AND CHANGE

While several chapters of this book point to diverse new forms of professional organisation, and perhaps to a new emergent archetype, it is also clear that significant elements of the traditional professional organisational form remain. Morris and Pinnington's chapter, "Continuity and Change in Professional Organisations: Evidence from British Law Firms", analysed a large sample of British law firms, and found evidence of both change toward more corporate structures as well as continuity of significant aspects of the traditional professional partnership, particularly in the maintenance of consensus-style governance structures. Moreover they found that it was the firms that were performing less well that were more likely to demonstrate more corporate, managerialist tendencies, perhaps indicating their resource dependence needs. Better performing firms were more likely to emphasise a blend of the traditional and new managerial structures and processes: senior management teams with partnership meetings, performance appraisal with lock-step remuneration systems, public relations and marketing functions along with individual control of clients. In these firms, professional autonomy and discretion remained unchallenged with management leaving client relationships to the professionals.

Discussed in several chapters, is another emergent form – the multi-disciplinary form (MDF) or the professional conglomerate – typified by multinational consulting firms and health care systems. This form also fits the MPB archetype, but is typically international in scope; it also combines not just different disciplines within the one profession, but professionals from a variety of professions, working in autonomous, differentiated business units. It is not just multi-disciplinary but multi-professional.

New environmental conditions and new resource strategies generally require changed structures. As indicated in the previous section, the contributed chapters in this book point to the emergence of several new organisational forms such as the Global Business Advisory Firm and the Managed Professional Business. There is also the suggestion, most clearly in Hinings, Greenwood and Cooper's chapter, of the emergence of a new potentially dominant archetype. The issue remains as to whether the changes in organisational forms identified in this book contribute to a single new archetype of the professional organisation, to archetypal incoherence or, perhaps, to a number of competing archetypes reflecting a variety of organisational forms.

KEY THEMES OF THE NEW ARCHETYPE

Much of the book is devoted to discussing the change process. Based within institutional and archetype theory, we analyse and predict the aspects of continuity and change in the field of professional organisations. If there is a new emergent archetype of the professional organisation, we would expect it to reflect a similar sedimented structure – displaying aspects of both change and continuity. However, the new archetype would be need to be substantially different from the old in order to constitute a new archetype, as is argued by Hinings, Greenwood and Cooper where they suggest the MPB constitutes a new archetype for the large accounting firm. As we have already indicated, we see key aspects of the MPB in the other emergent organisational forms identified in this book. These common features may be viewed as key themes of the new emergent, potentially dominant, archetype.

There are recurring themes in these new forms such as managerialism, business-orientation, corporate governance, larger size, greater complexity and internal differentiation. The question is whether these common themes and similar structures constitute a new emerging archetype of the professional organisation. The following paragraphs briefly describe each of these themes:

- managerialism and becoming more "business-like". Many of the chapters agree with Cooper et al. (1996) in describing contemporary professional organisations as more business-like. The language of business: customers, market share, efficiency and – importantly – profit, is increasingly the norm. There is widespread adoption of new management structures, functions and systems such as performance appraisal systems, strategic business units, marketing and business development, cross-selling, chief executive and senior management teams and so forth. This trend is undeniable in NZ's legal fraternity, but more pronounced in larger firms, which generally have professional managers, boards of directors and functional managers (eg marketing and HR);
- less reliance of informal networks. It is a well-established proposition that informal networks can be more effective than formal relationships in facilitating cooperation between potentially rival organisations. Kitchener relates a medical professional remembering the "good-old-days" when expensive machinery would be informally loaned, and other personal favours done by supposedly competing professionals. However, in a market place with more formalised performance controls, there is more reliance of formal networks and an eschewing of informal links. Relationships are more likely to be contractual. Small law firms around the world may be linked to form a "virtual multinational" law firm. Even in the relatively close-knit NZ legal community, lawyers from different firms who thought of each other as colleagues in the past are more likely to consider each other competitors today;
- a tendency towards individualised rewards: while many traditional partnership agreements are still in force, specifying equal sharing of profits, more and more "eat-what-you-kill" (or piecework) remuneration systems are being put in place throughout the professions. Flood's chapter shows the link between productivity and influence and power in his US case study. Traditional professional bureaucracies, such as hospitals, introduce performance-based pay in order to "incentivise" the health professionals. NZ law firms are doing more to recognise and reward superior performers;
- a tendency away from partnership. While the partnership is currently entrenched in NZ law firms, the trend away from this ownership form is clear elsewhere in the world as well as in other NZ professions. The trend toward corporatisation of health care is well documented, and even while many professionals still retain the habit of calling their associates "partners", in reality we find trusts, limited companies, and sharing agreements in place. And in NZ's larger legal partnerships, increased size, consequent dilution in partnership shares, and the introduction of different levels of partnership, effectively means that the vast majority of "partners" (all but the most senior) are little different from middle managers in terms of their control and remuneration;
- a tendency towards globalisation. Professional organisations both contribute to and are impacted by the

general trends towards globalisation. New communication and travel technologies present opportunities for professional organisations to pursue resource acquisition internationally. This propensity is a function of various characteristics of particular professions (such as certification and standardisation) which explains why the accounting profession has been more globally oriented than law. Interestingly, a recent article in *The Economist*, ("Lawyers Go Global", 26 February 2000, 81-87) makes the point that London law firms have been more eager to globalise because of their relatively small domestic market (compared to New York). Contrarily, Australian law firms seem to be keener to stretch across the Tasman than NZ's firms have. Clearly we have much to learn in this area;

- from generalist to specialist to multi-disciplinary practice. While the trend from generalist to specialist practices has been apparent for some time, the corollary is more specialised professional organisations appealing to particular markets or providing particular services. However, we see a further trend from specialist to multi-disciplinary practice, generally accomplished through mergers of specialist practices with others. We note the tendency for law, engineering and accounting firms to follow their expanding global clients to wherever they are in the world. By the same logic, the professional firm has to offer the full range of services that the client might require. So the strategic shift towards implementing the "one-stop shop" for professional and business advisory services. We anticipate this trend to become increasingly apparent in NZ in the near future.

These common themes suggest an emergent, potentially dominant, archetype of the changing professional organisation that is different in significant respects from the old professional bureaucracy and P^2 forms. However, change processes are rarely linear and successful. While there may be a potentially dominant archetype, the plurality of organisational forms identified by the contributors to this volume would suggest that it is far from achieving dominance. Indeed, there may well be competing archetypes as the professional organisation undergoes transition.

COMPETING ARCHETYPES

An archetype is an ideal type and, thus in theory, one would expect to find only one archetype in an organisational field. However, having established that archetypes do change, it is difficult to conceive of these changes taking place instantaneously. Rather it is likely that there will be a period of archetype incoherence when several competing archetypes may coexist. There is some research evidence for more than one archetype coexisting at a point in time.

Our research has identified three organisational types which may point to as many as three competing archetypes of professional organisations coexisting today. The traditional archetype (P^2) may well be on the decline. However it shows much resilience amid the trend to larger professional forms. Small to medium, generalist, traditional partnerships are still common in NZ, especially away from the larger centres. While solo practice and very small firms are decreasing in prominence, it is clear they will continue to exist in the foreseeable future.

At the other end of the spectrum we find the large, business-like, diversified, networks of professional service firms, frequently with international reach. For brevity we use the acronym GPN or Global Professional Networks to identify this emerging archetype. The pervasive trends of deregulation, globalisation, mergers, new technology, increased competition, and client demands all feed into the growth of GPNs. A superficial view of the structures of GPNs hardly differentiates them from other large industrial and commercial enterprises and multinationals. However, the other theme highlighted earlier – that of continuity and sedimentation – is critical here. It implies that many of the internal processes of contemporary GPNs still rest on traditional professional values of collegiality, consensus, quality of service, and technical autonomy in serving clients. In this sense, it reflects the emergence of a conjoint, or hybrid archetype, as noted earlier, combining new business values and structures with central elements of the old professional interpretive scheme.

A third possible archetype is that of a medium-sized, highly specialised professional firm that persists in that form (ie resists merger or significant growth) by a fixation on the highest professional quality standards and a commitment to individual excellence. Evidence of this archetype is presented by Starbuck's Wachtell, Lipton case and by Gray's "Star" form. Like the GPN, the Star archetype is a hybrid with the critical professional and partnership dimensions of the P^2 still very much in evidence. And managerial systems and controls are not prevalent. The Star firm or organisation is so successful that it can afford some organisational slack. However, in recognition of the critical roles of extremely talented and innovative individuals, reward systems are unlikely to be equal or lockstep. In addition to performance-related remuneration systems, individuals in Star organisations are all expected to bring in new business and revenues through aggressive pursuit of big deals and wealthy clients. The relative absence of hierarchy and bureaucratic controls, and the focus on the successful individual professional rather than the organisation or team, distinguishes the Star archetype from the GPN. It has more in common with smaller and highly successful advertising agencies or investment banking deal-making units than the large GBAFs that populate the right-hand apex of the typology or professional organisations. In the medium term, we suspect that the Star may be a viable competing archetype. Perhaps it is likely to be more pervasive in law and medicine where localism and national borders inhibit growth.

The professional organisation is undergoing substantial change, and the New Zealand law firm is clearly subject to powerful competitive and environmental forces. These processes are likely to continue in the future. The GPN and Star types are gradually replacing traditional general partnerships. However, even should one archetype achieve dominance, the evidence presented in this volume suggests that it will retain a strong and distinctive professional character. There is little evidence to suggest that professional organisations will lose their distinctiveness and simply be subsumed under a monolithic corporate business archetype. But at the same time NZ's law firms need to understand the organisational change dynamics around them and incorporate these insights into their strategic deliberations. The opportunities offshore, and the internal arrangements needed to foster multi-disciplinary work must be considered. Potential competitors from other professions and countries are already at our doorstep. So further research is needed to delineate the changing dimensions of professional organisations as they transform themselves to meet the demands of new institutional environments and uncertain resource flows. New Zealand lawyers need to harness the resolve to change as needed by these opportunities and threats. ❑

RESTRUCTURING THE PROFESSIONAL FIRM

Duncan Webb, Victoria University of Wellington

reviews **Restructuring the Professional Organization: Accounting, Health Care and Law, *David Brock, Michael Powell and C R Hinings eds (Routledge, 1999)***

It is trite to observe that the legal profession is undergoing change. More relevant is the nature of the change, whether the change is for the better and whether accurate predictions can be made about the most appropriate or most likely course of change in the future. Some of these issues are addressed in this volume of essays.

The book comprises a number of essays on organisational structure in the accounting, healthcare and law professions. While there are some similarities between these professions, and particularly between accounting and law, there are also substantial differences. Consequently some portions of the work are only of peripheral interest to the practitioner of law or manager of a legal practice.

The first challenge to any legal practitioner who picks up this book its somewhat specialised language. The book appears to be written for an academic audience, and one schooled in the language of business rather than law. However if one perseveres through the jargon and the somewhat repetitious reviews of preceding scholarship there are aspects of the work which provide some insight into the direction of the practice of law in New Zealand today.

The theme of the book is changing trends in the way in which professionals are organised and organise themselves. The common thread in all of the essays is the shift to a more business oriented approach to the provision of professional services. It bears mentioning that the measure of success of and applied by all of the authors is financial. A successful firm is a profitable one. Accordingly the authors generally take a critical view of organisations which do not adopt structures aimed at maximising profits. Such a view fails to appreciate that some professionals will choose to organise their practice in a way which the rewards are other than purely financial. It may therefore be that leaving partners to autonomously manage their own clients and cases leads to a more personally rewarding career in the law, and a more satisfying relationship with the client. It would be refreshing to see scholarship from those interested in organisational management which focused on such matters.

It is also of note that the work focuses almost exclusively on large practices which specialise in commercial work. In fact most legal work occurs in firms which are not large national or international enterprises. The market for legal services simply could not support a great number of large high-fee "elite" firms. It would therefore be interesting to hear what insights experts in organisational management might make in respect of how a small to mid-size practice might be managed most effectively given the constraints imposed by the market in which it operates.

Given that the book was published in 1999 it is interesting that the introductory chapter opens with the observation that "a large Auckland law firm considers merging with the legal arm of an accounting firm". The emergence of KPMG legal was perhaps as inevitable as is a change in the rules to allow MDPs. It is also interesting that there does not appear to be a rush to enter into such alliances (though it appears that at least one more is imminent), and that some accounting firms seem to have taken a conscious decision not to enter the legal arena in New Zealand. It is in this environment of uncertainty and change that the authors address the future direction of professional organisation.

In chapter 2 Ahroni observes trends towards internationalisation in the accounting profession. One of the interesting distinctions between law and accounting firms is the general resistance to the internationalisation of law. While there are a number of law firms with a presence in several jurisdictions, the legal profession does not approach the international ubiquitousness of accounting firms. Neither do law firms display the dominance of a small number of large firms at the top of the profession. Apart from the regulatory barriers to such internationalisation one of the reasons for this may be the fact that most of the services provided by major law firms are tailored solutions in that they respond to particular client demands in the unique legal environment of the client. This differs from accounting where some functions are essentially repetitive in nature, such as auditing, and they are carried out in a uniform regulatory environment across jurisdictions. Ahroni examines the shift to adapt to the challenge of internationalisation in the accounting profession. In light of the trend towards harmonisation of important areas of the law the observations may soon be relevant to the legal profession.

Historically law firms have generally been organised in a manner which has been labelled the professional partnership. Most of the commentators pick up on this and in an essay by Hinings Greenwood and Cooper a useful exposition of the nature of the professional partnership archetype of management is found. Traditionally law firms were managed by their owner-partners who were also the main fee earners. Decisions were made by consensus or majority, and all partners were involved in management. Such an organisation gave its member/owners a high degree of autonomy with the main check on conduct coming through informal peer controls. Partners in such firms had close personal links with clients. In a sense the firm was a coalition of independently practising lawyers who shared costs and profits in an agreed manner. Control over lawyers in the firm was

largely in the hands of the lawyers themselves and any common goal was not the result of careful strategic planning.

Most of the authors touch on the emergence in the 1990s of a new professional archetype labelled the managed professional business (MPB). A useful description of the MPB and the shift toward it is contained in chapter 7, albeit in the context of the accounting profession. The shift is away from partner autonomy and towards a more centralised management structure with the professional ethos dominated by the firm rather than by individuals. The clear focus is on managing its activities as a business rather than as an old-style profession. There is a corresponding move to specialisation, marketing, and efficiency in a move to meet client needs and expectations. This change occurs in an environment where the pressure for change is claimed to come from both without and within. Clients of the firm are demanding more of a business rather than old style professional approach to the provision of the service in question. It is observed that not only is the way in which the service is being provided being questioned, but also the nature and utility of the service itself. As such the providers must justify the nature of and need for the service to the clients as well as achieving effective delivery.

Gray, in chapter 5 of the work, addresses issues arising from the restructuring of law firms. He takes the concept of restructuring a step further by noting that in a competitive environment restructuring is an essentially continuous process. The author's adoption of a metaphor of a whirlpool as representative of restructuring is indicative of the obscure management-speak that the reader must wade through:

> It reminds us that although individual molecules of water are constantly replaced they pattern the flows of the whirlpool. It reminds us that the molecules are not equally influential in the patterning. It leads us to consider where, and if boundaries could be drawn of the whirlpool/organisation ....

The point of all this is the observation that firms are continually changing and that the members of the firm are both active and reactive in respect of this change. As such a key feature of a successful firm will not be any particular feature at a particular time, but its "reflexivity". The author concludes by observing, in his view paradoxically, that effective law firms arrange their firms in a manner which is managerialist, but accommodates the demands of a partnership model and traditional conceptions of professionalism.

Gray predicts that a new kind of firm is set to emerge. It appears that these "star" firms will be smaller than the larger MPB type firms and will be dominated by particular individuals who are identified as of outstanding ability. Such firms will specialise in discrete areas where excellence is necessary – such as telecommunications and information technology contracting. Law which is, in the words of one partner of one such a firm, "get it right or get dead law".

Flood's chapter entitled "Professionals Organizing Professionals" contains much interesting anecdotal information from case studies from the United States and United Kingdom concerning methods of acquisition and retention of clients. Inheritance is identified as a traditional but rapidly diminishing form of client acquisition. In a more competitive environment clients are less likely to remain with a firm to be inherited. Moreover senior members are less likely to hand clients on in an environment where remuneration is sometimes closely tied to personal billing. This is seen as raising problems for aspiring or junior partners who may become frustrated in such an environment. Methods of acquiring clients outside of the formal framework of legal practice are identified. Thus the importance of memberships of clubs, organisations, or family and social connections is emphasised. Promoting the firm by seminars or other publicity was also seen as important. The author observes that promoting the firm itself by brochures outlining the history and/or mission of the firm is not particularly useful as there are rarely any real distinguishing features in such material. That is to say every firm claims a proud history, specialist expertise in uniform areas, and a client focus. One case study involved a major firm a hosting large numbers of prospective clients at functions or events. The author appeared to be sceptical of the utility of such events with no real focus or method of ascertaining success.

In chapter 10 Morris and Pinnington discuss their survey of British firms focusing on changes in the profession. The finding that there is a move to a more managerial structure is unsurprising. However of interest is the observation that in worst performing firms there was evidence of moves towards partners being assessed on financial controls, and strategic goals. The author does not clearly state whether these are responses to poor performance or causes of it. Also of interest is the observation that most firms retain an equal sharing of firm profits amongst partners rather than the more American "eat what you kill" method which uses the partner's own billing as determinative of partner profit sharing. Thus the British profession seems more reluctant to shed certain professional habits and embrace the managed professional business archetype wholeheartedly

Some prediction of the way of the future is made by Brock, Powell and Hinings in chapter 11. They, somewhat warily, suggest that a number of features will typify the "new, emergent, potentially dominant, archetype" of professional business. The first of the features is already with us – the emergence of managerialism and dominant profit motive. The second feature, the declining reliance of lawyers on informal networks and relationships, is hard to measure. They also suggest that modern firms will tend towards individualised rewards – that is remuneration based on personal billing/productivity. Also predicted is a tendency away from partnership towards corporate vehicles for professional practice. Whether this occurs in the legal profession in New Zealand will largely depend on whether current regulatory restrains remain. The globalisation of professional practice as suggested by the authors seems unlikely in the near future, at least in respect of New Zealand law firms. Although the emergence of closer links with Australian firms (or their appearance in New Zealand) is not unlikely. A more probable tendency, specialisation within firms, and a shift to multi-disciplinary practices is also predicted.

In overview this work contains some useful insights into how a law firm might organise itself to be successful in a modern and changing environment. However much of this work observes what many lawyers already know and can observe. The insights are also hidden in the scholasticism of the authors who are constrained to use obscure language and unhelpful conventions of academic writing – a criticism usually aimed at lawyers. Firms that are already commercially successful have more than likely implemented many of the changes identified by the authors of this work. Other firms make the choice not to take the road to commercialism and managerialism. However if you are a member of a firm which wishes to change its structure from a professional partnership model to a managed professional business and beyond, this book will be instructive. ❑

LITIGATION

"TIDYING" THE LIMITATION ACT

with

Andrew Beck

On 16 July 2000, the Law Commission released its report on limitation provisions (Report 61 *Tidying the Limitation Act*). The media release accompanying the report explained:

The Courts have struggled valiantly to do justice despite the restrictive terms of the statute as it stands, but there are limits to what can be achieved by creative interpretation, and the real need is for amendments squarely addressing the problems.

The three problems specifically identified were:

- time running before the claimant is aware there is a problem;
- psychological damage from sexual abuse preventing the victim from summoning the resolution to take proceedings in time;
- open-ended claims for relief against mistake.

However, the report does little more than repeat the positions adopted by the Commission in its preliminary paper No 39, *Limitation of Civil Actions* (February 2000), which was discussed in [2000] NZLJ 109.

Fundamental propositions

The preliminary paper raised a number of questions, and invited comments. The final report does not indicate what responses were received, but it does mention submissions from the Law Society and the Ministry of Consumer Affairs. The Law Society submissions were critical of the preliminary paper, and expressed concern in relation to many of the tentative views of the Law Commission. It does not seem that any of these have been taken on board. The fundamental recommendations of the Commission are, in summary:

- limitation periods should commence once all the facts necessary to establish a claim are in existence, whether or not the plaintiff is aware of them;
- an extension should be permitted where the plaintiff can prove that damage, or the defendant's responsibility for it, was not reasonably discoverable until a later date;
- all claims should be subject to a long stop of ten years from commencement of the period;
- a plaintiff should be regarded as being under a disability (with a consequent extension of the limitation period) if unable, by reason of matters on which the claim is founded, to make reasonable judgments in respect to the bringing of the claim.

Long stops have, understandably, not been introduced by the Courts. In the other respects, the position adopted by the Commission is generally more conservative than that which had already been reached by the Courts.

Recommendations not made previously

What is somewhat surprising is that there are a number of recommendations which were not foreshadowed in the preliminary paper. These are:

- the section exempting equitable claims from the ambit of the Act should be repealed, and the Act should cover all civil claims not regulated by other statutes;
- a limitation period of two years from the date of accrual of the cause of action should be imposed on claims for contribution or indemnity under s 14 of the Act;
- section 28 of the Act should be amended to remove the postponement of claims by reason of fraud or mistake; (Although this matter does not feature in the summary of recommendations, that is apparently an unintended omission.)
- section 43(5) Fair Trading Act 1986 should be amended to provide a limitation period of five years from the time at which the relevant matter occurred, or three years from the time of reasonable discoverability of the likelihood of loss or damage, whichever expires first.

The new recommendations

It may well be that some of the matters raised for the first time in the final report only occurred to the Commission after the publication of the preliminary paper, but it is disconcerting to find that the Commission is prepared to make firm recommendations without taking any public soundings. There is no indication that these were propositions enjoying general support.

In its submission, the Law Society was supportive of the idea that equitable claims should not be regulated by a separate regime, but the Commission did not indicate that it intended to suggest such a course of action. Where such a proposal is to be made in conjunction with the very early accrual of a cause of action recommended by the Commission, there should at least be pause for thought. After all, there is a major shift in the law from a purely discretionary limitation period to six years after the occurrence of a breach of trust (assuming that damage is not an element of the cause of action).

The abolition of the rule postponing limitation by reason of fraud or mistake may be seen as a simple corollary

of adopting a reasonable discoverability test, but the proposals involve a ten year long stop. It is not clear why a defendant should benefit from fraud because ten years have passed since it was committed. Such a proposition also involves a significant shift away from the existing law.

The provisions of s 14 have existed in their current form since the commencement of the Act, and have given rise to virtually no cases. One of the few examples is *Cromwell Plumbing Drainage & Services Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218. No suggestion was raised there that the rule was inappropriate in any way. As a two year limitation period is short by any standard, it would not be right to adopt it without considerable consultation. It must also be noted that it would be a further anomaly created by a reform ostensibly aiming at consistency.

The proposed amendments to the Fair Trading Act arise out of the Business Law Reform Bill, which includes a clause aimed at introducing limitation based on a reasonable discoverability test into the Fair Trading Act. This clause was referred to in the preliminary paper, but not subject to any discussion or recommendation.

Given the approach adopted by the Commission, it is obvious that such a provision would not have been viewed with favour. The recommendation of a long stop provision is therefore not unexpected, and was foreshadowed to some extent in para 18 of the preliminary paper. The five year long stop period is consistent with a ten year period for civil claims with a six year limitation period, but a long stop period was opposed by the Ministry of Consumer Affairs. It appears that there is not general acceptance of the type of long stop proposed, and it would not be appropriate to adopt it without further consultation.

Commentary

It would serve no purpose to revisit complaints with the substance of the Law Commission proposals, which appear to have fallen on deaf ears. Suffice to say there is no general agreement with the proposal to start limitation periods with the time when the facts establishing a cause of action come into existence.

As far as the long stop period is concerned, the Commission appears to have taken its lead from the Building Act 1991, which has a ten year long stop period commencing on the date of the act or omission on which the proceedings are based. That provision only applies to proceedings commenced on or after 1 July 1993; it is too early to conclude that the rule is a good one, or that it does not result in material unfairness. To adopt it as a universal yardstick would be premature. The conclusion, if any, to be drawn from cases such as *Cromwell Plumbing* and *Price v Sanders Lane & Page* 19 August 1999, Master Venning, HC Nelson CP 18/98 is that there may well be some unfairness in the Act, and that the ten year period is too short.

The extension of the definition of "disability" to situations where the plaintiff has been unable to make reasonable judgments concerning the bringing of a claim is a recognition of developments already made by the Courts. The statements made by the members of the Court of Appeal in *M v H* (1999) 13 PRNZ 465 demonstrate a generous approach to the construction of disability. The Law Commission proposal is more restrictive, however, in that it requires the disability to be related to the matters on which the claim is founded. Proving such a connection would undoubtedly be a fruitful topic for litigation by defendants, and could well redound to the disadvantage of genuine plaintiffs.

There are also difficulties in reconciling this with the proposed discoverability test. Where the disability is in relation to a bodily injury claim, the limitation period is deemed by s 24(a) to commence when the disability ceases. It is not clear how that is to be construed together with the proposed s 28A, which provides that the limitation period does not commence until the facts are reasonably discoverable. Nor is it clear how the long stop provision is to operate. The proposed s 28A states that no claim may be brought more than ten years after the date when all the facts necessary to establish the claim were in existence.

Conclusion

The Limitation Act is certainly in need of reform. Some of the matters requiring attention have been highlighted by the Law Commission report, but the proposals cannot be said to have been fully thought through or to enjoy general support. Far from tidying the Act, acceptance of the proposals would create the potential for further anomalies and potential injustices.

NEW VOIDABLE TRANSACTION RULES

The High Court Amendment Rules 2000 came into effect on 1 August. One of the important changes brought about by these rules is the introduction of a procedure dedicated to the setting aside of voidable transactions in a company liquidation.

When a liquidator issues a notice setting aside a transaction under s 294(1) Companies Act 1993, a creditor wishing to protect its position has to act quickly. Failure to make application within the 20 working days laid down by the Act results in an unchallengeable decision: see *Bond Cargo Ltd v Chilcott* (1999) 13 PRNZ 629. The proper procedure for a creditor to follow contained many potential fishhooks, and generated a number of decisions. Those will hopefully be relegated to history by the new procedure.

The procedure is set out in RR 700ZJ and 700ZK of the High Court Rules. These are made applicable to notices under s 294(1) by R 700A(2); this rule is of some importance, because Part IXA has in the past only applied to liquidations by way of application to Court. The new voidable transaction rules apply regardless of how the liquidation came about, but only apply to notices served from 1 August 2000: R 23 of the Amendment Rules.

Under the new procedure, a notice proposing to set a transaction aside is required to contain a heading in form 64N, and to follow the appropriate form set out in the schedule: R 700ZJ. The notice is also required to comply with the general provisions of RR 36-44, which means that an address for service has to be included. Form 64N requires that the name of the company in liquidation be included, and describes the matter as between the liquidator and the creditor.

In the case of a Court-ordered liquidation, the notice must be filed in the registry where the liquidation order was made and use the same file number: R 700ZK(1)(a). This rule applies regardless of the number of notices, and the fact that each notice will have a different heading: R 700ZK(2). In all other cases, the notice has to be filed in the registry closest to the company's registered office at the date of liquidation: R 700ZK(1)(b).

Rules 700ZK and 700ZJ do not provide how the application by the creditor is to be brought, but they have to be read together with the amend-

ments to Part IVA, which now permits such applications by way of originating application, and provides that such applications are to be filed in the registry where the notice was filed by the liquidator: R 458EA(1). The affidavit accompanying the application is required to attach the notice filed by the liquidator: R 458EA(2). The originating application rules have also been amended to provide that no application for directions as to service is required in a voidable transaction proceeding (R 458H(3)), and that the Court may give appropriate directions, including directions for the filing of pleadings: R 458I(1).

These rules are a vast improvement on the previous patchy system. They do not close all the gaps, because the use of the originating application procedure is not mandatory. R 700ZH (applications in the course of liquidation) has been amended to provide that it does not apply to an application to which Part IVA applies, but that still leaves open the possibility of a statement of claim. Although in practice there will probably be little difficulty, because the originating application procedure will be the preferred option, it would have been better to make it the only option.

The new system will mean that all notices to set aside voidable transactions will be filed in a central place, and will be able to be managed properly. It seems likely that the creditors' applications will have separate file numbers (there is some potential for confusion here, but the practice will no doubt be sorted out in time), but they will be able to be cross-referenced to the liquidation proceeding because the liquidator's notice will be attached.

The flexibility created by directions should ensure that proceedings which demand full pleadings rather than a notice of application will be dealt with accordingly. Every case is likely to be brought before a Master at an early stage, enabling effective case management.

One matter which may require some thought is the status of the notice filed by the liquidator. Thus far the Courts have held that this does not amount to a "proceeding": *Stiassny v Gleeson* (1999) 12 PRNZ 684; *Bond Cargo Ltd v Chilcott* (1999) 13 PRNZ 629. As the new rules require the notice to carry the heading of a proceeding, it might be thought that it should be accorded the same status.

The use of the form should not be allowed to divert attention from the substance of the matter, and the reasoning of Paterson J in *Stiassny* remains relevant. The filing of the notice is not an "application to the Court for the exercise of the civil jurisdiction of the Court". The application is made by the creditor. The new procedure should not be seen as altering this approach. When the creditor makes the originating application, the creditor should properly be named as the applicant, and the liquidator as the respondent.

If that approach is followed, the heading on the creditor's application will be different from that on the liquidator's notice. The rules do not provide that the same heading should be used, and there may well be a natural inclination to use the same form. There is probably no great harm in doing so. The main confusion is likely to result from the Court number which is allocated to the application. If the liquidation number is used there are likely to be several proceedings with the same number. It seems that each application by a creditor should be treated separately, and allocated its own number.

ARBITRATION APPEALS

The High Court Amendment Rules 2000 include a new Part 17, containing provisions necessitated by the Arbitration Act 1996. Three matters are covered: appeals from awards; leave to appeal from awards; and entry of awards as judgments.

Applicability of rules

The rules apply to an application made under R 878 after the new rules come into effect (1 August 2000) unless the Court orders otherwise: R 24 of the Amendment Rules. The date of the arbitration award is therefore irrelevant; it is the time at which the appeal or enforcement action takes place which determines the procedure. The Court has discretion to apply the rules to applications which have already been commenced; it seems, however, that this is likely to be of limited use.

Appeals from awards

Rules 879 to 890 deal with appeals under cl 5(1)(a) or (b) of the Second Schedule to the Arbitration Act. The Second Schedule applies by default to all New Zealand arbitrations unless its provisions are excluded by agreement. Appeals are only permitted on questions of law, and then only if the parties have agreed beforehand (cl 5(1)(a)), if they consent to the bringing of the appeal (cl 5(1)(b)), or if the Court grants leave (cl 5(1)(c)).

Prior to these rules, appeals from arbitration awards were governed by Part X of the High Court Rules, the Part dealing with appeals from Tribunals generally. That was not entirely satisfactory, because those rules are geared towards statutory tribunals and do not cater for the wide variety of forms which an arbitration may take. They assume that there will be an official to provide copies of the record, and some continuing office to which communications may be directed. On the other hand, they had the merit of uniformity, whereas there are now different procedures for different situations.

An appeal against an arbitration award must now be commenced by way of originating application in form 108, accompanied by an affidavit exhibiting the award and proving that the requirements of cl 5(1)(a) or (b) are satisfied. The notice must be served on the other party, who may respond with a notice of opposition.

It is rather odd that an appeal should be commenced by way of originating application rather than a notice of appeal. It is doubly odd that the appellant should be described as a "plaintiff". Form 108 could just as easily have been called a notice of appeal, which would have reflected reality. The process is not in truth an originating application, which would require a determination on affidavit evidence (subject to cross-examination with leave). It is a review of a decision which has already been made by an arbitrator. This becomes even clearer when it is learnt that a defendant who wishes to challenge any other matter of law must file a "notice of cross-appeal" (R 884), which is also in form 108.

Once the notice of application and response have been filed, the Court is required to call a directions conference, which will generally include directions as to the preparation of the record (R 885). Provision is made both for filing of an existing record (R 886) and the transcription of evidence (R 887). The appeal can then be set down for hearing (R 888). Appeals are to be by rehearing, and the Court has the powers of the tribunal to order hearing in private and to prohibit publication (R 889). This matter is of importance. If the arbitral tribunal had no powers

to restrain publication, neither will the Court: *Guy v Preliminary Proceedings Committee* (1994) 8 PRNZ 109.

As can be seen, the procedure has little in common with an originating application: it is not heard on affidavits, nor is a hearing date allocated on filing. There was no need to invoke Part IVA of the rules at all; Part 17 could have sat quite happily on its own.

Leave to appeal

Where leave to appeal is sought pursuant to cl 5(1)(c), RR 891-894 apply. Once again, the proceeding is to be commenced by originating application supported by an affidavit exhibiting the award. It appears that the contents of the affidavit are limited by R 880, and do not go to the substance of the application. Once a notice of opposition has been filed (or time has expired), the plaintiff is required to file submissions as to why leave should be granted, and the authorities relied on.

At the hearing of the application for leave, counsel are restricted to 30 minute addresses with ten minutes for reply unless the Court orders otherwise (R 892(3)). If the Court grants leave it is directed not to give reasons unless it considers that the circumstances require (R 893(1)). If leave is refused, then reasons must be provided (R 894(1)).

These provisions are unique in the High Court Rules, and are designed to restrict the significance of leave applications. Reasons are presumably considered unnecessary because there is no appeal from a decision to grant leave. From the point of view of precedent and accountability, however, the availability of reasons is very important and the wisdom of forbidding them might well be questioned. It might also be thought that this is a rather fundamental issue to deal with in the ambit of a rulemaking power which is designed for purely procedural matters.

Once leave has been granted the application metamorphoses somewhat miraculously into an appeal. The Court is required to give directions as in the case of an appeal, such directions dealing with the production of the record. The plaintiff is required to provide a memorandum setting out the grounds for appeal (R 893(4)) and the defendant provides a memorandum in response (R 893(5)).

It can be seen that the process is a little different from an appeal without leave, which again raises the question as to why these particular procedures have been chosen. The concept of applications for leave is well known, and the procedure generally adopted is an interlocutory application followed by an appeal in conventional form. It is true that the procedure under RR 891-894 requires only one originating document, but the existence of different methods of commencing appeals depending on whether leave is required seems undesirable.

Entry of award as judgment

Enforcement of arbitral awards necessarily involves the assistance of the Courts. Article 35 of the First Schedule to the Arbitration Act provides for entry of the award as a judgment on application to the Court, or by action. This applies regardless of where the award was made.

Rules 895 to 901 lay down procedures for application to the Court. The first possibility is that there is no opposition. If all parties agree, the Registrar can enter the award as a judgment on receipt of a letter signed by the parties (R 895).

If there is no agreement, the party seeking to enforce the award can choose to proceed with a conventional proceeding under Part II of the High Court Rules (frequently done by way of summary judgment) or can proceed in terms of R 897. That procedure involves an originating application in form 110, accompanied by an affidavit proving the requirements of art 35(2), which also requires the authenticated original award or a certified copy.

If the defendant wishes to oppose the entry, it does not file a notice of opposition, but must file a further originating application seeking an order that recognition and enforcement be denied. The plaintiff's application is stayed pending the determination of the defendant's application, but the Court is required to determine both applications together (R 901).

This is a very cumbersome procedure, and one with potential for confusion. There is the possibility that the defendant's application would be filed in a different registry, and allocated a different number. The procedure to be adopted at the hearing could also become rather complicated. It would have been simpler to have only one application in which all matters are raised. Any issues of onus of proof could have been dealt with by appropriate rules.

Operation of Part 17

It remains to be seen how the procedures will operate, and it may be that there will not be great difficulty in putting it into practice. Despite its reliance on the originating application procedure of Part IVA, Part 17 contains a sui generis approach to matters arising out of arbitrations and is likely to develop its own jurisprudence having little in common with other originating applications or appeals.

JUDGMENT RULES

The High Court Amendment Rules 2000 have also introduced much needed reforms to the procedure for judgment. These relate mainly to the consequences of *Bell-Booth v Bell-Booth* [1998] 2 NZLR 2 (CA), where it was virtually impossible to decide whether judgment had been given.

The new R 540 does not require an oral judgment to be delivered in open Court, but provides that it is only permissible in ex parte applications, or where the parties have an opportunity to be present or to hear the Judge give the judgment. Reasons are not a prerequisite for the giving of judgment, but the parties must be able to hear the Judge, not merely a relayed message as in *Bell-Booth*. Whether non-compliance with that is merely an irregularity able to be cured, as the Court held in *Bell-Booth*, remains moot.

Written judgments are given once signed by the Judge together with a date and time. This is an alteration from the current rule, which requires the judgment to be made available to the parties. There is potential for difficulties where a delay occurs between signing and availability, but in general this rule should contribute to certainty. The actual time of giving judgment may be of great significance in liquidation matters, such as *Knight v Paterson* (1999) 13 PRNZ 459. In most cases, however this additional requirement seems to be a burden for little benefit.

The rules relating to sealing have been amended to reflect the changes to R 540, and to provide that a Judge may direct that sealing can only take place at a time in the future. In other cases, the sealed order must show the date of judgment as determined under R 540 and the date of sealing. The sealed order is not required to show the time of judgment. A party sealing a judgment is now required to serve a sealed copy on all other parties. Unfortunately the rules still do not provide for consultation before sealing. ❑

CRIMINAL PRACTICE

with

Robert Lithgow

RETROSPECTIVE PENALTIES

R v Poumako(CA 565/99, 31 May 2000, Richardson P, Gault, Henry, Thomas and Keith JJ, 38 pp

On 31 October 1999, P pleaded guilty to the 1998 murder of Beverly Bouma. That was the Reporoa home invasion which prompted the swift introduction of the home invasion legislation. That legislation consists of two Acts: an amendment to the Crimes Act that came into force on 2 July 1999; and an amendment to the Criminal Justice Act, which came into force on 17 July 1999, that amends s 80 by lowering the threshold for minimum periods of non-parole and providing a mandatory 13 year minimum non-parole period for murder involving home invasion and by providing that s 80, as amended, is to apply "even if the offence concerned was committed before that date". The two were originally introduced into the House as companion measures but the Criminal Justice Amendment Act was held up when, after it had been to the select committee, retrospectivity was created by last minute amendment.

P having pleaded guilty to Mrs Bouma's murder post 17 July 1999, the Judge imposed the mandatory 13 year minimum non-parole period. P appealed on grounds that s 2(4) as inserted by the CJAA was overridden by s 4(2) CJA which states the principle against retrospectivity:

> Section 4(2) ... notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the offender's consent.

The Court of Appeal decision comprises three judgments: the majority of Richardson P, Gault and Keith JJ and separate dissenting judgments from Henry J and Thomas J. All five Judges agree that the appeal must be dismissed because 13 years' minimum non-parole was available in the present case under the old law in any case. Where they differ is on what to do about the abhorrent retrospectivity of s 2(4) of the amended Criminal Justice Act.

Henry J observes that, in light of the fact that there are other cases that will be affected, he will give some guidance on the retrospectivity point. Henry J holds that notwithstanding the conflict with the Bill of Rights, the International Covenant on Civil and Political Rights and long-standing common law, s 2(4) is "clear, unambiguous and certain in its retrospective effect" and cannot be ignored: Parliament reigns supreme and the Court must give effect to the legislation. Henry J held that the Bill of Rights did not avail – there was no ambiguity so it was not a question of preferring an interpretation consistent with the Bill of Rights and therefore the Act prevails per s 4. His Honour eliminates the possibility of interpreting the provision as meaning retrospective for 15 days for a number of obvious reasons including the fact that the Crimes Act amendments provide a simple factual query of whether the events in question involved home invasion as defined. Henry J preferred to leave the question of whether a declaration that the legislation was bad could be made for a case where the retrospective provision itself had to be enforced and the issue of declarations could be fully argued.

The majority considered there were two possible interpretations: first, the literal approach adopted by Henry J and second, to interpret the provision as meaning that, so far as non-parole and home invasion are concerned s 2(4) means that it is retrospective back to the date that the Crimes Amendment (Homes Invasion) Act came into force, ie 15 days earlier; before that there was no such thing as home invasion and therefore no murders committed prior to 2 July 1999 involved home invasion. Although they "tentatively favour" the second construction, the majority were also "conscious of the strength of the reasoning in Henry J's judgment and of the fact that this construction would only ameliorate the problem of retrospectivity and would not fully address the continuing inconsistency with fundamental rights". As to the issue of a declaration, the majority observe that if the Court is presented with a case where it must decide the issue then it may also have to decide whether there should be a declaration of inconsistency with s 25(g) of the Bill of Rights.

Thomas J held that s 2(4) of the CJAA was a "constitutional privation" and quite possibly even a Bill of Attainder (much criticised one-off Acts of Parliament to apply only to a small group and not of general application) and purported to issue a declaration of inconsistency with the Bill of Rights Act and the ICCPR.

The decisions all graphically demonstrate that, when motivated, the Court can produce a detailed analysis of a complex cat's cradle of legislative handiwork. Not so clear is that they can agree on basic issues of unconstitutionality and what to do about it. Is the Court of Appeal ready, willing and able to protect citizens against direct attacks on the most basic principles such as retrospective criminal penalties? The short answer is no – they prefer the ancient dance steps between Parliament and the Courts notwithstanding

that this mongrel legislation was by last minute amendment passed opportunistically by catching a political heat wave. In short, do not look to the Court for protection against constitutional breach by Parliament itself.

Further, the reason given for not following the CJA prohibition and the Bill of Rights Act protection was s 4 Bill of Rights Act, which reads (précised): "No court shall, ... hold any enactment impliedly repealed, revoked, invalid, ineffective or decline to apply any provision 'by reason only that the provision is inconsistent with any provision of this Bill of Rights'". So what is the problem. The retrospective provision is not only inconsistent with the Bill of Rights but with its own Act and the ICCPR which NZ ratified in 1978, The Universal Declaration of Human Rights and Common Law (see Blackstone's *Commentaries on Laws of England* (1st ed (1765) vol 1 at p 46). There is, after all, an argument that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them" (*Fraser v SSC* [1984] 1 NZLR 116, 121 (CA)).

EVIDENCE

Counsel for the child and Court psychologists

R v H [2000] 2 NZLR 581 (CA)

H was charged with four offences relating to mistreatment of his daughter – three of physical abuse and one indecent assault charge. H had sole custody of the complainant and her two siblings. H's estranged wife had applied to the Family Court for better access arrangements and counsel for the children was appointed under the Guardianship Act and commissioned a psychological report. When the charges were laid some four years later, H applied to the District Court to cross-examine the complainant and, if necessary, to call evidence from counsel for the children and the psychologist. The trial Judge declined the application on the basis that the Family Court proceedings had raised an expectation of confidentiality in the complainant when she spoke to counsel and the psychologist. The Court of Appeal held that the statutory provision of counsel for the child has special features which necessarily preclude or limit the full application of conventional legal professional privilege. Therefore, the question of confidence fell to be decided under s 35 of the Evidence Act (discretionary privilege) with recognition that the relationship is analogous to solicitor-client. Similarly, the psychologist appointed under s 29A of the Guardianship Act was not appointed to treat the child but to report to the Court and therefore no absolute privilege arose.

Evidence from previous acquittals

When can the Crown lead evidence of prior offending either as similar fact evidence or as going to the issue of guilty knowledge? The issue arose in two recent cases: in the Court of Appeal in *R v Arbuckle* (CA 526/99, 2 March 2000, Keith, Doogue and Penlington JJ, 8 pp) and in the House of Lords in *R v Z* (22 June 2000, Lords Hope of Craighead, Browne-Wilkinson, Hutton, Hobhouse of Woodborough and Millet (website copy)).

Prior to that, the leading decision was *R v Ollis* [1900] 2 QB 758 in which a 6-2 majority held that evidence of prior offending is admissible in proceedings for later offending, not to show that the earlier offences were committed (although in the particular case it may well do so) but as proof of intent on the current charge. It is admissible on that basis whether or not the conduct in question has previously been the subject of an acquittal. That case was qualified by *G (an infant) v Coltart* [1967] 1 QB 432 where it was held that evidence of the earlier conduct may be relevant to later offending as going to prove intent or some other element but it is not permissible to rely in the later case on the fact of guilt in the earlier case if the defendant was acquitted because to do so would be to reach behind that acquittal.

Arbuckle is the first time the issue has been squarely put before the Court of Appeal but *R v Davis* [1982] 1 NZLR 584, *R v Roberts* (1992) 10 CRNZ 172 and *R v Wilson* [1997] 2 NZLR 161 provide some guidance. In *Davis* the Court held that evidence of earlier offending was highly relevant and the only prejudice raised lay in its legitimate probative value but ruled that the evidence in that particular case was inadmissible on the basis that it would require the jury to revisit the earlier acquittal. This was because the probative value of the evidence lay in the defendant having committed those acts which the Crown had failed to prove in the earlier trial. *Roberts* distinguished *Davis*. The defendant had been charged with threatening to kill and rape. The complainant's evidence was that there had been a knife and he had said that he would kill her. He was acquitted on the threatening to kill charge but the jury were unable to agree on the rape charge. On the retrial for rape, the Court of Appeal held that the evidence of the threat was inadmissible but evidence of the knife was admissible because it was relevant to the issue of consent or belief in consent and the earlier acquittal was not consistent only with a complete rejection of the complainant's evidence on that point. Similarly, in *Wilson* the Court allowed evidence of a previous rape charge involving stupefication notwithstanding the acquittal because the verdict did not necessarily mean a complete rejection of the complainant's evidence.

Arbuckle was originally charged with 28 counts of obtaining or attempting to obtain money with the execution of securities by false pretences. The Crown originally presented two indictments – one of 20 charges and one of eight. Three applications then came before the Court: two by the Crown, to amend the indictment by removing one charge no longer available in law and to call evidence of three earlier convictions and a severance application by Arbuckle. The first application was granted, the second refused. As to the third, the Judge ruled that there should be two indictments of 14 counts and 13 counts, the final paragraph of the Judge's ruling stated:

> Finally for completeness, and lest it be thought by the officer in charge of the case or others, that notwithstanding the direction as to the number of counts in an indictment, other evidence can be called [as] similar fact .... when the Judge is minded to sever the indictment, it is not appropriate to frustrate his purpose by calling the evidence supporting the several counts on the basis that it is relevant to those remaining. One effect of such a course of action would be that if the accused were to be acquitted on any of the counts before the jury, then it would seem wrong that other cases sought to be called as similar fact should then be able to come back before a jury in another indictment. Provisions such as exist with autre fois acquit and the like can apply in principle to such a situation. [8]

The severance ruling was not appealed.

The first trial (first indictment) on 13 offences went ahead. The defence was lack of intent: Arbuckle was a muddled businessman who made a

series of blunders rather than being dishonest. He was convicted on six counts and acquitted on seven. The acquittals relate to the first seven charges in time so it is reasonable to assume that the jury decided that, at some point in time, Arbuckle must be taken to have known what he was doing.

The Crown then made application prior to the second trial (s 344A) to call evidence of the transactions that formed the basis of the first 13 counts at the trial on the remaining 14 counts as relevant to intent. That application was refused and the Crown appealed.

In the Court of Appeal, the Crown referred to the authorities, including *R v Ollis* [1900] 2 QB 758 (CCR) in support of the proposition that evidence given at an earlier trial, even if it led to acquittals, could be called at a later trial provided that it was relevant and otherwise admissible. The Crown argued that evidence of all 12 transactions that formed the basis of the 13 charges in the first indictment were relevant and admissible and there was no illegitimate prejudice so it ought to be admitted. As a fall back position, the Crown argued that at the very least the evidence of the transactions that underlay the six convictions was admissible.

The Court held:

> We do not consider it necessary to examine the detail of the authorities to which both counsel referred us. Rather, two broad reasons relating to the fairness of the overall trial process and possible difficulties with the management of the trial lead us to the conclusion that the ruling excluding the evidence should stand. [14]

The first reason, shortly stated was:

> The fairness reason which is to be related to broad powers to prevent abuse of process, basic common law principle and s 25(a) of the Bill of Rights arises from the failure of the Crown to apply for leave to appeal against the initial ruling about severance. .... While issue estoppel and res judicata do not technically stand in the way of the present appeal we do not think that, in the overall context, fairness allows the Crown now to attempt to recover from its initial failure to appeal. [15]

The second reason was the "significant" trial management problems and the prospect of a mistrial that would arise in trying to explain the proper use of the evidence to the jury and the like. It was however, still open to the Crown to try and persuade the trial Judge to use his discretion to admit the evidence on application during the trial.

The same issue came before the House of Lords in *R v Z*. Z was charged with rape and the defence was consent or belief on reasonable grounds in consent. He had been tried on four previous occasions for rape – acquitted three times and convicted once. It was not disputed that all four complaints together were cogent and particular enough to amount to similar fact. The trial Judge ruled inadmissible the three complaints that had resulted in acquittals on the basis of the following dicta in *Sambasivam v PP of Malaya* [1950] AC 458, 479 (PC):

> The effect of a verdict of acquittal ... is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the proceedings. The maxim "res judicata pro vertitate accipitur" [what has been decided is taken to be true] is no less applicable to criminal than to civil proceedings.

Further, the evidence of the remaining complainant did not establish a sufficiently cogent picture of similar facts to be admitted. On appeal to the Court of Appeal the sole issue was whether the previous acquittals rendered the evidence of the first three complainants inadmissible (it being accepted that the four combined amounted to similar fact). The Court of Appeal held that it was bound by *Sambasivam* and ruled it inadmissible but expressed regret in having to do so and reserved a question of law. The House of Lords reviewed the authorities and allowed the appeal. The decision was unanimous but all five Lords gave judgments. The leading judgment was given by Lord Hutton.

Lord Hutton concluded that:

- double jeopardy operates to cause a criminal Court in the exercise of its discretion to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier acquittal (or conviction);
- provided it does not place the defendant in double jeopardy in that sense, evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show the defendant was in fact guilty of an offence of which he was earlier acquitted;
- no distinction should be drawn between evidence which shows guilt on a charge earlier acquitted on and evidence that tends to show guilt of such an offence or that appears to relate to one distinct issue rather than the issue of such an offence. Therefore *Coltart* should not be followed;
- issue estoppel has no place in the criminal law.

Lord Hobhouse added that the issue of fairness remains and the fact of the previous acquittal is one of the relevant factors in striking the balance between probative value and prejudice but it is only one of the factors.

Lord Hutton noted but disagreed with *R v ARP* [2000] LRC 119, in which the Supreme Court of Canada followed *Ollis* and *Coltart*.

Arbuckle opens up the possibility of issue estoppel in criminal law albeit under the name of "general fairness" but does not actually consider the relevant authorities – including the New Zealand ones – or the issue of whether evidence of previous offending previously the subject of a trial is ever admissible in a later trial, on what basis etc. The opportunity to clarify the position having been once missed, one hopes that, next time, the carefully-reasoned decisions of the House of Lords and the Supreme Court of Canada will be analysed and that the Court will choose one or the other.

PROCEDURE

Demanding clients

R v Page CA 4/00, 6 June 2000, Gault, Doogue and Robertson JJ, 17 pp

P was a difficult client and wanted to run his defence as he saw it, namely that he was the subject of a manufactured complaint. He had three lawyers on legal aid up to and including depositions. He was unhappy with his last lawyer but did not disrupt depositions and sought a new lawyer for the trial. The Registrar refused offering only the depositions lawyer and the Court appeared to encourage that stance. The Court did however appoint an amicus to cross-examine the complainant.

Section 10 of the Criminal Justice Act provides that a person cannot be sentenced to imprisonment unless advised of his right to a lawyer at a time he is at risk of conviction. P wanted a lawyer but did not want the one the Court wanted him to have.

The Court of Appeal upheld the failure to advise of a right to a lawyer; and the invalid process of appointing amicus. They did not however provide a remedy but a declaration that he should have been told he could have a lawyer (which he knew), although he couldn't have one that he believed would present his defence as he wanted. This declaration – laughable but tragic – cements two propositions: firstly, as referred to in *Poumako* (supra) declarations are of no use to criminal appellants; secondly, choice is for those who can pay.

[Note: the writer was appellant counsel in this case, but since we are talking about declarations in criminal appeals ...]

Appeal jurisdiction (again); ex partes; bad procedure

R v Coughlan CA 70/00, 4 May 2000, Thomas, Blanchard and Tipping JJ, 4pp

C appealed to the Court of Appeal against an effective sentence of two years' imprisonment. This is yet another example of the confusion caused by the criminal procedural provisions. C pleaded guilty to two charges of threatening to kill after he had been committed to trial. He was committed to the District Court jury trial jurisdiction so he fell to be sentenced in the District Court but any appeal would be to the Court of Appeal. However, at the same time as he was sentenced to six months' imprisonment on those charges, he was also sentenced on a number of summarily laid charges to which he had also pleaded guilty. Those charges had never entered the trial jurisdiction so any appeal lay to the High Court. The sentences for those offences included a sentence of two years for burglary. All of the sentences were to be served concurrently. C appealed to the Court of Appeal.

He was declined legal aid by the Registrar after judicial consultation so the appeal was heard ex parte (the lawfulness of which is to be ruled on by the Privy Council later this year). As the real issue was the two-year burglary sentence, the Court of Appeal did not have jurisdiction to hear the appeal but, to avoid delay, the Court reconstituted as a full High Court and dismissed the appeal.

What appears to have been overlooked in the desire to dispose of a perfectly reasonable sort of appeal is that the case was not the Court of Appeal's to dispatch. It is all very well to reconvene as a High Court but – whether or not the Court of Appeal can dispose of appeals on an ex parte basis, I do not think anyone has ever claimed that the High Court can. Further, those cases that the Court of Appeal does deal with ex parte are so treated because legal aid has been declined. However, the Registrar of the Court of Appeal is not a Registrar of the High Court and therefore had no authority to consider legal aid with or without consultation, let alone the right to refuse it. In the words of James K Baxter, a job well botched (*Wild Bees*: 1951).

Jury vetting and overall fairness

R v Watson CA 384 and 507/99, 8 May 2000, Richardson P, Gault and Henry JJ, 30 pp

Watson was convicted of the murder of Olivia Hope and Ben Smart and sentenced to a minimum period of 17 years non-parole. W appealed his conviction on the basis of a number of things that happened in the course of the trial, which were said to amount collectively to such unfairness as to warrant a retrial. He also appealed the length of the non-parole period. The appeal failed on all counts but the Court of Appeal, somewhat tantalisingly, did not express any view on one of the matters that was complained of – jury vetting by the Crown. W had applied for an order preventing the Crown from using the Wanganui Computer to see whether any of the potential jurors had criminal convictions. The trial Judge refused to make the order. On appeal, counsel accepted that it could not have amounted to a miscarriage of justice. On that basis, the Court of Appeal "concluded that it would not be appropriate to make any definitive ruling on the lawfulness, or alternatively the desirability, of the practice, one which we understand is not uniform throughout the country. ... The issue must however be regarded as open, particularly as regards the policy issue of overall fairness". [55]

The disappointing aspect is that this issue has been around a long time and featured in the Arthur Allan Thomas saga but still has no judicial directive. The reference to the practice not being uniform is a reference to Auckland where the previous Crown Solicitor discontinued the practise after criticism in the *Thomas* case.

Sentence indications in indictable jurisdiction

R v Edwards CA 74/00, 28 June 2000, Tipping, Williams and Goddard JJ, 6pp

E pleaded guilty to a number of serious driving charges and was sentenced to an effective five and a half years' imprisonment and ten years' disqualification. The imprisonment consisted of an 18 months' term cumulative upon a four-year term. He appealed. E then pleaded guilty to two further driving charges and was sentenced to 18 months' imprisonment on each charge to be served concurrently with the existing sentences. However, the Judge recorded that, had E not already had 18 months cumulatively imposed on top of the four years at the early sentence, then His Honour would have made them cumulative. The Judge went on to say that should the first sentence be altered in any way then the second sentence ought to be cumulative. That second sentence was not appealed. On appeal against the first sentence, the Court of Appeal considered that the second Judge's remarks amounted only to an observation that had a substantial period of imprisonment not already been imposed he would have considered imposing a cumulative sentence. The appeal period had expired and the matter could not be revisited otherwise so the whole matter could therefore be set to one side.

The first sentence was appealed on the basis that the sentence was manifestly excessive and that it was greater than the sentence indication given prior to pleading. Prior to pleading, a different Judge to the one who in fact sentenced E had indicated a figure of three years; which the sentencing Judge referred to as a "ballpark starting point". The Court adopted the procedure set out in *R v Gemmell* [2000] 1 NZLR 695 CA, that is, treated it as an appeal against conviction and remitted it back to the Court to give the opportunity to plead again. Strangely, the Court did not direct no further sentence indication be given to E in particular or to the general populous. However, the Court does say that "notwithstanding the practical advantages there must be serious doubt about the wisdom of Judges who are not fully informed of all relevant sentencing considerations involving themselves in a sentence indication process". So are sentence indications in the indictable jurisdiction allowed or not? Don't know. ❑

OBJECTS AND FAIRNESS IN FAMILY LAW

Stuart Birks, Massey University

scrutinises the Child Support and Matrimonial Property Acts

EQUITY

Equity is a nice term. Outcomes are more likely to be acceptable if they are considered equitable. It is a powerful term, but its precise meaning is hard to specify.

Economists refer to horizontal and vertical equity. Horizontal equity relates to like circumstances, under which equitable outcomes require like treatment. Vertical equity refers to differing circumstances, for which an "appropriate difference" in treatment is required.

"Like circumstances" depend on the degree of detail considered – should one look at current income, or lifetime income, or how the income is earned, should one also consider the number of dependants, their ages and specific needs? If there are problems with the concept of horizontal equity, there are even greater problems with vertical equity. "Appropriate differences" in treatment depend on the variables used and the values placed on them. Should time with children be considered? How should it be measured – hours, days, nights? What costs should be included? What effect would specific differences have on treatment?

Discussion of disadvantage and discrimination hinge on the same points – what variables are selected to draw comparisons, what are "appropriate differences" and what values are assigned in terms of specifying the significance of a difference and whether it is considered beneficial or detrimental to a particular group. Policy debate frequently revolves around differences in choice of and interpretation of variables. For example, current proposals for unequal splitting of matrimonial property are based on the monocular consideration of caregivers' assumed sacrifice of earning capacity, disregarding numerous other dimensions. Resulting policy, often specified in legislation, can be confused and inappropriate.

CHILD SUPPORT

Section 4 of the Child Support Act 1991 lists its objects. It is stated on the IRD Child Support web page http://www.ird.govt.nz/childsupport/csa.htm#legislation that: "Child Support is governed by the objectives set out in the Child Support Act 1991".

Child support is paid by a liable parent to a custodial parent. Both parties are assessed in a shared parenting situation, with a net payment going from one to the other. I shall only consider the formula under sole custody. Key aspects of the basic child support formula in a sole custody situation are as follows:

- child support income is equal to taxable income up to a maximum level, now $68,436.00;
- a living allowance is deducted from this as follows:

Description	Living allowance
Single with no dependent children	**$11,446.00**
Married or de facto with no dependent children	**$15,501.00**
Single, married or de facto with one child living with the paying parent	**$20,001.00**
Single, married or de facto with two children living with the paying parent	**$24,445.00**
Single, married or de facto with three children living with the paying parent	**$26,889.00**
Single, married or de facto with four or more children living with the paying parent	**$29,333.00**

Child support is equal to the balance times a percentage rate, 18 per cent for one child, 24 for two, 27 for three and 30 for four or more children;

- the custodial parent's income is not considered;
- the liable parent's time with the children is not considered unless it includes at least 40 per cent of nights;
- there is some scope to deviate from the formula through an administrative review or hearing, but most applications by liable parents are declined;
- if a custodial parent is on the DBP, child support payments go first to offset that payment. Any additional child support is passed on to the custodial parent.

When the objects of the Act are compared with the formula, several inconsistencies can be observed. Neither the custodial parent's income nor the liable parent's time with the children are taken into account. Vertical equity cannot generally be achieved. If the formula assessment is correct for one level of custodial parent's income, then it is incorrect for others, and similarly for time with children. There are also problems with payments not being linked to expenditure on children, and with both parents potentially being caregivers for some of the time. Inconsistencies are found with most of the objects of the Act:

- object (a) is *to affirm the right of children to be maintained by their parents*, but the Act does not ensure that

payments are made by both parents, nor does it ensure that payments actually benefit the child(ren);

- object (b) is *to affirm the obligation of parents to maintain their children*, but the Act focuses only on "liable parents";
- object (c) is *to affirm the right of caregivers of children to receive financial support in respect of those children from non-custodial parents of the children*, but non-custodial parents could be the caregivers for up to 40 per cent of nights with no effect on child support obligations;
- object (d) is *to provide that the level of financial support to be provided by parents for their children is to be determined according to their capacity to provide financial support*, but only liable parents are required to provide, and the other parent's circumstances are generally not considered;
- object (e) is *to ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support*, but under the formula this only applies for comparisons between liable parents. The other parents' circumstances are generally ignored;
- similarly, object (f), *to provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined*, refers to parents, but the formula only refers to payments by liable parents of money received by the state or by custodial parents;
- object (h) is *to ensure that equity exists between custodial and non-custodial parents, in respect of the costs of supporting children*, and is commonly not met because only the circumstances of the liable parent are considered;
- object (j) *is to ensure that the costs to the state of providing an adequate level of financial support for children and their custodians are offset by the collection of a fair contribution from non-custodial parents*, but can it be a "fair" contribution when there is no change in contribution as the liable parent's time with the children rises from 0 per cent to 40 per cent of nights?

In other words, the specifics of the law are inconsistent with its objectives.

The use of nights as a measure is also problematic. It is explained in *Butterworths Family Law in New Zealand* 7th ed, p 294 as follows:

> The choice of 40 per cent of nights might at first appear curious but it is probably explained by the fact that most children spend a great part of the day time in school and most of the parental care is later in the day and in the early morning with sleep in between.

Young children are not at school, but for those who are there can be a big difference between custodial and non-custodial parents' time with them. Non-custodial parents would generally care for children at weekends and school holidays, when contact time and associated expenses can be much greater.

Review of the Act

The Act commenced on 18 December 1991. There has since been a review headed by Judge Trapski: Child Support Act Working Party (1994) *Child Support Review 1994: A Consultative Document*, and Trapski P, et al (1994) *Child Support Review 1994: Report of the Working Party*, Wellington: Inland Revenue Department. Not only was there no mention of these inconsistencies, but the Act also appears designed to achieve other unspecified labour market objectives. On consideration of the custodial parent's income the *Consultative Document* states: "a strong disincentive to workforce participation could result if every dollar earned by the custodian over a given threshold resulted in a decrease in child support. As 84 per cent of lone parents are women, structural gender based inequities in the labour market could be worsened" (p 24).

Review of assessments

It could be suggested that anomalies can be allowed for through the review process. However review officers are lawyers and may be equally unaware of the problems. In fact some aspects, such as the "costs of enjoyment of access" for the liable parent, are expressly ignored. Section 105(2)(b)(i) of the Act refers specifically to the costs of "enabling access" only.

Rather than ignorance, disregard for the inconsistencies may be tacitly accepted because the status quo is considered desirable. Benson describes how, in *Commissioner of Inland Revenue v Aspinall* [1999] 3 NZLR 87, certain objects were considered and others ignored: "Departures from Child Support Assessments" [2000] NZLJ 176. Benson also highlights a more serious problem, namely the judiciary's adoption of a flawed line of reasoning. I have referred elsewhere to Judges selecting, as convenient, from a "menu of principles" to support of their preferred outcome. (see, eg s 2.8 of Birks S (1998) *The Family Court: A View from the Outside, Issues Paper No 3* Centre for Public Policy Evaluation, Massey University http://econ.massey.ac.nz/cppe/papers/cppeip 03.htm); Benson describes this process also. The result is a post hoc rationalisation for what may simply be the whim of the Judge in question. Judge Boshier has actively encouraged lawyers to "push these boundaries". "Developments in Matrimonial Property", Family Law Conference, 1998, Christchurch, New Zealand Law Society, pp 51-69. This form of judicial activism can be very harmful given the judiciary's limited information and understanding of the wider social implications of its actions. We see this in operation elsewhere in family law.

MATRIMONIAL PROPERTY

According to its title, the Matrimonial Property Act 1976 is: "to recognise the equal contribution of husband and wife to the marriage partnership; to provide for a just division of the matrimonial property between the spouses when their marriage ends by separation or divorce".

There are two key aspects to this, equal contribution, and just division. There is a rebuttable presumption of equal contribution. The decision as to whether contributions were equal or unequal would depend on the aspects considered (choice of variables), and the values assigned to each of these components. Hence, under the presumption, a greater paid work contribution by one party is considered to be balanced by a greater unpaid work contribution by the other. This places an implicit value on unpaid work which can be determined by the explicit value of income earned from paid work or other financial contributions. The difference in financial contribution is considered equal in value to the difference in unpaid work contribution. Taken as a firm rule, this can lead to ludicrous valuations (See Birks S (1994) *Women, Families and Unpaid Work*, School of Applied and International Economics, Massey University, Discussion Paper 9.49. A modified version is at: http://www.massey.ac.nz/~KBirks/gender/econ/unp 4web.htm).

Some of the sections of the legislation, such as those relating to the matrimonial home and chattels and to superannuation, can serve to give extreme results. Unfortunately the Court is in a poor position to assess an alternative value.

Another weakness in legal thinking is apparent where possibly tortuous reasoning may give inappropriate results. Consider, for example, *Lewis v Lewis* [1993] 1 NZLR 569, which relates to the Matrimonial Property Act. Section 8(c) states that all jointly owned property is matrimonial property. Section 10 states that property acquired by succession or by survivorship or as a beneficiary under a trust or by a gift is separate property except under specific circumstances such as via intermingling or by use for a matrimonial home. There is therefore a conflict when the conditions for both sections are met. Which should be considered dominant? At 574 the Court said:

> It can be said that if Parliament had intended s 8(c) also to yield to s 10, a subordinating "subject to" would have been provided. Since Parliament did not do this there is no sufficient reason for the Court to read in such a qualification.

The decision is based on the presumed intent of Parliament. Pages 4108-4111 of *Hansard* of 23 November 1976 (vol 408) contains Mr McLay's speech presenting the report of the committee on the Matrimonial Property Bill. On p 4109 he defines matrimonial property, including the terms of s 10 without qualification by s 8(c). He is even clearer introducing the second reading in his speech of 9 December 1976 (pp 4721-4722):

> The other suggestion made, which is, in my opinion, an irresponsible suggestion, is that the Bill is some way represents a "confiscation of property" .... The purpose of the legislation, in my view, is to enable possession to be given, or a just and proper apportionment to be made, of those capital family assets which Lord Denning has referred to as the things intended to be a continuing provision for the parties during their joint lives, the working capital of the marriage partnership that may be generically described – and I underline the words "marriage partnership", in contrast, for example, with formal gifts or investments brought to the marriage by one party or the other, or achieved by incomes ranging well outside the normal family needs.

As if that was not clear enough, he then reiterated the significance of the term "marriage partnership". The closing comment in the quote may also be of interest for those following *Z v Z* [1997] NZFLR 241.

The concepts of horizontal and vertical equity are useful for identifying the real interpretation of equal contribution under the Act. Consider two couples, identical except that in one couple someone entered into the relationship with ten years of prior superannuation contributions. The presumption of "equal contributions" would mean that all the other contributions made by that person are found to be worth less by the value of the prior superannuation. How can this be justified? To add another dimension, should the consideration of this be different if that person had already made a lump sum payment to a previous spouse because of that super- annuation?

As another example, consider someone who received an inheritance. If it is kept separate, there is no change to the perceived value of contributions to the marriage partnership. If it is put into the family home, then the other contributions by that person are considered to be worth less by the amount of the inheritance. And for another dimension, if one person's inheritance is included in matrimonial property, should consideration be made of an anticipated inheritance by ex-partner?

For yet another example, someone could consider marrying one of two people, then contributing by keeping house. The tasks performed in either marriage would be identical, but one potential partner has an annual income of $100,000, the other $25,000. If the partner does nothing besides earn, then keeping house is valued at four times more in one marriage than in the other.

Paradoxically, while the Matrimonial Property Act considers unpaid work in the home to be a significant and valued contribution, the Child Support Act does not. Equal sharing under the Matrimonial Property Act implies an intra-family sharing of income, but a homemaker who is a liable parent under the Child Support Act would be assessed as having no income, and an income earning liable parent will receive minimal consideration for the presence of a homemaker partner.

We could ask why marriage has a special significance, especially given proposals to apply the legislation to other relationships. A "just division" is called for if a marriage lasts for three years or more. Someone's grown-up child could live in the same home for three years and have no claims on the family assets when leaving, but an adult can enter the family for the same time and leave with a claim on half the assets. While the Act's title refers to "taking account of the interests of any children of the marriage", it makes no reference to other children from a previous marriage.

Under the legislation, assets are transferred rapidly from one adult to another when one brings more wealth or earning power to the relationship than the other. The more someone brings to a relationship in terms of assets and earning power, the less the Court values him or her as a person. What will the long-term social implications be in terms of people's willingness to earn and save, to plan for the future, to acknowledge the contribution of others, and even to form stable relationships?

It is in this context that lawyers and the judiciary are intervening in people's lives and applying policies in their own way, possibly quite at odds with the original intention of the policymakers. They do this with limited supervision and accountability and with a marked reluctance to publicly debate and justify their actions.

IMPLICATIONS

There are problems with laws being incompatible with their stated intent and objects. Despite years of application, these problems have not been acknowledged. This sends a worrying message about the actions of lawyers and the Courts in applying these laws. It appears that there are serious weaknesses in some forms of currently acceptable legal reasoning. Lawmakers should be aware of these limitations and recognise that the law may be a cumbersome and imperfect instrument. It should be used sparingly and with caution. There has been some recognition of this. In the third reading of the Protected Disclosures Bill on 29 March 2000, Stephen Franks MP said:

> As a lawyer, I can tell members that there is more than ample obscurity in this Bill. There is more than ample confusion about what was really expected or intended for any Judge to pare back the protection as he or she feels fit. There is also more than ample opportunity for anyone who wants to misuse these procedures to take advantage of them, and we could well find that we have the opposite of our intentions. ❑

GOVERNANCE IN THE ELECTRICITY INDUSTRY

Barry Barton, the University of Waikato

examines the paradox of collective action for competition

The Ministerial Inquiry into the Electricity Industry (David Caygill, chairperson, Susan Wakefield and Stephen Kelly) reported to the Minister of Energy on 12 June 2000. (www.electricityinquiry.govt.nz) Its recommendations involve a number of questions about legal arrangements for regulation, self-regulation and governance in order to achieve public objectives in the management of economic activity.

The inquiry had wide terms of reference and the government stated a wide general objective: to ensure that electricity is delivered in an efficient, reliable and environmentally sustainable manner to all classes of consumer. (This objective was little different from that stated by the previous National government.) But anyone who has been following policy development could imagine an informal but more specific Brief: no privatisations; no more restructuring; you can talk about regulation again, but no big new regulatory agency.

The problems that the inquiry identified (para 123) were: "Overall, competition is emerging, but it is sluggish at the retail level; industry change is slower than it should be. There is an undue imbalance of market power at all levels. Some prices are higher and quality of service is lower than need be. Consumers are not being delivered all the benefits they should be receiving from the competitive parts of the electricity industry, nor are they being adequately protected from the behaviour of the non-competitive parts".

This article considers the inquiry's recommendations as to governance of market institutions and of lines companies. Although the recommendations about price control and retailing have attracted much attention, policy makers and the industry may face a bigger challenge in relation to governance.

BACKGROUND

The modern history of the electricity sector begins with the corporatisation of the Electricity Corporation of New Zealand under the State-Owned Enterprises Act 1986; Transpower was split off with the national transmission grid as another SOE, then Contact as a competing generator (subsequently sold), and finally under the Electricity Industry Reform Act 1998 ECNZ was divided into Meridian, Genesis and Mighty River Power. The local electric power boards and municipal electricity departments were corporatised under the Energy Companies Act 1992, some being sold, some being owned by consumer trusts or local authorities. They were then obliged under the EIRA 1998 to separate the local distribution or lines function from the retail or energy sale function. Most local trusts retained the lines business, and most of the retail businesses were bought up by the generator companies.

The industry established the New Zealand Electricity Market in 1996 as a commodity exchange for open and competitive wholesale electricity trading. Bids by generators are matched with demand so as to determine the dispatch order and the spot price half-hourly. There is a secondary market in derivatives or financial instruments such as hedges and futures. It is voluntary and currently about 75 per cent of electricity production is traded through it. The Metering and Reconciliation Information Agreement (MARIA) 1994 sets the rules that allow electricity flows across transmission and distribution networks to be measured and matched against wholesale sales contracts. It allows bilateral trades to be made outside the NZEM. In April 1999 were added the profiling rules that allow small customers to switch retailers. The third arrangement is the Multilateral Agreement on Common Quality Standards (MACQS) of November 1999, being implemented with the Grid Security Committee. Through it, users of the national grid will negotiate quality standards with Transpower.

The story is one of commercialisation, turning electricity from a public service into a market commodity, and of engendering competition where previously there had been none. The old integrated central and local government agencies were broken into components with separate functions. The relationships which once would have been their internal arrangements are now established at arm's length by a network of commercial contracts. The EIRA 1998 was passed to deal finally with dominance of the generation market by ECNZ and Contact, and to stop local companies subsidising competitive retail activity from the lines businesses where they enjoyed an effective monopoly. Restructuring, rather than regulation, has therefore been the policy implement right through this period. There is no licence required to generate, transmit, distribute or retail electricity. Other than safety, the only statutory regulation is the information disclosure requirements for distribution businesses under the Electricity Act 1992, the general competition legislation of the Commerce Act 1986, and the rules for separate ownership of lines and retail under the EIRA.

Submissions to this inquiry showed that there is no real momentum to reverse the splits of 1998. Nor are there any suggestions for further structural reform. In truth, there is nothing much left to restructure. As a result, this is a turning point; policy makers must now look at other options.

WHOLESALE MARKET

NZEM, MARIA and MACQS are established by contract among member companies who agree to abide by their rules. They are not creatures of statute, and no government agency approves their rules, or sits on their boards. They only have indirect government approval; NZEM was the subject of a Government Policy Statement on 8 June 1995 under the Commerce Act. They are complex agreements as a quick view of the NZEM will illustrate.

The general part of the NZEM Rules states the "Guiding Principles", and the rules for membership, admission, voting and rule amendment. It establishes the Rules Committee, the Market Surveillance Committee (MSC), the Market Administrator and the Service Providers. Part Two states the rules for the operation of the spot market, including processes for pre-dispatch schedules, power system operation, contract formation, provisional and final prices, clearing and settlement. Part Three concerns the secondary market.

The *Principles* control rule making. They follow the Policy Statement of 1995. In brief, they declare that the rules should (i) foster efficient and competitive markets; (ii) enable the entry of new buyers and sellers on unbiased terms and in particular not unfairly disadvantage new electricity supply technologies and demand-side management; (iii) comply with the Commerce Act and other law; (iv) be robust and enforceable; and (v) maintain a process to set and change rules which is transparent, is not biased towards any person, and achieves a balance between certainty in rules and flexibility to alter them in line with market conditions.

NZEM's Rules Committee is its primary governance body. It consists of two generator-class participants, two purchaser-class, one trader class, and one representative each of the Market Administrator (M-co Ltd) and Grid Operator (Transpower). It considers rule changes and can bring them into effect subject to appeal to the MSC for contravening the Guiding Principles and subject to the right of 25 per cent of market participants to put the change to a resolution of participants in each class. Vote entitlements are by market share except in the trading class where it is one person one vote. The Rules Committee can establish working groups to consider changes and the work of the Market.

The MSC members are appointed by the market participants and service providers, but must be independent. At present its chairperson is Sir Duncan McMullin, a retired Court of Appeal Judge. Its surveillance duties include monitoring the conduct of participants. It investigates alleged breaches and misconduct, and the rules make full provision for the procedure in hearings. It has a broad jurisdiction to investigate an "undesirable situation" in the market. Its most-used remedies are a fine or a compensation order. It can issue a binding interpretation of a rule, like a declaration. It maintains a public record of its decisions (http://www.m-co.co.nz/C2fMsc.htm). An MSC decision may be appealed to an Appeal Board.

The NZEM agreement (Pt 1, R 2.1) says that each market participant, service provider and the market administrator has submitted to the jurisdiction of the MSC and will not seek to enforce, other than under the agreement, any duty or obligation of any other person described in these rules; and R 2.19 states that subject to the appeal provisions a decision of the MSC shall be deemed conclusive and binding. However there is an outward-looking element to the rules as well. Rule 2.1 goes on to say that "This rule shall not preclude any other form of enforcement rights arising independently of these rules". And R 2.9 permits any person to pursue a breach before the MSC, not only market participants, the administrator or service provider.

These provisions have undergone their first High Court scrutiny, in *Electricity Corpn of NZ Ltd v McMullin* (HC Wellington CP 40/00, 6 April 2000, Doogue J). ECNZ was refused an injunction to restrain the MSC from proceeding to recalculate prices in the aftermath of an Appeal Board decision. ECNZ conceded that the rules constitute the method by which members of the NZEM agreed that issues arising between them could be determined. The Court held that there was no good reason for it to intervene; even though ECNZ had raised significant issues, the MSC and the Appeal Board should determine them in the first instance, and not the Court. Doogue J expressed a tentative view that the rules and the determination did not constitute an arbitration.

The inquiry's recommendations

The main concern of the inquiry in the wholesale market was the dominance of the market and the governance structure by a small number of generator-retailers, and the lack of independence of the governance structure from the industry. Other market interests are little represented. One possible result the inquiry identified is the lack of progress in introducing a real-time market favouring demand side management. Others were limited incentives for governance to give effect to the market's guiding principles; and limited sanctions for enforcement (paras 99, 100, 141).

The inquiry therefore recommended that:

- NZEM, MARIA and MACQS be replaced by what one may call the "proposed Market" with a single governance structure;
- membership be made compulsory;
- membership be extended to include Transpower and the distributor or lines companies;
- the proposed Market have wider responsibilities, eg as to the pricing methodology of Transpower and the distributors;
- the governing board of the proposed Market be elected by the members, but its majority be persons independent of the industry;
- the MSC be strengthened to improve enforcement;
- the proposed Market be required to adopt a set of overarching objectives and principles that would be endorsed by the government and against which the Market's rules or decisions can be formulated;
- the secondary market in hedges, futures, etc should be separated and kept free from these changes; and
- these changes be made by the industry, but if not then by statute.

These recommendations go further than many will have been expecting; proposals such as the broadening of responsibilities, the merger and the new objectives were not signalled in the Inquiry's Issues Paper. Submissions had made little call for an overhaul of the market institutions. The governing bodies said that the industry had a good record for self-regulation, it was addressing problems like demand-side management, retail switching, and administrative complexity, and should stay voluntary and stay self-regulating. Strengthening the MSC has not been widely discussed; contrary to what one might gather from the report, it already has power to recommend rule changes, it has a good record for penalising breaches, it has powers to gather information, and publishes the results of its investigations more than most

formal Courts let alone tribunals of self-regulating bodies. Nor is it clear what sort of accountability is proper for the MSC, acting judicially, to owe the proposed Market Board.

The proposals represent a considerable shift in thinking about the role that market institutions occupy, perhaps a bigger one than first meets the eye. The proposed Market will be asked to carry out much more of a public role, on terms not entirely of its own choosing, and certainly not as an industry club. Its relationship with the state will change. This is rapid evolution for institutions no more than six years old, but exchanges in Britain, Australia, Canada and the USA are evolving just as fast.

Is an electricity market a private matter entirely internal to its electricity industry membership? If not, is it a government organisation? If it is not that either, then what place does it occupy? My view is that it occupies a position as a system of collective governance that needs a degree of autonomy from the state system, the profit-driven economic system and also other systems such as the law. To obtain that autonomy, it needs to show that it is capable of outward-looking behaviour as well as inward. In looking outward, it must take a pluralist view, having regard to the interests of a variety of spheres in society and not merely those of the state; it must not act as an agent of the state.

An electricity market is a paradox. It is an institution of collective governance the purpose of which is a competitive market; a non-market institution to facilitate a market. It is a collective effort by a group of entities that have conflicting interests and are in direct and serious competition with each other. The paradox underlies all the inquiry's recommendations.

Collective governance commonly occurs through self-regulation. Self-regulation, often an alternative to conventional regulation, can lead to various relationships with the state (J Black "Constitutionalising Self-Regulation" (1996) 59 Mod. L Rev. 24):

(i) mandated self-regulation, where a collective group is required by the state to formulate and enforce norms within a framework defined by the state. A law society is an example;

(ii) sanctioned self-regulation, where the collective group itself formulates the regulation, which is then subject to government approval;

(iii) coerced self-regulation, where the industry regulates, but in response to threats that if it does not the government will do so. The MARIA Retail Competition Project in 1999 was an example;

(iv) voluntary self-regulation, where there is no active state involvement. Professional associations and sporting bodies are examples, and so are the NZEM, MARIA and MACQS.

(Also see M Priest, "The Privatisation of Regulation: Five Models of Self-regulation" (1998) 29 Ottawa L Rev 233.)

Law encounters collective governance in efforts to apply administrative law to non-statutory institutions: M Taggart (ed), *The Province of Administrative Law* (Hart, 1997). The Courts have been willing to intervene in the affairs of non-governmental bodies where their decisions affect the public or where they must be regarded as exercising public power: *Finnigan v NZ Rugby Football Union (Inc)* [1985] 2 NZLR 159 (CA); *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA); *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA). While the NZEM agreement requires parties to resolve disputes within through its procedures, R 2.1 is realistic about judicial review, almost welcoming; and R 2.9, permitting "any person" to pursue a breach, presumably invoking the Contract (Privity) Act 1982, is equally outward-looking.

The recommendation for new objectives and principles for the proposed Market is far-reaching. The statement of objectives is important because a power exchange is not a corporation with its simple objective of maximizing shareholder value, nor is it a department with a minister to direct it. Objectives reduce the tendency of directors to pursue their companies' self-interest. They constrain the decisions of independent directors as well. How are objectives to be made and changed? The inquiry recommended legislation if necessary. Even if the industry makes the required changes itself, the objectives will no longer be its own. The nature of the Market's self-regulation, and its relationship with the state, will have changed.

The recommendation for a majority of Board members who are independent ensures that the Board serves the stated objectives, and thereby, presumably, the interests of the exchange and of the public, rather than the interests of the participant companies. The Rules Committee under the existing NZEM rules is obliged to reject rule changes that contravene the Guiding Principles, but its members are not obliged to disregard their companies' interests.

The dominance of the market institutions that concerned the inquiry can be traced to the Electricity Industry Reform Act 1998, because the generator companies bought most of the retailing arms of the local companies which then disappeared from the market. The risk is that they will give priority to rule changes and operations that interest them. Changes that benefit consumers, traders, retail-only companies, or companies with innovative plans in technology, marketing or energy efficiency may be slower. And this with even the most conscientious effort to follow the *Principles* in respect of neutrality and openness.

The inquiry also addressed dominance by bringing in Transpower and the lines companies as market participants. (Transpower has several roles under the NZEM Rules but is not a "Market Participant".) The inquiry wanted consumers to have a greater say, possibly through direct representation on the Board (para 143), something that occurs on the GSC but not on NZEM bodies. Either way, this will mean more participant classes, and more complex rules on the voting for Board members and for rule changes. This has been a headache elsewhere. Barker, Tenenbaum and Woolf, "Regulation of Power Pools and System Operators: An International Comparison" (1997) 18 Energy LJ 261 identify four categories of power exchange governance in use internationally. They examine exchange boards, noting however that in some cases (eg the England and Wales Pool) major decisions like rule changes go to the membership at large:

(i) a multi-class stakeholder board. A club or representative model in which different classes of participant (generators, buyers, marketers, etc) are represented and given a fair voice. The existing NZEM is, or began, in this category. How many classes to represent separately, and what votes to give them, can be difficult to determine, especially as to domination by the generators and incumbents;

(ii) a non-stakeholder board of independent directors. Members elect boards who have no financial interest in any of the market participants, but who are chosen for their professional experience to act independently. Alberta's Power Pool Council is an exam-

ple. Hybrid boards have some such independent directors and some stakeholder representatives. The proposed Market is in this category;

(iii) a single-class board. All decisions are controlled by one class, eg generators as in the old US regional reliability pools. They are unlikely to serve a competitive market. In effect, the inquiry is saying that this is where the NZEM has moved to;

(iv) a single for-profit corporation not affiliated with market participants. Nord Pool, owned by the Norwegian grid owner Statnett is the only example. Again this is unlikely to serve present purposes. (M-co, incidentally, is a contracted service provider to NZEM and MARIA.)

The inquiry's proposal does not fly in the face of the international experience revealed in this study. But hopes for a simple solution should be kept low. The California Power Exchange Governing Board appears to have 12 classes and 26 voting members: www.eob.ca.gov. Nor should we make any rash assumptions that disputes like transmission pricing that have gone on for years will yield gracefully to the internal procedures of the proposed Market.

Compulsory membership was proposed. There is already a mandatory element to trading arrangements, for wholesale buyers and sellers must belong to either MARIA or NZEM. Presumably the proposed Market would come in segments, some mandatory and some not. Whether an exchange should have a monopoly is actively debated internationally, and examples either way can be found; Pools in England and Wales and in Alberta are compulsory, while the Scandinavian Pool is not, and the new arrangements in England and Wales will offer a greater choice of markets. It can be strongly argued that exchanges should be subject to market pressure in the form of other trading arrangements, in order to keep their costs down. In the financial world, a stock exchange monopoly is hard to sustain in the face of electronic trading and information systems.

The wider mandate for the proposed Market will put greater responsibility on its Board. People will feel more entitlement to turn to it for an explanation when things go wrong with pricing or supply. It will be harder for it to deny that it does anything more than provide a trading floor.

What may emerge from all this is a hybrid multi-class/independent form of governance. A possibility that is emerging in parts of the USA, and favoured by Barker, Tenenbaum and Woolf is a two-tiered structure, with an independent board above, and a stakeholder board below. A lot of careful thought is required because its importance will extend well beyond the industry. The role of the government needs to be made much more explicit. An open and principled method of setting and changing exchange objectives is necessary. Government decisions to endorse industry structures (para 129) are too far-reaching to be made informally or made as Statements of Government Policy to the Commerce Commission. Things have changed from when MARIA and the NZEM were set up, and the government and its SOEs could work in concert on restructuring. Now it may actually be the industry that wants the relationship with government clarified, especially where its governance is asked to take on the government's policy priorities, and to assume a more central role in the sector. Self-regulation may need to move into Black's first or second categories, and a relationship may need to be developed between internal self-governance and external setting of objectives and principles.

STATE-OWNED ENTERPRISES

Governance proposals in other parts of the electricity industry can be noted briefly. The inquiry recommended a further re-direction of Transpower in its Statement of Corporate Intent. Although this comes soon after a major SCI revision in 1997 it indicates the continuing usefulness of the SOE model in this sector, reconciling commercial and public objectives in a workable and generally acceptable fashion. One problem is the Crown ownership of three competing SOEs; the inquiry noted the possibility of a common mindset without actual collusion. How far can one SOE go to drive another out of business? A more general problem is that the SOE model as a whole undoubtedly needs review. The recent intervention of the new government in management and personnel decisions in Timberlands and TVNZ are not readily reconciled with the SOE Act's division of responsibilities between shareholder ministers and boards of directors.

LINES COMPANIES

The inquiry was concerned about governance and accountability in lines companies majority-owned by community trusts or local bodies. It recommended that they be required to adopt SCIs like Transpower's, including its substantive commitments on service quality, costs and prices. There are still provisions for SCIs in the Energy Companies Act 1992 s 39 to this effect (but also see s 42), but many provisions of that Act are probably being overlooked. It should be repealed, and the still-relevant sections moved to the Electricity Act or the EIRA 1998. The inquiry also recommended that trust-owned companies be made subject to the Local Government Official Information and Meetings Act 1987, the Public Finance Act 1989 and the Ombudsman Act 1975, like SOEs and local body trading enterprises.

These improvements are welcome, but raise the question of governance and accountability of the community energy trusts themselves. There is great variation in structure and, probably, in ability, up and down the country. Energy trusts (and other community trusts, for that matter) were set up in haste, and do not fit readily into corporate, government department, or private law governance models.

Before any lines companies reforms go ahead, the recommendations in *Auckland Power Supply Failure: Report of the Ministerial Inquiry into the Auckland Power Supply Failure* (Wellington: Ministry of Commerce, 1998) should be revisited. That inquiry found that defects in corporate governance and accountability resulted in a loss of opportunity to prevent the failure. It recommended SCIs for all lines companies, asset management plans, security standards, and consumer contracts with better provisions for security of supply and liability. Of these recommendations, asset management plans and security performance measures have found their way into the information dis-closure regulations.

CONCLUSION

The inquiry's recommendations put the paradoxical character of an electricity market into issue. How can a collective be organised to promote competition? How can governance be internal self-regulation and at the same time look outwards to cater to the needs of the government and a variety of other stakeholders? New Zealand is not alone in facing these questions, in finding competition slow to emerge, and in finding that one phase of reform simply leads to another set of problems. ❑

BRICKBATS AND BOUQUETS

Jonathan Coates, Simpson Grierson

compares the English and New Zealand medical disciplinary processes

This article is a consideration of, and comparison between, the approaches to medical discipline in England and New Zealand. The article primarily considers the practices of the General Medical Council (the "GMC") in England, and the Medical Practitioners Disciplinary Tribunal (the "MPDT") in New Zealand.

New Zealand has traditionally adopted the English system of regulation of the medical profession. In recent years, and in particular with the passing of the Medical Practitioners Act 1995, New Zealand's approach to regulating health professionals has, in this writer's opinion, left the General Medical Council far behind. New Zealand must not however be complacent. In the search for the fairest possible system for all, there are still changes that can be made. A consideration of the English system assists in identifying those aspects that still require attention, and in reinforcing the view that the old ways should not be allowed to resurface.

The four aspects of the disciplinary process which are considered are the requirement for the adjudicators to provide statements of reasons for their decisions, the professional composition of the tribunals, the number and nature of charges, and the standards of conduct imposed by the tribunals. Each aspect can independently play a significant role in the fairness of the proceedings, and have a bearing on the ultimate attainment of justice.

STATEMENTS OF REASONS

At the conclusion of a disciplinary hearing, it is the adjudicators' responsibility to reach a decision as to whether a practitioner is guilty or not guilty of the charge as alleged, and if so, what penalty to impose. A statement of reasons indicates how and why the adjudicators have reached their decision.

The principle grounds for requiring a statement of reasons are as follows:

- statements of reasons enable a litigant dissatisfied with a decision to more readily consider whether there are grounds for appeal;
- statements of reasons enable an appellate Court to ascertain the determinations of the tribunal on questions of fact, and to determine what principles of law have been applied and whether such principles were correct;
- as a matter of respect, parties should be told of why a particular decision was reached and why they are either subject to some kind of liability or why their complaint has failed;
- statements of reasons prevent arbitrariness;
- statements of reasons assist in ensuring the uniformity of decisions. Inconsistent decisions result in the unequal and unfair treatment of parties.

England

In England, the Professional Conduct Committee ("PCC"), the committee which hears allegations of professional misconduct on behalf of the GMC, is not required to, and consequently does not, give reasons for any of the decisions it reaches.

There is no general rule of law in England that reasons should be given for administrative decisions. There are signs however that this approach may be under threat. The High Court recently stated that "there is a perceptible trend towards an insistence on greater openness in the making of administrative decisions" and that "if the giving of a decision without reasons was insufficient to achieve justice then reasons should be required". (*R v Ministry of Defence, ex p Murray* TLR 17 Dec 1997.)

There is no sign however that the PCC is set to change its practice. In *Ledward*, a case in 1998 observed by the writer, no reasons were given by the PCC despite there being a clear conflict in the expert evidence as to whether the defendant gynaecologist's conduct fell below an acceptable standard. Eminent professors gave evidence both in support of and against the surgeon. Notwithstanding the conflict of evidence, the PCC gave no reasons for preferring one body of expert evidence over the other, or for finding the practitioner guilty and striking him off the medical register. This is a practice which must not only be deeply insulting to the experts whose evidence has been rejected and integrity challenged, but more importantly, a real threat to the fairness of the decision handed down to the practitioner.

New Zealand

Common law – the "sufficiency test"

In New Zealand, the general rule is that providing reasons is necessary to ensure procedural fairness.

> There can be no doubt that it is desirable that all Courts and Tribunals should where possible give reasons for decision. (*Potter v New Zealand Milk Board* [1983] NZLR 620 at 624 per Davison CJ.)

This general rule has been assimilated into the common law relating to medical disciplinary tribunals. In *Brake v Preliminary Proceedings Committee of the Medical Council of New Zealand* [1997] 1 NZLR 71 at 76, the High Court observed that:

> The obligation of the council is to make clear both its findings on each separate charge and its findings on any comprehensive charge. It should also give a reasonably full explanation of its reasons.

The Court in *Brake* went on to say that the findings must be "sufficient to enable this Court to appreciate the reasons for the council's conclusion". This "sufficiency" test effectively summarises the position at common law.

Medical Practitioners Act 1995

The MPA requires that the MPDT provides, in certain situations, reasons for its decisions. One situation where reasons are required, is where a penalty is imposed following a charge being proven. (Sch 1 cl 12(1)) Thus if a practitioner is found guilty and the Tribunal imposes a penalty, there is a statutory obligation to provide reasons.

However if the decision is to find the practitioner not guilty, there is no statutory requirement to provide any reasons for that decision. There is little logic to this. The necessity for a statement of reasons is exactly the same whether the practitioner is found guilty or not guilty. The grounds for requiring a statement of reasons apply equally to complainants whose complaint has effectively been rejected and the prosecution whose charge has been dismissed, as to a practitioner who has been found guilty.

The Dental Act 1988, s 61(7) also only requires that the Dentists Disciplinary Tribunal provides a statement of reasons where the practitioner is found guilty.

These anomalies in the legislation are to be regretted. It is anticipated however, that the appellate Courts will continue to follow the common law position of requiring sufficient statements of reasons in all situations.

The Nurses Act 1977 is more far-reaching. Section 43(8) requires that "every order, decision, or determination of the council under this Part of this Act shall be reduced to writing [and] shall contain a statement of the reasons on which it is based". This all encompassing requirement to provide a statement of reasons is the procedure that all disciplinary tribunals should adopt.

LEGALLY QUALIFIED ADJUDICATORS

The PCC in England has no legally qualified members. It is comprised of medically trained members, with a requirement of at least one lay member. The Legal Assessor who sits with the PCC has the role of advising the members on questions of law such as the admissibility of evidence, but plays no part whatsoever in the determination of the case.

Prior to the enactment of the MPA, the position in New Zealand, with respect to medical practitioners, was analogous to that in England. The MPA, s 98(1)(a) however, provides that any hearing before the MPDT must be presided over by either the chairperson or a deputy chairperson both of whom must be barristers or solicitors of at least seven years' practice. This is a significant and welcome change.

There remains no such requirement for the Dentists Disciplinary Tribunal under the Dental Act 1988 or the Nursing Council under the Nurses Act 1977. Consequently there are no legally qualified members on these tribunals.

One of the dangers of having a predominantly medically trained committee, is that the medical members will rely on their own experience of medical practice in determining whether a practitioner has fallen short of the standards required, rather than rely on the expert evidence as to acceptable practice. Medical members must be careful not to cross the, admittedly fine, boundary between their proper role as adjudicators and final arbiters of what are acceptable standards, and the improper role of becoming de facto expert witnesses themselves where they impose their own personal views of what are acceptable standards. The difficulty with blurring these roles is that there is no opportunity to test the "evidence" of members of the committee by way of cross-examination. For this reason alone, any such "evidence" would be unsafe. Non-medically trained members, whether legally trained or otherwise, will not have the same

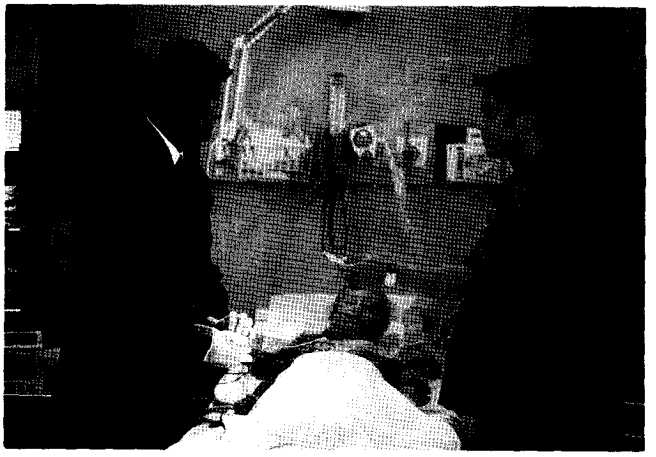

Photo courtesy of Shortland Street TV One

difficulties with the distinction, as they will have no real background in medical practice, and thus will be forced to resolve any dispute between experts on the basis of the evidence they have heard.

These type of concerns have been seen in decisions both of the PCC in England, and the Medical Practitioners Disciplinary Committee in New Zealand prior to the 1995 legislation. The case of *Lake v The Medical Council* (High Court, Auckland HC 123/96, 23 January 1998, Smellie J) is one such example. The Committee had found Dr Lake guilty of professional misconduct, notwithstanding that there was expert medical evidence to support the practice she had adopted. The Committee, as final arbiter of standards, was entitled to reach this conclusion. What the Committee was not entitled to do, and what the High Court found had been done, was to impose their own personal views of practice over the accepted standards as espoused by the experts. The Committee's decision was thus overturned.

The problem can be significantly ameliorated where the tribunal is chaired by a senior barrister or solicitor, who will firstly, have no real background experience of current clinical practice, and secondly, will be conscious of the fine legal distinction and will be in a more objective position to ensure that the boundary is not crossed. This is the case with the MPDT, but not with the Nursing Council or Dentists Disciplinary Tribunal. The Nurses Act and the Dental Act should be amended.

It is worth remembering that lay members of a tribunal are totally dependent on expert medical evidence. No matter what the make-up of the tribunal is, the medical profession itself, as of course it should, remains by far the greatest influence in the setting of standards.

THE CHARGES

England

There is only one charge that can be laid before the PCC, serious professional misconduct (SPM). The common law confirms that SPM equates with the most serious charge available in New Zealand.

There are two principal concerns with having only one charge. The first is that by only having one serious charge, the GMC is not adequately holding doctors to account. There is concern that doctors are let off lightly.

The second concern is that, in light of the increase in public awareness and calls for accountability, the PCC is inclined to find that conduct comes under the SPM definition when the facts suggest that it is not sufficiently serious to do so. If the options open to the PCC are either acquittal or

SPM, there is the danger that cases somewhere in between will be inappropriately pushed to either extremity.

New Zealand

The MPA, s 109(1) allows for a trilogy of charges:

- disgraceful conduct in a professional respect;
- professional misconduct;
- conduct unbecoming a medical practitioner.

The trilogy of charges is helpful in that it allows for a wide range of complaints to be considered by the MPDT without the temptation to force any particular conduct into an inappropriate classification. This protects both medical practitioners and complainants.

The Dental Act 1988, s 54(1) allows the Dentists Disciplinary Tribunal to find a dentist guilty of either professional misconduct, or "of any act or omission in the course of or associated with the practice of dentistry that was or could have been detrimental to the welfare of any patient or other person". This is wide reaching and vague.

Section 42(1) Nurses Act 1977 provides only for a charge of professional misconduct.

Consideration should be given to extending and/or clarifying the charges available under both the Nurses Act and Dental Act.

STANDARDS OF CONDUCT

England

In determining what amounts to SPM, the Privy Council has proposed a two stage test. The PCC should ask itself:

1. did the doctor's conduct fall short, either by act or omission, of the standard of conduct expected among doctors: If yes, then;
2. was this falling short "serious"?

(*Doughty v General Dental Council* [1988] AC 164)

This raises the difficult issues of how the test differs from that adopted by a civil Court considering an action for medical negligence, and what amounts to "serious". The PCC has traditionally distinguished between misconduct which is merely negligent which is not within its jurisdiction, and misconduct which is both negligent and serious, which is within its jurisdiction.

Because the disciplinary committee and the civil Courts are quite separate, there is the danger of inconsistencies between the two. One such example of an inconsistency between a PCC decision and the civil law is the case of *Dally v GMC* Privy Council, No 7 of 1987; 14 September 1987. Dr Dally was a psychiatrist who specialised in the treatment of drug addicts. She was found guilty of SPM when she adopted a method of treatment which was against the Government's Drug Dependency guidelines. At the time however, there was significant debate among psychiatrists about the best form of treatment, and there was a large minority of psychiatrists who supported Dr Dally's method of treatment. Dr Dally appealed to the Privy Council who, despite acknowledging that the medical evidence before the Committee revealed a division of professional opinion, held that the PCC were entitled to reach the conclusion that they reached. The appeal process was severely hampered by the insufficient reasoning of the PCC.

For many years, a doctor would not be liable in negligence if he or she acted "in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art" (*Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118), notwithstanding that there was a body of opinion that took a contrary view. This is the "*Bolam*" principle, and was the law at the time of *Dally*. A gloss has subsequently been placed on this by the House of Lords in *Bolitho v City & Hackney HA* [1997] 4 All ER 771. In *Bolitho* it was held that a doctor could be liable in negligence in respect of diagnosis and treatment, despite a body of professional opinion sanctioning the conduct, where it had not been demonstrated to the Judge's satisfaction that the body of opinion relied on was reasonable or responsible. The House of Lords noted that such cases, where "the professional opinion is not capable of withstanding logical analysis", will be "rare" (at 779 per Lord Browne-Wilkinson).

a negligent deviation from acceptable standards of practice will not in itself amount to a disciplinary offence

It is contended that the expert evidence in support of the practitioner in *Dally* was not of the kind that would come under the "rare" category of evidence that is not capable of withstanding logical analysis. Highly respectable evidence was offered in support of the defendant's practice. The conflicting professional evidence related to specialised medical techniques that amounted to little more than scientific disputes. On this basis, there must be doubt whether Dr Dally would have been liable in negligence in the civil Courts. Whilst negligence may or may not amount to serious professional misconduct, any error in diagnosis or treatment that equates to serious professional misconduct must surely also be negligent.

There has been no translation as yet of the *Bolitho* principle to the disciplinary context.

New Zealand

It is clear in New Zealand, as in England, that the starting point for determining what amounts to any of the three charges will be evidence from medical colleagues as to acceptable standards. The High Court in *Brake* (at 77), stated that the test for "disgraceful conduct in a professional respect" is "an objective test to be judged by the standards of the profession at the relevant time".

Elias J in *B v The Medical Council* (High Court, Auckland, HC 11/96, 8 July 1996), made the important point that conduct which attracts professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable standards. Furthermore, Her Honour noted that a finding of misconduct is not required in every case where error is shown (at p 15):

> The question is not whether error was made but whether the practitioner's conduct was an acceptable discharge of his or her professional obligations. The threshold is inevitably one of degree. Negligence may or may not (according to degree) be sufficient to constitute professional conduct (sic) or conduct unbecoming.

Elias J's dictum confirms that a negligent deviation from acceptable standards of practice will not in itself amount to a disciplinary offence. There will need to be a more detailed analysis of all the circumstances of the case to determine whether the departure was significant enough to warrant sanction for the purposes of protecting the public.

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LEGITIMATE EXPECTATION OF SUBSTANTIVE BENEFIT

Richard Best, Ashurst Morris Crisp, London

contrasts recent English and New Zealand attitudes

In *R v Secretary of State for Transport, ex p Richmond-upon-Thames London Borough Council* [1994] 1 WLR 74, 92-94 Laws J (as he then was) appears to have said neither precedent nor principle goes further than the enforcement of legitimate procedural expectations. His views echoed those of many. In *R v Ministry of Agriculture Fisheries & Food, ex p Hamble Fisheries (Offshore) Ltd* [1995] 2 All ER 714, 723-724, Sedley J (as he then was) disagreed and propounded a test by which the Court could undertake a balancing exercise between the decision-maker's policy objectives and reasoning on the one hand and the potency and reasonableness of the applicant's expectations on the other. In doing so he had the support of English academics, a handful of English authorities and European jurisprudence. The Court of Appeal's sweeping comments in *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 All ER 397 were taken by some to have curtailed this long-standing dispute, at least in cases falling outside the extreme abuse of power cases of which *R v IRC, ex p Preston* [1985] AC 835 and *R v IRC, ex p Unilever Plc* [1996] STC 681 (CA) were representative. In *Hargreaves* the Court referred to and disagreed with Sedley J's balancing test in *Hamble*. Hirst LJ (with whom Peter Gibson LJ agreed) said that whilst Sedley J's decision in *Hamble* stands, his ratio in so far as he propounded a balancing exercise to be undertaken by the Court was "heresy" and should be overruled. Pill LJ described it as "wrong in principle".

Now enter *R v North and East Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622, perhaps one of the most significant administrative law cases of 1999. In this case the English Court of Appeal (Lord Woolf MR, Mummery and Sedley LJJ) undertook a wide-ranging review of the case law on legitimate expectation of substantive benefit and staked a definite role (albeit of uncertain ambit) for the Courts in protecting expectations of substantive benefit. Lord Hobhouse recently described the Court's judgment as "valuable" (*R v Secretary of State for the Home Department, ex p Hindley* [2000] 2 WLR 730, 740 (HL).

The purpose of this note is simply to outline the Court's approach in *Coughlan*, to comment on its later discussion in *R v Department of Education and Employment, ex p Begbie* [2000] 1 WLR 1115 (CA), to ponder briefly whether the New Zealand Court of Appeal will follow it and to mention some of the practical implications of *Coughlan* and its progeny.

COUGHLAN

In 1971 Miss Coughlan was grievously injured in a road accident. In 1993 she and other patients were moved with their agreement to a purpose-built facility, Mardon House. Miss Coughlan's care was accepted as the responsibility of the NHS acting, ultimately, through the North and East Devon Health Authority (the "health authority"). The health authority did not dispute that Miss Coughlan and her fellow patients accepted the move to Mardon House on the basis of a clear promise that Mardon House would be their home for life.

Although purpose-built for the long-term disabled, Mardon House also functioned as a "reablement unit". By 1995 the authority was having to consider whether that reablement service could realistically be kept at Mardon House. This created the question whether, if the reablement service was to go, Mardon House could be maintained as a home for younger chronically disabled patients together with some alternative health service use. In October 1998, following an earlier review of the options for placement and care of Miss Coughlan and an extended public consultation process, the health authority decided to close Mardon House.

Miss Coughlan's application for judicial review succeeded in both the High Court and Court of Appeal. Among other things, the Court held that the breach of the promise to Miss Coughlan was unjustifiable. It quashed the closure decision accordingly.

Legitimacy of expectation and the three *Coughlan* categories

The Court said the starting point, when considering questions of legitimate expectation, is "to ask what in the circumstances the member of the public could *legitimately* expect" (p 644, emphasis added). The legitimacy of an expectation was said to involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

The Court said there were at least three possible outcomes to this question of legitimacy:

(1) the Court might decide the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding to change course. Under this category the Court would be confined to reviewing the decision on traditional grounds of judicial review. The test would be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise. The Court appears to have made conflicting comments as to its role in this first category. On the one hand, it spoke of the authority giving the policy or representation such weight as the authority thinks right. On the other, it seems to have said the tests which the Courts would apply would be rationality and

whether "proper weight" was given to the implications of not fulfilling the promise. There is a substantial line of authority holding that the weight attributed to relevant matters and implications is for the decision-maker, not the Court. In other words, "proper weighting" is not a conventional ground for review. If the Court of Appeal meant to suggest that it will determine whether the weight given to particular implication was "proper", rather than simply considering whether such matters were taken into account, then arguably it is introducing a balancing inquiry for the Court even in this first category and, by doing so, is going beyond the conventional/procedural to the substantive;

(2) the Court might decide the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is made. In this category an opportunity for consultation must be given unless there is an overriding reason to resile from it in which case the Court would, if called upon to do so, judge the "adequacy" of the reason advanced for the change of policy, taking into account what fairness requires. (Query whether the Court meant to say that it would judge the adequacy of the reason advanced "for the change of policy" as opposed to the reason "for not consulting on the change of policy". If it meant the former, this too would be a significant change in the law and is arguably inconsistent with other passages in the judgment.);

(3) where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the Court could in "a proper case" decide whether frustration of the promise is so unfair that to take a new and different course would amount to an abuse of power. Here, once the legitimacy of the expectation is established, "the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy". The Court is required to determine whether there is a sufficient overriding public interest to justify a departure from what has been previously promised.

The Court discussed the difficulties in deciding into which category any particular decision should be allotted. In this developing area of the law, it said, "attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation to an expectation that whatever is in force at the time will be applied" (p 645). (Laws LJ addressed this issue in *Begbie*, discussed below.) Nevertheless, the Court said, "most cases of an enforceable expectation of a substantive benefit (the third category) are likely ... to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract" (p 646). The Court recognised that the Courts' role in relation to the third category "is still controversial" but, in its view, it was now clarified by case law. The Court said legitimate expectation "may operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices [and] without injury to the *Wednesbury* doctrine it may furnish a *proper* basis for the application of the now established concept of abuse of power" (p 650, emphasis added).

Transitional measures

The Court appears to have signalled the desirability of transitional measures where citizens' legitimate expectations of substantive benefit would, without such measures, be breached by an administrator's change of tack. The Court said (at p 654):

> The fact that the Court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive's policy-making powers should not be trammelled by the Courts .... Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the Courts as part of the factual data – in other words, as not ordinarily open to judicial review. The Court's task – and this is not always understood – is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will already have considered this and made appropriate exceptions ... or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, it is for the Court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.

Coughlan a third category case

For the following reasons, the Court concluded that Miss Coughlan's case fell into the third category:

- the importance of what was promised to Miss Coughlan and her reliance upon it;
- the fact that the promise was limited to a few individuals and was made in precise and unqualified terms on a number of occasions; and
- the fact that the consequences to the health authority of requiring it to honour its promise were likely to be financial only.

One may question why the small number of people to whom the promise was made should necessarily make a difference. Why should it make a difference if the same clear promise was made to, say, 20, 30 or even 100 people if all those people formed an expectation in consequence? If it does make a difference, where does one draw the dividing line? One may also question why "mere financial consequences" to the health authority necessarily supported the Court's conclusion and, indeed, whether the Court was or can be well placed to assess the impact of individual resource allocation decisions on other areas of health care provision.

Although the health authority undertook the balancing exercise required by what the Court was later to define as a third category case, the Court disagreed with the authority's conclusion on how the scales balanced. This was not a case where the health authority would, in keeping the promise, be acting inconsistently with its statutory or other public law duties and a decision not to honour it would be equivalent to a breach of contract in private law. Perhaps fatally, the health authority had "not offered to [Miss Coughlan] an equivalent facility to replace what was promised to her" and the "authority's undertaking to fund her care for the remainder of her life [was] substantially different in nature and effect from the earlier promise that care for her would be provided at Mardon House [and that that] place would be her home for as long as she chose to live there" (p 657). The Court said it could not prejudge the result had there been on offer accommodation reasonably equivalent to Mardon House and had the health authority made a properly considered closure decision in the light of that offer. But without such an offer there was unfairness amounting to an abuse of power.

BEGBIE

In *Begbie* Peter Gibson, Laws and Sedley LJJ provided various comments on the annunciation of principle in *Coughlan*. Peter Gibson LJ thought *Coughlan* contained "a useful distillation of the authorities on legitimate expectation" whilst Sedley LJ, of course, was one of its authors. Laws LJ did not oppose the statements of principle in *Coughlan* but did explore the limits of third category cases.

In this case the applicant student unsuccessfully sought judicial review of the decision of the secretary of state for Education and Employment not to permit her to continue with her assisted place at a particular school in Cambridge for the duration of her secondary education. One of the grounds of review was that the secretary of state's exercise of discretion was inconsistent with statements made by or on behalf of the incumbent government both before and after the 1997 General Election and which gave rise to a legitimate expectation that the applicant would retain her assisted place until she completed her education at that particular school.

Counsel for the applicant argued that this was a case falling within the third of the three *Coughlan* categories. The legitimate expectation argument failed because, even if on the basis of some of the documents relied upon there was an expectation, there was no "legitimate" expectation. Peter Gibson LJ could find no legitimate expectation for the following reasons:

- the expectation advanced was beyond the contemplation of the statutory scheme under which the secretary of state was obliged to act (as Sedley LJ pointed out, this principle was dispositive of the case);
- an opposition spokesperson for a political party did not speak for a "public authority";
- elected representatives, anxious to win votes, were not irrevocably bound to carry out pre-announced policies contained in election manifestos and to hold that pre-election promises bound a newly elected government could be inimical to good government;
- as regards the post-election statements: Sedley LJ made the point that "a pre-election promise may of course be expressly adopted by a new administration once in office, but then it acquires a new character with, no doubt, consequences analogous to those of any other representation made by a public authority" (p 1134).
  - the Prime Minister's words in an *Evening Standard* article were general, in one sense literally true, could not reasonably be interpreted as an announcement of a change of policy and there was no detrimental reliance upon them;
  - words by the secretary of state in a particular letter, although containing an unambiguous representation, were corrected by another letter some five weeks later and there was no evidence that in the interim the student's parents had "relied on the representation to change their position"; in addition, in the first letter the secretary of state had misstated by mistake what his own policy was; and
  - the other main letter on which argument centred contained no clear representation, could never reasonably have been relied upon and in fact was not relied upon.

Detrimental reliance

Peter Gibson LJ was clearly influenced by the lack of detrimental reliance (although his comments on this point are obiter dicta). Before expressing the above factual conclusions, His Lordship found it necessary to comment on counsel's submission that it was not necessary for a person to have changed her position, as a result of unambiguous and unqualified representations, for an obligation to fulfil a legitimate expectation to subsist. Rather, counsel submitted, the principle of good administration prima facie requires adherence by public authorities to their promises. Peter Gibson LJ said "it would be wrong to understate the significance of reliance in this area of the law". He said it was "very much the exception, rather than the rule, that detrimental reliance will not be present when the Court finds unfairness in the defeating of a legitimate expectation" (p 1124). He said "the position" is summarised in De Smith, Woolf and Jowell's *Judicial Review of Administrative Action* (5 ed, 1995, p 574) in these terms:

> Although detrimental reliance should not therefore be a condition precedent to the protection of a substantive legitimate expectation, it may be relevant in two situations: first, it might provide evidence of the existence or extent of an expectation. In that sense it can be a consideration to be taken into account in deciding whether a person was in fact led to believe that the authority would be bound by the representations. Second, detrimental reliance may be relevant to the decision of the authority whether to revoke a representation.

On the facts His Lordship could see nothing wrong, in the absence of something like reliance, with defeating the expectation engendered by the first post-election letter. He said the Court should be slow to fix the public authority permanently with the consequences of its mistake (see further p 1127).

Sedley LJ also explored the question of reliance. His Lordship said that, even if the statutory scheme did not preclude the applicant's argument for a legitimate expectation, there were at least two reasons why the nature and circumstances of the representation in the first post-election letter were incapable of generating a legitimate expectation. First, the letter was not addressed to the applicant or her parents and, although her mother saw it, there was no making and acceptance of a representation assuring the applicant's place for the remainder of her schooling; alternatively, any expectation acquired could not have outlived the subsequent correction of the first letter because, it seems, there was nothing "such as reliance" to give it legitimacy. Sedley LJ said (at p 1133): These passages are potentially inconsistent and demand close scrutiny:

> ... I have no difficulty with the proposition that in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it. The legitimate expectation in such a case is that government will behave towards its citizens as it says it will. But where the basis of the claim is, as it is here, that a pupil-specific discretion should be exercised in certain pupils' favour, I find it difficult to see how a person who has not clearly understood and accepted a representation of the decision-maker to that effect can be said to have such an expectation at all. A hope no doubt, but not an expectation.

> If this be wrong and if the Begbie family can rightly be said to have acquired an expectation from their sight of the Teed letter, then the expectation cannot legitimately have outlived the correction of the letter and the reversion to the original policy signalled by the [subsequent] letter .... It follows, I do not doubt, that if in the interim Heather's position had shifted to her detriment in reliance on the representation or misrepresentation – for example, by turning down an alternative school place in the belief that her assisted place was now secure – the Court might well have held resiling from it to be, in her case, an abuse of power. But all this depends first on there having been a representation sufficient to generate a true expectation and secondly on something – acting in reliance on it, for example – giving it legitimacy. Mr Beloff accepts that legitimacy of expectation may include, though it will not be limited to, the reasonableness of relying upon the representation.

Justiciability

Laws LJ agreed the appeal should be dismissed on "the short ground" that the expectation was inconsistent with the statutory scheme. Nevertheless, he wished to comment on the application of the legal principles relating to legitimate expectations had the door not been shut by the statutory scheme.

His Lordship said abuse of power has become or is fast becoming "the root concept which governs and conditions our general principles of public law". He said, among other things, that it "informs all three categories of legitimate expectation cases as they have been expounded by this Court in *Coughlan*" (p 1129). But:

> The difficulty, and at once therefore the challenge, in translating this root concept or first principle into hard clear law is to be found in this question, to which the Court addressed itself in *Coughlan*: where a breach of legitimate expectation is established, how may the breach be justified to this Court?

His Lordship noted that in the first *Coughlan* category, the test is limited to the *Wednesbury* principle but in the third category, where there is a legitimate expectation of a substantive benefit, the Court must decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. However, he observed, the first category may also involve deprivation of a substantive benefit. "What marks the true difference between the two?" he asked. Having quoted the reasons for *Coughlan*'s case falling within the third category, Laws LJ observed that fairness and reasonableness (and their contraries) are objective concepts but each, he said, is a spectrum, not a single point, and they shade into one another. He said it was now well-established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake, and that abuse of power may take many forms. Having then referred to *Hargreaves* and the *Coughlan* Court's distinguishing of it, he gave an answer to his question as to what marks the difference between the first and third categories in *Coughlan* (pp 1130-31):

> As it seems to me the first and third categories explained in *Coughlan* are not hermetically sealed. The facts of the case, viewed always in their statutory context, will steer the Court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the Court); here the Judges may be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear ....
>
> In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in *Coughlan* that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the Court is asked to embark. The Court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the Court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the Court is the judge, offers no offence to the claims of democratic power.

Laws LJ recognised that there will be a multitude of cases falling within these extremes or sharing the characteristics of one or the other. He said the "more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the Court's supervision". In that field, he said, "true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy" (p 1131).

The case before him did not lie in the macro-political field but concerned a relatively small and identifiable number of persons. Had there been an abuse of power, His Lordship would have granted relief. But this case was not a change of policy case; rather, the government's policy had been misrepresented through incompetence. Mrs Begbie did not alter her or her daughter's position in reliance on the misrepresentation before it was corrected. The issue, Laws LJ said, was whether the correction amounted to an abuse of power or, so far as consequences were concerned, whether the secretary of state should be compelled to allocate public resources to the grant of assisted places inconsistently with his lawful policy. In the absence of detrimental reliance, His Lordship said he would not have been prepared to hold "that it would be abusive for the secretary of state not to make the earlier representations good". His Lordship said the Courts "do not sit here to punish public authorities for incompetence, though incompetence may most certainly sometimes have effects in public law" (p 1131).

Laws LJ's judgment draws one's attention to the fact that first as well as third category cases may involve deprivation of expected substantive benefits and, on one reading, provides some guidance, couched in the language of justiciability, as to the basis upon which the Courts might allot substantive expectation cases to either the first or third *Coughlan* categories. However, it is unclear whether his Lordship envisaged the Courts having a "weighing role" (as per the third category) or a lowered rationality or abuse of power threshold in those cases between the extremes he identified. His use of words such as "likely" and "less intrusive" may be taken to suggest he did but the position

is not clear. If he did, the proposition may be problematic. All this, it seems, is the start of and will likely fuel the inevitable debate as to how far *Coughlan* can be taken.

What Laws LJ did not do, is state expressly that cases allotted to the first category are so allotted because the pleaded expectation lacks legitimacy. The *Coughlan* categories are outcomes to the question "what was the applicant's legitimate expectation" and the *Coughlan* Court clearly thought that a first category case is to be judged on classic *Wednesbury* grounds "not because the expectation is substantive but because it lacks legitimacy" (p 651).

In the writer's view, Laws LJ's comments on justiciability should be taken as an important contribution to this primary issue of legitimacy. There are various reasons why a pleaded expectation of substantive benefit may not be legitimate.

If the expectation is inconsistent with the statutory scheme then, given Parliament's sovereignty, the expectation cannot be legitimate and arguably the Courts have no choice but to allot the case to the first category and, therefore, cannot weigh fairness against overriding interest.

If a pleaded expectation of substantive benefit cannot be characterised as legitimate for reasons of justiciability then, it may be argued, the Court cannot undertake this balancing task because the adversarial process is not well equipped to handle it and because to do so would, against the separation of powers doctrine, encroach upon executive policy-making. In these cases the Court may simply ask whether the respondent's explanation is rational or, in other words, it may only intervene if that explanation "outrageously defies logic or accepted moral standards" (*R v Ministry of Defence, ex p Smith* [1996] QB 517, 540). In other cases where, for example, the expectation cannot be characterised as legitimate in the absence of detrimental reliance, whilst the Court could weigh fairness against overriding interest, it simply is not required to do so because it recognises that the prerequisite of legitimacy is not present.

Issues of justiciability could be taken to influence both the allotment of a case into the first category and the balancing process within the third category. For starters, depending on different conceptions of justiciability and whether one is a red or green light theorist, one Judge's "non-justiciable" may simply be another's "need for restraint", two potentially very different things (to say, for example, that a polycentric or multi-levelled policy issue is non-justiciable is quite different from saying a Court should merely exercise restraint in relation to it). In addition, differing judicial approaches could develop as to when the test of justiciability should be applied. To apply it at the allotment stage is to inform the question of legitimacy. To apply it the balancing stage within the third category is to have found legitimacy of expectation notwithstanding potential justiciability problems "down the line". In the writer's view, the former approach is preferable: questions of justiciability should be considered alongside all the other circumstances, such as the statutory scheme and the presence or absence of detrimental reliance, when determining whether the pleaded expectation is legitimate. Only then, if a finding of legitimacy follows, would the Court weigh the interests of fairness against any allegedly overriding interest furnished for the decision-maker's change of tack. It follows that the question of legitimacy needs to be determined by reference to the date at which the expectation is said to have been frustrated.

THE NEW ZEALAND POSITION?

Although there are inconsistent decisions in the High Court on the legitimacy of expectations of substance and although Thomas J has made supportive comments in a number of cases (such as *New Zealand Maori Council v Attorney-General* (Court of Appeal, 13 June 1996, CA78/96) and *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58), to the writer's knowledge there is no majority decision of the New Zealand Court of Appeal expressly sanctioning legitimate expectations of substantive benefit. However, we do have the Court of Appeal's unanimous judgment in *Attorney-General v Steelfort Engineering Co Ltd* (3 March 1999, CA 143/98, reported at (1999) 1 NZCC 61,030 to get the ball rolling. The case concerned an import tariff concession granted to and enjoyed by Steelfort between 1987 and 1990. Customs changed its mind about the propriety of the concession and, a number of years later, sought recovery of the duty which it believed to be payable for imports from 1986 until the beginning of the 12 month period in 1989. The Court did not need to consider the abuse of power arguments but made the following obiter comments (at pp 10 and 12):

> In the United Kingdom it is well-established that a tax authority, like any other official, is under a general obligation not to act unfairly in the exercise of a statutory discretionary power. To do so can amount to an abuse or excess of power (*In re Preston* [1985] AC 835). Review of a decision for unfairness may be available where the conduct complained of is equivalent to a breach of contract or a breach of an assurance concerning future behaviour. The extent of the obligation to act fairly will depend upon the particular circumstances and the terms of the statute. The tendency of the Court is, however, against reading a statute in a way which removes protection for those affected by the exercise of power by officials.
>
> ...
>
> Accordingly, there appears to be room within the statutory regime applicable to the levying of Customs duty for the approach taken by the House of Lords in *Preston*. On that approach the Collector is amenable to judicial review if guilty of an abuse of power in the making of an amendment to an assessment under s 152B or in taking some other step in the collection of duty.

Here, it seems, are the primary seeds for the Court of Appeal's acceptance of *Coughlan*. In substance, the Court has said it would uphold a legitimate expectation of substantive benefit. Although arguments can be made both for and against the approach in *Coughlan*, it is probably only a matter of time before the New Zealand Court of Appeal follows the *Coughlan* line in expressly accepting, in "proper cases", the legitimacy of expectations of substantive benefit.

PRACTICAL IMPLICATIONS

In *Coughlan* the Court observed that the limits to the role of the legitimate expectation doctrine have yet to be finally determined and that the doctrine's application is still being developed on a case by case basis. In New Zealand, of course, the enforceability and scope of legitimate expectations of substantive benefit are yet to be explored in depth at appellate level. In the interim, what are the implications of *Coughlan* that public sector (and certain other) clients may wish to take on board or at least bear in mind or which, in the light of inaction by decision-makers, would-be applicants for review might exploit? Some of the implications are as follows:

(1) Where a body susceptible to judicial review has a discretionary power to provide services, benefits or concessions, thought might usefully be given to the way in which representations as to the provision of those services, benefits or concessions are being made to actual and potential recipients, including representations through Internet websites. Such bodies, and those with power to bind them, may wish to be wary about making unequivocal promises and representations (whether through policy statement or otherwise). It may be one thing to say "we hope to be able to provide this service" (unenforceable) but quite another to say "we promise to provide this service to you", particularly where that promise is relied upon (potentially enforceable). Policy statements and other representations may need to be qualified. Guidelines to staff may need to be prepared to alert them to the risks of making promises to members of the public. This may be particularly important in the health and accident compensation sectors where staff faced with patients enduring great suffering may make promises without due thought to whether they can be kept.

(2) If an authority wishes to depart from a representation, promise or policy statement, it should first give thought to:

(a) whether people may have formed expectations based on the relevant representation, promise or policy statement; and, if so,

(b) whether, in the light of the terms of the relevant promise or representation, the circumstances in which it was made, the nature of any statutory empowering environment, the possibility of detrimental reliance and the extent to which substantial questions of executive policy may be involved, such expectations or any of them could be considered "legitimate" by the Courts.

(3) Consideration may need to be given to more than one of the three categories set out above into which expectations might be allotted because a given policy or representation might give rise to expectations of both procedural and substantive benefit which, in all the circumstances, might be or become legitimate.

(4) If there is a real risk that a Court would find legitimate an expectation of substantive benefit, and if the authority nevertheless wishes to depart from the promise or representation that gave rise to that expectation, it should first consider whether there is a sufficient overriding public interest to justify the departure. Logical balancing processes should be fully (and carefully) documented at the time they are performed. In appropriate cases consultation with affected parties on the proposed departure may be helpful if not necessary.

(5) If there is a real risk that the Court would, as in *Coughlan*, decide that it would be an abuse of power to frustrate the promise or representation (there being no overriding public interest), the authority may then need to consider whether it should take steps to accommodate the expectation by alternative means of like kind or through compensation should it still wish to proceed. Not doing so may only increase its exposure to litigation. ❑

continued from p 306

Due to the scarcity of medical negligence litigation in New Zealand, there is little recent New Zealand common law on the standards of care of health professionals imposed by the civil Courts. The New Zealand Courts have traditionally adopted the *Bolam* principle.

The High Court has however recently shown a tendency to deviate from the straight *Bolam* test in a number of medical disciplinary cases. One example of this is the "reasonableness" test introduced in *Ongley v Medical Council* [1984] 4 NZAR 369 at 375, where Jeffries J stated that, in determining the meaning of "professional misconduct", the question to be asked was:

> Has the practitioner so behaved in a professional capacity that the established acts under scrutiny would be *reasonably* regarded by his colleagues as constituting professional misconduct? (Emphasis added.)

This test requires not only that a practitioner's conduct be regarded by colleagues as professional misconduct (or whatever charge is alleged), but that the colleagues' opinion is reasonable. Whether the colleagues' opinion is reasonable can only be determined by the adjudicators.

Smellie J provided a succinct summary of the New Zealand position in *Lake v Medical Council of New Zealand* (High Court, Auckland HC 123/96, 23 January 1998) at p 30:

> In the end it seems to boil down to this. If a practitioner's colleagues consider his/her conduct was reasonable the charge is unlikely to be made out. But the disciplinary tribunals and this Court retain in the public interest the responsibility of setting and maintaining reasonable standards. What is reasonable ... goes beyond usual practice to take into account patient interests and community expectations.

This clear statement confirms that in medical disciplinary cases, as in the law of negligence, the role of expert evidence in the determination of professional standards is persuasive, even highly persuasive, but not determinative.

CONCLUSIONS

- Reasoned decisions are essential to ensure procedural fairness. In this regard, England, where no reasons are required, is significantly behind New Zealand. The Medical Practitioners Act 1995 and the Dental Act 1988 do not require the relevant tribunals to provide a statement of reasons where the practitioner is found not guilty. Although the common law suggests that the appellate Courts will require a statement of reasons in all circumstances, this statutory position is to be regretted.
- The requirement that the Medical Practitioners Disciplinary Tribunal be chaired by a senior barrister or solicitor is a significant advance. The Dentists Disciplinary Tribunal and the Nursing Council should follow suit. There must be continuing vigilance to ensure that members of the disciplinary tribunals do not become de facto expert witnesses.
- The trilogy of charges available under the MPA assists in ensuring that offending can be dealt with by an appropriate charge. The English approach of having only one serious charge is restrictive, and pressures decision-makers into inappropriately categorising conduct into either serious professional misconduct or conduct that does not warrant criticism. The Dental Act and the Nurses Act should be brought into line with the MPA.
- Standards of conduct imposed by the disciplinary tribunals must be cognisant with the standards imposed in the civil Courts. ❑