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THE HOUSING (HOMELESS PERSONS) ACT 1977 - A VIEW

by T. John Lewthwaite*

The Housing (Homeless Persons) Act 1977 is a legislative measure of considerable importance in the field of welfare law; it introduces "lawyer's law" into an area previously regarded by many practitioners as the sole province of charity and party politics. Essentially, the Act, with its emphasis on rights makes the problem of homelessness at least partly a legal one.[1] It remains to be seen, however, how far lawyers and the courts will in the long term respond to the claims made upon them by the aggrieved homeless.[2] Indeed, it is pertinent to question how far actions of Housing Authorities under the Housing (Homeless Persons) Act 1977 can be challenged in the courts - bearing in mind the highly subjective wording of certain parts of the Act and the imperfectly developed form of administrative law existing in this country at the present time.

Background

The Housing (Homeless Persons) Act 1977, hereafter referred to as "the Act", came into effect on 1 December 1977, having started life as a private member's Bill, but eventually being adopted by the Government of the day in its determination to place a statutory duty towards the homeless upon Housing Authorities. This approach was felt to be necessary in view of the fact that in only 59% of local authorities were housing departments solely or mainly responsible for accommodating the homeless.[3] Not only this, 68% of authorities used bed and breakfast and other hostel establishments as accommodation for homeless persons. Furthermore, 60% of authorities refused help to non-priority groups as identified by the Government in Circular 18/74.[4]

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1 Of course, the problem has its roots in economic and political considerations. No complete answer can be found in terms of "the law".

2 For a summary of the position to date, and an indication of the methods available for enforcing the provisions of the Act, see Arden LAG Bulletin December 1979, 283; January 1980 14; March 1980 64.

3 Summary of returns to DoE Questionnaire, Appendix 1: Blunt Powers Sharp Practices (SHELTER; August 1976).

4 Ibid. Formerly, the duty - albeit of a limited and "temporary" nature - to provide accommodation for the homeless was imposed on social services authorities by s21(b) of the National Assistance Act 1948. In 1974 the Government, in Circular 18/74, asked Housing Authorities to *voluntarily* shoulder the burden.

Some of these practices of local authorities produced, amongst others, the effects of dividing families or forcing them to roam the streets during the day waiting for their evening shelter.[5] The Government's decision to take action was, however, seriously affected by a dispute as to the precise nature of the obligations which it proposed placing on Housing Authorities.[6]

On the one hand there were those who wished the duties to be strict and well-defined; on the other hand many influential persons and bodies desired the introduction of a large element of discretion for the authorities. In particular, the Association of District Councils was responsible for many amendments to the original proposals as published in the Bill. It was felt that strictly-defined provisions would over-advantage "defaulting Irishment, rent-dodgers, beach scroungers, queue-jumpers and the deliberate home-leaver",[7] and give an opportunity to various voluntary organisations to use the courts in establishing property rights for the homeless. In the result, the obligations imposed by the Act are weakened versions of those original proposals.

The Main Provisions

The first task is to define "homelessness" and "threatened homelessness". In Section 1 the Act refers to those who have no accommodation which a person or any other person who resides with him as a member of his family or in circumstances in which *the housing authority consider it reasonable*[8] for that person to reside with him is entitled[9] to occupy by virtue of an interest in it, court order, express or implied licence, etc. Also to be regarded as homeless are such persons as the victims of domestic violence, and others: ie those persons who cannot secure entry to their accommodation or could only be expected to do so by running the risk of violence from someone already in occupation. This provision extends to any member of the family of the person concerned.

However, two hurdles of proof must first be surmounted. The test of anticipated violence is "probability"; and fear resulting from threats to do violence must relate to the likelihood of those threats being carried out. In the Code of Guidance, authorities are asked to respond sympathetically to applications from women, and others, who are in fear of violence.

5 Bed and Breakfast, Shelter, 1974 and Blunt Powers - Sharp Practices, Shelter, 1976.

6 The effectiveness of the measures was weakened also by the fact that no extra funds were made available for the Act's implementation.

7 HC Debate, Vol 934, Col 1658. This view contradicts some previous research findings in respect of self-induced homelessness: eg J Greve, "London's Homeless" (1962) and B Glastonbury "Homeless Near a Thousand Homes" (1971).

8 (Emphasis added.) This is the first of many subjective powers of interpretation given to housing authorities; power which enfeeble the Act as a charter of rights for the homeless.

A person is "threatened with homelessness" if it is likely that he will become homeless within 28 days.10

Those provisions, together with many others, are to be interpreted according to the advice contained in the Code of Guidance which accompanies the Act. By virtue of section 12 authorities "shall have regard (to the Code) in the exercise of their functions." This mandatory requirement may well be of use in an action against an authority for abuse of discretion; but it does not mean that an authority must follow the Code's advice.11

Echoes of 1974

Circular 18/74 first defined housing need in the context of homelessness by reference to priority groups. Section 4 of the Act provides that Housing Authorities are obliged to secure permanent accommodation only where there are claims from persons who manifest a priority need. The Act sets out a number of priority categories, viz (1) persons who have one or more dependant children living with them or who might reasonably be exprected to live with them. "Dependant children" is not defined, but the Code refers to children under 16 (19 if in full-time education) and assumes that they need not be blood relations; (2) persons who become homeless or threatened with homelessness because of an emergency such as fire, flood, or other disaster; (3) persons (or anyone who resides or might reasonably be expected to reside with them) who are vulnerable as a result of old age, mental illness or handicap or physical disability *or other special reason.*12 In referring to "other special reason" the Code suggests, eg. consideration of the plight of homeless young people who are at risk of sexual or financial exploitation. Otherwise, the authorities in general regard the single as a section of the community quite well able to fend for themselves.13

The final category (4) is pregnant women, together with anyone who lives, or might reasonably be expected to live, with them.

The Secretary of State is, from time to time, empowered to specify further categories of persons in priority need.

9 Thus a trespasser, eg, will not usually be "homeless".

10 Court possession orders usually allow an occupier 28 days to vacate the premises.

11 It was shown in De Faco v Crawley Borough Council("The Times", December 13th, 1979) that the Code was something to which an authority had to have regard, although it did not have statutory effect.

See also Miller v Wandsworth London Borough Council ("The Times", March 19th, 1980).

12 Emphasis added.

13 The single homeless present a considerable social problem, one which the Act does little to diminish. See, eg, the After Six 1979 survey (discussed in "Roof" March/April 1980 p 48) of young persons who leave local authority care on reaching the upper age limit. S5 of the Supplementary Benefits Act 1976 imposes a limited duty on the SBC to provide accommodation for certain single homeless persons.

What are the duties owed to those persons who are homeless or threatened with homelessness?

Section 3 provides that a Housing Authority to whom application is made under the Act must make "appropriate inquiries" where it has reason to believe that the applicant is homeless or threatened with homelessness. Further inquiries are to be made after homelessness is established, to establish priority need and the fact whether the applicant became homeless or threatened with homelessness intentionally. Authorities are also empowered, but not obliged, to inquire whether the applicant has a local connection with the area of another authority. Where the authority has reason to believe that homelessness and priority-need are present, it has a duty to secure accommodation pending *a final decision on the applicant's case.* This duty to secure temporary accommodation applies even if intentional homelessness or local connection with another authority are present. It is section 4 of the Act which lays down the ultimate responsibilities of Housing Authorities to those who are homeless or threatened with homelessness.

(1) If the authority is not satisfied as to priority need, or if it thinks the homelessness is intentional the only duty is to provide the applicant with "advice and appropriate assistance".

(2) If the *authority* is satisfied that priority need exists, but that the applicant became homeless intentionally it owes a duty to secure accommodation for such period as will give the applicant a reasonable opportunity to obtain accommodation himself.[14]

If the authority is satisfied as to the priority need of someone threatened with homelessness (and is satisfied that he was no so threatened intentionally) its duty is to take reasonable steps to secure that accommodation does not cease to be available for the person's occupation.

(4) If there is no local connection with the area of another Housing Authority, where priority need exists and it is established that the homelessness is not intentional the authority owes the full duty to secure that accommodation becomes available for occupation by the applicant.

14 In Lally v Kensington and Chelsea London Borough Council ("The Guardian") 22nd March, 1980) Mr Justice Browne-Wilkinson ruled that an authority must given an intentionally homeless person a reasonable period of time; sufficient to reasonably enable him to obtain his own accommodation. In the present case the authority had acted illegally by imposing a 14 day time limit on the provision of temporary accommodation for the plaintiff, who had been found intentionally homeless.

Intentional Homelessness[15]

This concept, like the priority need categorisation, was introduced to allay the fear of local authority associations that wide-embracing and strongly-worded statutory duties would open the floodgates to all manner of claims. Not least from the undeserving.

According to section 17 someone becomes homeless intentionally "if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and *which it would have been reasonable*[16] for him to continue to occupy." A person becomes threatened with homelessness intentionally if he deliberately does or fail to do anything the likely result of which is that he will have to leave accommodation *"which it would have been reasonable for him to occupy."*[17]

An act or omission in good faith is not, however, to be regarded as deliberate where it occurs due to lack of awareness "of any relevant fact." However, reasonableness in relation to intentional homelessness falls to be assessed in accordance with the "general circumstances prevailing in relation to housing in the area."

Thus Housing Authorities are given a very broad discretion in assessing the reasonableness of an applicant's conduct. The general housing conditions in the area, eg, must be taken into account. This may mean that relative degrees of housing stress will determine the reasonableness of, say, leaving accommodation which the applicant considers unsatisfactory.

The reference to awareness of "relevant facts" introduces more uncertainty. Thus, eg, this may well cover lack of knowledge of entitlement to welfare benefits. But what of the person who becomes homeless after leaving accommodation upon receiving a *contestable* notice to quit? Is he to be blamed for not seeking legal advice? Is a person threatened with homelessness *expected* to contest his landlord's notice to quit?

15 Clearly, each case must be considered on an individual basis. In Williams v Cynon Valley Council (County Court) "The Guardian" 5th October, 1979, the general policy of an authority to treat as intentionally homeless all those who had been evicted for rent arrears was struck down as illegal.

In Afan Borough Council v Marchant (1979) JSWL 367 (County Court) the decision of the authority that a couple were intentionally homeless was found to have been arrived at in a manner which contravened the rules of natural justice. The council had considered evidence from a source which put only one side of the case. No consideration was given to the couple's side of the story.

16 Emphasis added.

17 Emphasis added. In Youngs v Thanet District Council, The Times, February 26th, 1980, Chancery Division, it was held that a local authority was wrong in judging a family intentionally homeless when they became homeless a second time - on the grounds that they had found intentionally homeless on a previous occasion. Homelessness under the Act was a matter of *fact*, not *status*.

All this may well mean, particularly when added to the duty owed by an authority to someone who is threatened with homelessness *unintentionally,* viz to take reasonable steps to ensure that accommodation does not cease to be available to him, that Housing Authorities have to assume an increasing social work role.

Local connection

When a Housing Authority considers that neither the applicant nor anyone who might reasonably be expected to reside with him has a local connection with its area, but that there is a connection with the area of another authority, it may notify that other authority.[18] The duty to secure accommodation will then pass to the notified authority unless some members of the applicant's household will thereby be placed at risk of domestic violence.[19] However, until any uncertainty or disagreement between authorities is resolved[20] the notifying authority is obliged to secure accommodation for the homeless applicant.

Accommodation

Where the duty to secure accommodation arises, section 6 stipulates the ways in which this obligation may be discharged. The authority may make a council house available; or secure that the applicant obtains accommodation from some other person, or give the applicant such advice or assistance as will secure that he obtains accommodation from some other person. Thus the Act does not provide automatic passport to council housing, nor does it insist that the accommodation offered be permanent. Although the Code of Guidance states that permanent accommodation should be secured as soon as possible, and that homeless persons should not have to spend a certain period in interim accommodation as a matter of policy, it also recognises that interim accommodation may need to be used as a last resort - eg, accommodation in "battered wives" hostels.

18 s5.

19 "Local connection" is defined in terms of former residence, employment, family connection or because of any special circumstances: s18.

20 Disputes between authorities are to be referred to arbitration by virtue of s5. Applicants are not parties to these disputes.

There is no provision in the Act as regards the *standard* of accommodation that must be secured but, as the Code of Guidance points out, any accommodation offered should be in line with standards laid down in general housing and public health legislation. However, the Act does make it clear that accommodation is "available" to an applicant under the Act *only* if it can be occupied by him "and by any other person who might reasonably be expected to reside with him." Thus, as stated in the Code, it should not be general practice to split families, ie children should be received into care only where there are "compelling" reasons, apart from homelessness, for such a course of action.[21]

Notification

On completion of its inquiries a Housing Authority must notify the applicant of its decision on the question of whether he is homeless or threatened with homelessness, and at the same time notify him of its decision on the question of priority need.[22] If the authority has decided that the applicant has a priority need it must at the same time notify him of its decision on the question of intentional homelessness and whether it has notified or proposes to notify another Housing Authority of his application. In cades where the authority decides that it is not under the full duty to secure accommodation it must also notify the applicant of its reasons. Once a decision has been reached under section 5, where appropriate, the notifying authority must inform the applicant whether it or the notified authority owes the duty to him to secure accommodation and give him the reasons why the authority subject to that duty is so subject.

This statutory requirement to give reasons may well prove important to an applicant who is aggrieved by the action, or inaction, of a Housing Authority in relation to its duties under the Act. Clearly a statement of reasons will help protest through a local councillor or MP. It will also help in laying complaints before the Local Ombudsman, and may give grounds for challenge in the courts.[23]

Penalties

Criminal offences of a distinctly Draconian nature are specified in section 11 of the Act. Three offences are created, viz knowingly or recklessly making false statements; or knowingly witholding information reasonably required by the authority; failing to notify the authority of changes in material facts occurring before notification is received under section 8.

21 Judge Mervyn Davies issued a declaration against Wandsworth London Borough Council. He found illegal its policy to restrict its discretion (as Social Services Authority) under s1 Children and Young Persons Act 1963, so not to provide assistance with housing for intentionally homeless families with children - even though that might mean the children would be received into care. ("The Guardian" 18th March, 1980).

22 s8.

23 Eg, a notification given under s8 might arguably form a "record" for the purposes of certiorari.

The first two offences require an *intent* to induce the Housing Authority to believe that he, ie *any* person, not merely the applicant, or any other person is homeless or threatened with homelessness or has a priority need or did not become homeless or threatened with homelessness intentionally.

The import of this provision is very wide; for example, it would cover an adviser to a homeless family, or a friend of the family, who satisfied the criteria set out in section II (above).

Whilst mens rea is required in the case of the first two offences, the third crime is one of *strict* liability - no proof of intent is required: "A person who fails to comply with subsection (2) abeve shall be guilty of an offence unless . . . ."[24] He is guilty unless he can show (a) he was not given an explanation by the authority or (b) he did receive the explanation, but had a reasonable excuse for non-compliance. Only the applicant can be guilty of this offence.

The authority must explain (to the applicant) the strict duty imposed by section II *and* the effect of the special defence to it, in "ordinary" language. It may be thought this imposes a difficult task on local authority staff unversed in the subtleties of strict liability, and defences. In order to explain technical matters in "ordinary" language it is surely necessary to have a sound technical knowledge of the subject matter.

Conclusion

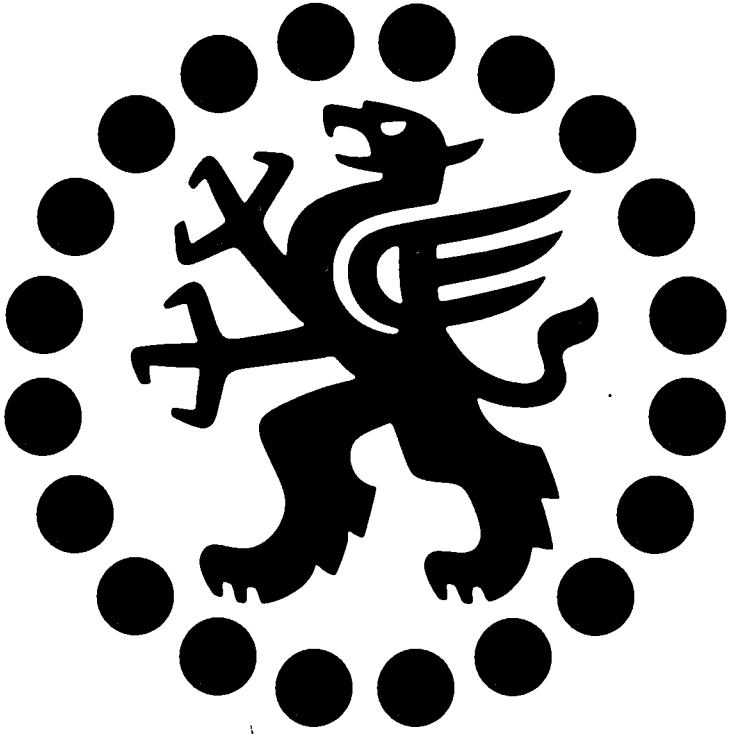
It can be readily seen that the Act has introduced labyrinthine procedures of Byzantine proportions in the process of laying down legal rights for the homeless. Ironically, given more sympathetic judicial attitudes, the previous statutory provisions - providing for the securing of "temporary" emergency accommodation - were much more all-embracing.

In fact, a state of flux exists at the moment. This situation is unlikely to radically change in the near future; the outer limits of the court's jurisdiction are not yet clearly defined. Advisers to the homeless are still subjecting the Act to the test of judicial legality. For example it has been recently established that an action for breach of statutory duty is available in respect of an authority's failure to observe the duties imposed upon it by the Act.[25] Furthermore, the duty to provide accommodation for the homeless under the Act is owed to all persons legally in this country - not merely to those persons having a local connection with a particular area of the country.[26]

24 Emphasis added.

25 Thornton v Kirklees Metropolitan Borough Council (1979) 2 AER 349 CA.

26 R v Hillingdon London Borough Council ex parte Streeting, The Times February 28th, 1980.



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ENFORCEMENT OF POSITIVE OBLIGATIONS IN RELATION TO FREEHOLD LAND

by CEDRIC D. BELL*

Since the latter part of the nineteenth century, it has been a clearly established principle of real property law that the burden of a positive covenant will not run with freehold land either at law or in equity The problem that a successor in title is not bound by a positive covenant entered into by an original covenantor is particularly acute where the initial parties to the covenant own separate parts of one common structure whether flats, maisonettes, shops or offices.

The purpose of the present article is twofold. Firstly, to demonstrate that initially the burden of both positive and negative covenants could run with freehold land in equity and that the reasons for the subsequent limitation of equity's assistance to restrictive covenants are not very convincing. Secondly to evaluate some of the major indirect devices which have been invoked by conveyancers over the years to circumvent the aforementioned principle.

EQUITABLE INTERVENTION

The fact that the burden of a positive covenant cannot run with freehold land at law has been firmly established for several centuries. Until the mid-nineteenth century, the common law approach was consistently followed by the Court of Chancery. In 1848, the Court of Chancery delivered judgment in the landmark decision of TULK v MOXHAY.[1] The plaintiff owned a piece of open ground in Leicester Sq., and several houses located in the Square. When the plaintiff sold the ground, the purchaser covenanted with him that the ground was to be kept "in an open state uncovered with any buildings". The purchaser covenanted on behalf of himself, his heirs and assigns with the plaintiff and his heirs. The ownership of the relevant piece of land eventually vested in the defendant. The latter's purchase deed contained no comparable covenant with his vendor, but he conceded that he had purchased with notice of the original covenant.

When the defendant indicated an intention to change the character of the ground, the plaintiff who still owned several houses in the Square obtained an injunction to restrain him. Lord Cottenham's reason for granting the injunction was founded upon the equitable doctrine of notice. He concluded that, if a person bought land with knowledge of a given covenant it would be inequitable to permit such a person to act in a manner inconsistent with the covenant.[2]

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1 2 Ph 774 2 2 Ph 774 at 777-778.

Although the covenant in this case was negative in substance, Lord Cottenham did not draw any distinction between positive and negative covenants. Seemingly, Lord Cottenham had established that the burden of any covenant, positive or negative, could run with freehold land in equity.

Between 1848-1881, the vast majority of cases to which the doctrine was applied concerned negative covenants. However, in MORLAND v COOK[3] which concerned a covenant to repair a sea wall, Romilly M.R. clearly asserted that no distinction was to be drawn between positive and negative covenants.

> "I am unable to understand the distinction endeavoured to be drawn between TULK v MOXMAY and the present case, on the ground that in that case the covenant was that the proprietor should not use the land in a particular manner, and that here the covenant is, that the proprietor shall contribute his quota to a common benefit. In my opinion there is no distinction between the two cases."[4]

Subsequently, in AUSTERBERRY v CORPORATION of OLDHAM,[5] the aforementioned case was explained on the basis that the covenant had created a rentcharge for the repair of the sea wall. A better authority is COOKE v CHILCOTT[6] which resolved that the burden of a positive covenant could run in equity provided there was notice.

In 1881, the Court of Appeal in HAYWOOD v BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY,[7] clearly enunicated that only the burden of a negative covenant could run with freehold land in equity. However, the reasons why the court imposed this important restriction are rather unconvincing.

The court was clearly influenced by the fact that nearly all the cases decided since 1848 in which the principle had been applied concerned negative covenants.

> "Let us consider the examples in which a Court of Equity had enforced covenants affecting land. We find that they have been invariably enforced if they have been restrictive, and that with the exception of the covenants in COOKE v CHILCOTT only restrictive convenants have been enforced."[8]
> Per COTTON L.J.

The court seemed to be inferring that if the principle did embrace positive as well as negative covenants, there would have been by 1881 numerous examples from case law of such an application. One explanation for the dearth in 1881 of decisions in which positive

3 (1868) L.R. 6 Eq. 252.

4 (1868) L.R. 6 Eq. 252 at 265, 266.

5 (1885) 29 Ch.D. 75D.

6 (1876) 3 Ch.D. 694.

7 (1881) 8 Q.B.D. 403.

8 (1881) 8 Q.B.D. 403 at 409.

covenants had been enforced in equity was that the equitable remedy of mandatory injunction, as opposed to the traditional negative injunction, only emerged in the period immediately prior to 1881 and mandatory injunctions are an essential pre-condition for the enforcement of positive covenants.

The decision in HAYWOOD v BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY,[9] may best be explained if one remembers the contemporary setting. The TULK v MOXHAY[10] principle was still at a formative stage, there was little authority upon which to assert that the burden of a positive covenant could run with freehold land in equity and the court may have refrained from endorsing the latter principle because of an inability to fully comprehend the consequences which would flow from so doing.

INDIRECT DEVICES

For nearly a century, it has been established that the burden of a positive covenant relating to freehold land will not run either at law or in equity so as to bind a successor in title of the original covenantor. Accordingly, property lawyers have utilised a number of indirect techniques and devices to ensure that such a successor in title will be bound by such covenants. This section will examine three such devices and will endeavour to demonstrate that none of them are without shortcomings.

Chain of covenants - Privity of contract exists between an original covenantee and an original convenantor. The latter remains liable to the former in respect of any covenant he has entered into even if he subsequently sells the land. Therefore, it is in the interests of an original covenantor to obtain an indemnity covenant from any person who buys the land from him. Identical covenants can be extracted from each successive purchaser thus giving rise to a chain.

In theory, the covenantee should be able to ensure that the current owner observes any positive covenant simply by indicating that he will commence proceedings against the original covenantor. In practice a chain of purely personal covenants is very unreliable. The effectiveness of such a chain is destroyed if one of the parties to it dies, disappears, becomes insolvent or if a party omits to obtain an indemnity covenant from his successor.

Enlargement of Long Leases into Freeholds - Another suggestion that has been proffered is that a continuing obligation to comply with a positive covenant could be achieved by utilising L.P.A. S.153. Under this provision, a lease which satisfies certain conditions can subsequently be enlarged into a freehold. The crucial part of the section for our purposes is subsection (8).

9 Supra note 7.

10 Supra note 1.

> "The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over rights and equities and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject if it had not been so enlarged."

If the word "obligations" is to be construed literally then it should extend to positive covenants, and the freehold created out of the enlarged long lease would be subject to positive covenants into whosoever hands it came.

Only leases which have the following characteristics are enlargeable. Originally the lease must have been granted for a period of not less than 300 years and 200 years have still to run at the time of enlargement.[11] There must be no trust or right of redemption existing in favour of the reversioner.[12] A further requirement is that either no rent is payable on the term or the rent has no monetary value. Finally, the term which it is proposed to enlarge must not be liable to be terminated by re-entry if a condition is broken.

A tenant wishing to take advantage of L.P.A. S.153 must execute a deed of enlargement. However, it is important to emphasise that enlargement is not dependent upon the tenant securing his landlord's consent.

One matter with regard to which there is a dearth of judicial decision is the effect of an enlargement on a reversion. One line of argument which has been advanced is that the result of enlargement is to bar the reversion in a manner comparable to its barring by way of a disentailing assurance. Such an approach would make it difficult to adopt the literal interpretation of "same obligations of every kind" extend-to positive obligations.

An alternative theory is more conducive to a literal construction of S.153 (8). This theory proceeds on the basis that as the pre-enlargement term would have been subject to a reversion so will the enlarged fee simple. Challis after considering the equivalent to S.153 (8) in the Conveyancing Act 1881 stated that the provision "might well afford a reason for holding that the reversion remains still on foot, notwithstanding the determination of the term."[13]

The main obstacle to this theory is that it envisages two fee simple estates co-existing in the same parcel of land and such a situation might be considered as infringing the STATUTE of QUIA EMPTORES 1289. However, a brief analysis of thirteenth century land law and the statute demonstrates that his obstacle is not beyond circumvention in this context. Before 1290, whenever land was conveyed a feudal tenure was created by the parties. The grantor and grantee respectively retained and acquired an estate in the property concerned.

11 L.P.A. S153 (1).

12 L.P.A. S153 (1) (a).

13 Real Property (3rd. ed.) 335.

This process was known as subinfeudation. (With subinfeudation there were concurrent fee simples). The STATUTE OF QUIA EMPTORES prohibited further subinfeudation but the ambit of the legislation was restricted to situations in which land was "sold to be holden in fee simple."[14] **It did not include terms of years.** The legislation only applied where there was a sale of land in fee simple. In 1958, T.P.D. Taylor writing in the "Conveyancer and Property Lawyer"[15] posed the following facts. Landowner lets property to another for 2,000 years at a Peppercorn rent but for a lump sum consideration. There is a sale of the land by way of the grant of a term of years, the STATUTE of QUIA EMPTORES is excluded and the relationship of landlord and tenant created. If the tenant subsequently enlarges the term, no element of sale is present and in Taylor's opinion no reason why the term and reversion should be united, as the reversioner's consent to enlargement is unnecessary. He endorsed the view that the reversion could survive an enlargement.

The method is rarely invoked. The foregoing analysis reveals uncertainty as to the effect of an enlargement on a reversion. The conditions which must exist before enlargement can be countenanced are unlikely to be encountered frequently. In 1965, the Wilberforce Committee in their report on positive covenants affecting land concluded that the device was "untried and artificial".[16]

Doctrine of HALSALL v BRIZELL - The principle enforced in 1957 in HALSALL v BRIZELL[17] can be formulated as follows:-

> "In some cases a positive covenant can be enforced in practice by the operation of the maxim 'qui sentit commodum sentire debet et onus.' This obliges a person who wishes to take advantage of a service of facility e.g., a road or drains to comply with any corresponding obligation to contribute to the cost of providing or maintaining it. The maxim cannot, however, be invoked where the burdened owner does not enjoy any service or facility to which his obligations attach or has no sufficient interest in the continuance of these benefits."

In HALSALL v BRIZELL,[18] a building estate was developed in 1851 the plots being sold freehold. The road and sewers remained vestedin the original vendors, by a deed of covenant the original vendors were declared to be trustees for the various purchasers and they covenanted to maintain and preserve these amenities for the purchasers and their successors. The purchasers covenanted that they and their successors would contribute "a due and just proportion of the maintenance costs." The deed reserved to the trustees the power to distrain for unpaid contributions. The defendants were the executors of a purchaser who bought a plot in 1931 and he took a conveyance

14 The literal words of the statute are "istud statutu locu tenet de terris verditis tenendis in feodo simplr tantu...."

15 (1958) 22 Conv (N.S.) 101.

16 Cmnd 2719. P.5.

17 (1957) Ch. 169; (1957 1 A11 E.R. 371).

18 Ibid.

subject to the covenants in so far as they might have been capable of affecting the land. The plaintiffs sued the defendants in respect of the annual levy.

Upjohn J. stated as a general principle, that the defendants' could not be sued on the covenants contained in the deed of 1851 for a number of reasons, one of which was that a positive covenant did not run with the land. He then made the following assertion.

> "It is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder....."[19]

He emphasised that if the defendants' did not wish to take the benefit of the deed they could not be compelled to pay the levy. However, he concluded that they did intend to invoke the benefit of the deed.

> "Therefore it seems to me that the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. Upon that principle it seems to me that they are bound by this deed, if they desire to take its benefits."[20]

The principle articulated by Upjohn J. was that anyone who takes a benefit under a deed must submit to the burdens imposed by it. However, this result is not supported by the old rules applicable to deeds despite the assertion made by Upjohn J. in his judgment. The old rule as to deeds was that where a person named as a party to a deed knowingly took the benefit of it he was bound by it whether or not he executed it. The rule was therefore, restricted to the actual parties to deed and did not apply to any other person.[21] Accordingly, in HALSALL v BRIZELL[22] Uphohn J. extended the ambit of the old rule for deeds.

The wide principle formulated in HALSALL v BRIZELL[23] was accepted by the Supreme Court of Canada in PARKINSON v REID[24] however, the latter case illustrates the doctrine's limitation. The case concerned two adjoining lots of land numbered 28 and 29. The owners of lot 28 (Holmes and Crowe) entered into an agreement under seal with the

19 (1957) 2 W.L.R. 123 at 132. 20 (1957) Ch 169; at 183.

21 *Lady Naas v Westminster Bank Ltd.* (1940) A.C. 366.

22 Supra note 17

23 Ibid. 24 (1966) 56 D.L.R. (2d) 315.

owner of lot 29 (Sanderson). Holmes and Crowe were constructing a stairway to the second storey of their building and the parties agreed that it was to lead up to the second storey of the building on Sanderson's land and that Holmes and Crowe could use the westerly wall of lot 29 as a party wall. In return, Sanderson his heirs and assigns were given the right to use the stairway with Holmes and Crowe who in turn covenanted with him that they would keep it in good repair and reconstruct it if destroyed. The agreement was registered. Lot 29 was subsequently conveyed together with the rights in the agreement to the Plaintiffs. Lot 28 devolved upon the defendants subject to the agreement. Following a fire, the defendants on an architect's recommendation, removed their building and stairway. The purpose of the plaintiff's litigation was to request the defendants to replace the stairway.

Counsel for the defendants' admitted that the agreement conferred on the owners of lot 28 the right to use the westerly wall on lot 29 as a party wall. The Supreme Court of Canada asserted that so long as the defendants' utilised this wall as a party wall they were bound to keep the stairway in repair, but the obligation would terminate when they ceased to use the plaintiffs wall. In finding for the defendants' the court emphasised that since the fire the defendants' had not used the plaintiffs' westerly wall.

Several commentators feel that of all the indirect devices, the doctrine provides the greatest promise of general usefulness.[25] However, the doctrine is not without shortcomings. In addition to the aforementioned limitation the question of who comes within the "benefit and burden principle" remains fluid. Clearly a successor in title to land or other property is included. In TITO v WADDELL (no 2)[26] Megarry V.C. statod that the principle "ought to embrace anybody whose connection with the transaction creating the benefit and burden is sufficient to show that he has some claim to the benefit whether or not he has a valid title to it."[27] It will be interesting to see if this assertion receives further judicial endorsement.

The authors of "Emmet on Title" suggest that the principle may not apply as frequently as is assumed by some observers. In a passage concerned particularly with obligations to pay for drains and private roads they express their concern as follows:-

25 Alan Prichard "Making Positive Covenants Run" (1973) 37 Conv. (N.S.). 194 at 196.

26 (1977) 3 A11 E.R. 129.

27 (1977) 3 A11 E.R. 129 at 303.

> "It will usually be found, for example, that after a number of years roads have been dedicated to the public even if the liability for their maintenance has not passed to the local authority. Similarly drainage pipes will often be found to have become public sewers vested in the local authority under the Public Health Acts, so that they can be used irrespective of private rights under deeds containing covenants. For these and other similar reasons it will not be often that a successor in title will be obliged to rely on rights granted by the deed purporting to impose the burden of covenants on him."[28]

CONCLUSION

Space does not permit consideration to be given to other indirect devices which are utilised to enable the burden of a positive covenant to run with freehold land. However, all of the indirect devices have shortcomings, none are foolproof. It is submitted that the present law is unsatisfactory.

In 1965, the Wilberforce Committee recommended that the burden of a positive covenant should run with the land encumbered and the benefit with the land advantaged so long as the positive covenant related to the use of land and was intended to benefit other specified land.[29]

Unfortunately this recommendation has not yet been implemented. A reappraisal by Parliament of the Committee's findings is long overdue.

28 Emmet on Title (17th ed.) 609 & 610.

29 Cmnd. 2719, paragraph 53.

THE OFFICE OF ATTORNEY GENERAL

by

Rt Hon S C Silkin QC MP (then Attorney General)

Now you have said who I am, Mr Chairman; I always like to make it absolutely clear in case there is any confusion. You read almost every-day in the newspapers about Silkin having done this, that or the other. If the column is accompanied by a photograph of a rather sleek, happy, well-fed, smiling, gentleman, who looks as though a butter mountain wouldn't melt in his mouth, then that is the Minister of Agriculture, Fisheries and Food, casually tossing his green halfpennies in his pocket. If, on the other hand, it is accompanied by a photograph of a rather depressed, gloomy, worried looking person, then you may be quite sure it is the Attorney General, probably trying to recover his balance after some form of battering or other.

The job of the Attorney which goes back in one form or another to the 13th Century, when it had a different form from today, is one about which really very little is known, I think, or understood by the general public. That is not surprising, because when we do appear in the press or on the television, it is usually bocause of some particular case or event in which one figures; one is either doing wrong in having refused to consent to a prosecution or doing wrong in having consented to a prosecution, or persecuting somebody by bringing them before the court for contempt, or something of that kind. And the public, I think, not unnaturally, gets the impression that that is the kind of thing we go around doing; we Attorneys General spend all our time hunting for innocent journalists - if there are such things - to persecute and doing things of that kind. But the truth of the matter is that that part of the job is really only probably 5 or 10 per cent of the total. So I would like, if I may, to begin by saying a little about the 90-edd per cent.

I ought perhaps to mention first of all that I believe you have already had the pleasure of an address from Peter Archer, the Solicitor-General, and of course he and I share the job in effect, and we share it out between us as we think fit. The Law Officers are not strictly bound in the sense that the Attorney General has one specific set of duties and the Solicitor General has another; it depends upon what you find convenient, except that there are certain consents which I am entitled to give which he isn't unless I give him my authority. But, broadly speaking, we have learned how to divide our work between us and, almost inevitably, I think, the major work of the Attorney General is the work involved in being the Government's Principal Legal Adviser, whereas a very great deal of the work which Peter does is on the criminal side and the court side; my own philosophy is that I don't go into the courts unless I have to; because it takes up far too much of one's time and I have to be available at a moment's notice and you can't be available at a moment's notice if you are in the middle of a long and difficult case, particularly if it happens to be in Nottingham

or even Winchester. So, as much as possible, I leave that side to him and concentrate on the advisory work. But of course if one gets a particularly difficult or particularly sensitive criminal, or civil case then I may find that, whether I want to or not, I have to come into it.

So let me say something about the advisory side first, because that is the side which is almost completely unseen by the public and yet it is the major part of what I do. It is what I spend my evenings doing, what I spent up till 1 o'clock this morning doing, what I spend my weekends doing and what I spend most of my days doing, and if I have to ask my wife to turn the television down a bit in order to do it, I tell her to do so or ask her to do so. And it consists substantially, as the Principal Legal Adviser to the Crown of advising my colleagues - the Prime Minister and any other Minister in the Government, the Cabinet, the Cabinet Committees which are not officially supposed to exist, but which everyone knows about - on any matters or any aspects of what they are doing which have a legal or a constitutional significance or, going beyond that, which have a legal significance in the sense of what one might call general propriety verging on the constitutional. Of course there are certain areas which are very close to the other field of work, the criminal side, where I am naturally called in much more closely; for instance on matters which the Home Office are considering, amendments of the law relating to all kinds of subjects, like freedom of information for example, I will naturally be advising very much more closely. But the range of matters on which the Attorney has to advise goes far beyond those; it really covers the whole field of Government. The sort of problem that he has to advise on are problems as to whether Ministers can do certain things that they want to do, whether they are within the law, whether they are the kind of actions which would be deprecated by the Statutory Instruments Committee as being what they call "an unexpected use of a power", whether they are constitutionally proper, and more and more these days, whether they are likely to get us into trouble with the European Community, and in particular, of course, the court in Luxembourg.

Lord Denning, whom I am allowed occasionally to mention, had a famous aphorism about the Treaty of Rome flowing up the rivulets of English law; you probably know it much better than I do. But it was a wonderful simile in which you saw the Treaty of Rome gradually flowing further and further across the land. And I now tend to add to that, it not only does that, it very often also drives us up the creek, because the way of thinking of the Community Court and our partners in the Community are very different from our own way of thinking; a very method of interpretation from ours is something that we have to get used to, and we have to be quite sure of ourselves when we do bring out a new Bill or Statutory Instrument; in the case of a Statutory Instrument, that it is not merely within the powers of the UK legislation but also that it does not conflict with the competition rules, for example, of the Treaty of Rome. And similarly, when we give State Aid and so on, and that in itself involves an immense amount of work and study, which, together with my staff of 8 lawyers, I have to carry.

One thing I would like to say about that. People ask sometimes whether there is a different approach as between a Conservative Attorney General, a Conservative Law Officer and a Labour one. Obviously your politics are different but in relation to the particular job that one is doing and the way one does it, there ought not to be any difference of approach, because you are seeking to advise on the same basis of law and there should be no difference between the advice that is given by a Labour as opposed to a Conservative Attorney General any more than between a Labour and a Conservative Solicitor, for example, in advising a client. But there can be considerable differences in approach and in philosophy and the way in which one looks at the job not specifically for political reasons. I have discovered that as between my immediate predecessor and myself, in one respect in particular, there has been a very profound difference. And I discovered it not by being opposite him when I was on the Opposition Front Bench, but by reading an article which he had written after the decision of the House of Lords in *'Gouriet'*, upholding myself and my actions in a very generous way, whilst at the same time pointing to the differences of approach as he saw them. I have found that particularly interesting, because his approach to the Office of Law Officer was, and he put it in these very words, "The Attorney General, in his relation to his colleagues, should maintain (what he called) 'a formidable aloofness", and he said that when advising the Cabinet he should walk into the Cabinet Room, give his advice and walk out again. That is one way of doing the job, but it has never been my way and I was surprised frankly when, having done the job myself for some years, I discovered that that was his way. Because I have always taken the view that you are there to try not only to keep your colleagues out of the courts, which is one of your main functions, rather than to represent them in the court, but also to understand what it is that they are seeking to achieve. It is not enough simply to have presented to you a set of instructions which says "This is what we want to do and this is how we propose to do it, can we do it that way?" Answer: "Sorry, no, it is ultra vires or it is contrary to regulation so and so of Brussels." But you have also, in my view, if you are going to be of the greatest value in Government, got to think, "If he can't do it that way, how can he do it? Is there a way in which he can legitimately do it which does not conflict with the law and which comes at least as near as possible to carrying out his policy?" For example, when we came into difficulties with the Temporary Employment Scheme, which is a very valuable scheme, the Commission complained about it. They said it was a direct subsidy to UK firms and therefore unfair competition. At the same time the purpose of it was not to subsidise UK firms but rather to keep people in jobs, and so I was naturally asked to advise on whether the Commission were right about it and I had to put in the word "probably" just to safeguard myself in case a Commission spy was around. Having done that, I then thought, well, what is it that we are really trying to achieve and having thought that, that was really the genesis of the short time working scheme which has very much the same effect. In fact I think it is believed to be rather better from an employment point of view but does not conflict with the Treaty of

Rome or the Regulations. And I think that unless one is willing to do that and has that sort of approach to the job then one really is not doing it in the way it ought to be done. There is another thing that strikes me about this difference of approach between Peter Rawlinson's and mine, as you will hear when we come to the part of what I have to say about prosecution.

When one is balancing the public interest on whether to prosecute or not to prosecute in cases where the Attorney's consent is required or in other cases that may come to one, the balance of public interest must in many cases quite properly involve considerations which are of importance to a particular Department. For example, there may be very important international implications in a particular prosecution, where the Foreign Secretary has an interest in what you are doing when you are deciding whether to give consent or not. And I find that unless I really know intimately the people that I am dealing with when I go to them and say, "Look, I have this case and I would like to know your public interest views about it and what you feel about it, tell me if there are any points of importance that I ought to consider before making up my mind about it," I am at a disadvantage. I like to know what sort of a chap it is I am talking to and to be honest the extent to which I can assume that when he says something he really means it or he only means half of it and equally, since he has got to trust my judgement, he has got to know what sort of a chap he is dealing with and he has got to trust my judgement again and again and again, particularly on those issues like the question of what we can legitimately do in relation to the EEC or in relation to possible challenge of administrative action in the courts. And I don't believe that you can really do those things successfully with a policy of formidable aloofness. However, that is a matter not of politics but of philosophical approach, if you like, and, apart from that kind of thing, you won't find very much difference between the lawyers on the one side of the House, the Law Officers, and their Shadows on the other, and we do have a certain amount of contact. I will go and see my opposite number if I want to make some structural change, for example, in the way I receive the advice I am getting, and I discuss it with him, because, after all, there is the barest possibility that he might be in my job within the next 10 years, so he has a right to be consulted.

That is a sketch of the major part of my job. Let me go on if I may to the other side, the side that is concerned with prosecutions and contempt of court and the amorphous area where the Attorney General is described, rather pompously, as being "the guardian of the public interest." Part of his job is to give or withold consents and in various other fields he has to make decisions in a way which is totally independent of party politics, not independent in the widest sence of politics, but of party politics. When I first took this job on, being, if I may explain to you, a very quiet and diffident sort of person, it never for one moment occurred to me that before long the media would be customarily speaking about me as "the controversial Attorney General." I have discovered in fact that all Attorneys General are controversial, and it is just a matter of degree, and it is necessarily a controversial

job. And that is because many of the decisions involve conflict, not necessarily between good principles and bad, but between conflicting aspects of the public interest, where the balance may be a very fine one, or between what you know to be right but equally know will be intensely unpopular among certain sections of the community. These sections may be very influential sections, may include your own friends, but you cannot allow that to influence you. But I comfort myself with the thought that it is not a unique position, because it really in a sense applies to Judges and Magistrates; they have the same sort of conflicts and the same dilemmas. The difference I suppose is this. They have an immunity from answering directly for what they do; they do not have to come and explain themselves in Parliament; they may get attacked in the media it is said that it is very unfair that they should be attacked in the media; we do not normally attack them in Parliament on the grounds that they cannot answer back. It is one of those myths that I am not too sure about myself, because I have myself been a recipient of answers back from the judiciary. But as Attorney General, if I make a decision, I cannot be too careful, because every decision I make as Attorney General I make knowing that it may in one way or another come into the public gaze at some stage. I make those decisions knowing that any Parliamentary colleague can ask me why ever I did something which is so lacking in judgement or ordinary political nous, or alternatively why I did not have the courage to do it. That is why, for example, in 1977 I was able to be castigated by the Court of Appeal on the ground, which the House of Lords fortunately later said was spurious, that I was wrongfully dispensing with the law. And in 1978 I was able to be castigated by certain elements of the press, in my belief, with equal wrong-headedness, for refusing to dispense with the law. Well one is bound to ask the question, and some have asked, whether the Attorney General is really necessary and whether these dilemmas are really necessary.

I do not know whether you have heard the story about a juror who, when he went into court in the morning, asked the Judge if he could be excused service that day, and when he was asked why, in some embarrassment, he replied, "Well, to tell you the truth, my Lord, my wife is due to conceive today." The Judge thought this over for a while, and then he said, "I am not sure whether you are telling me the strict truth but I am sure you are trying to do so. At all events, I will release you, because whichever it is I have no doubt you ought to be there." I, too, feel that I ought to be there and if I were not I cannot help feeling that my Parliamentary colleagues would invent me in order to enable me to be there, because they simply would not be satisfied, criticising a functionary who could not answer back and could not be pressed very hard to disclose the factors in the public interest that led to his decision and to try as best he can to defend them against disparagement and against ridicule.

But the justification for an Attorney General is not, despite that a purely masochistic one. The knowledge that you may be called on to defend any decision that you make even one made at 2 o'clock in the

morning when you would be sooner resting your weary head on your pillow, is a very powerful influence in preserving a well balanced judgement. May I just digress for half a minute on the subject of resting one's weary head on a pillow. since it is not wholly divorced from what I was saying. Some of you may possibly remember a case when I had to appear very suddenly before the Court of Appeal not the famous case, but one called *'Holiday Hall'*. The *'Holiday Hall'* case was one which was concerned with the Government's then "sanctions" policy. Unhappily, someone on the Government's behalf had written a rather ill-advised letter and it had got to the stage of litigation. Late on Friday night, the Court of Appeal said that they must hear from the Department of Employment on Monday morning, and at that stage, late on Friday night, my officials were told about it and they told me and we looked at it and we decided that it looked as though someone had made an awful boob which we could not justify and we spent the whole of Saturday and Sunday, with Ministers flying backwards and forwards and Treasury Counsel looking up the law. By the end of Sunday we had got what we thought was exactly the right formula, exactly the right words for me to say to Lord Denning and his colleagues in the Court of Appeal on the Monday morning, in which we would eat humble pie and say, "Sorry, it should not have happened, we made a mistake. But we want to make it clear, that we maintain our sanctions policy" - for it was vital to make that quite clear and everything was in order and everybody had gone home, including myself, and I sank wearily into bed and at about 11.30 at night, when I had just got off to sleep, the telephone rang and my wife passed the phone over to me and a voice said, "This is Jim, Sam, I just rang up to find if everything was alright for tomorrow." Which was a very nice thing for Jim to do.

Having, I hope, justified the existence of the Attorney General, may I next ask what in fact he is. This is the difficulty I meet wherever I am introduced to a foreign lawyer because they always say that I must be the Minister of Justice, and I say I am not, and they say, "Who is the Minister of Justice?" and I say his top part is the Lord Chancellor and his bottom part is the Home Secretary, a bit is the Secretary of State for Trade and a bit is me. And this is all very difficult for them to understand, even if I refrain from referring to Scotland and its own system and its own Law Officers.

But one thing I am sure you will know, with your constitutional knowledge, is that despite my duties in connection with prosecutions, I am not a Minister in charge of the prosecution service. In some countries the Attorney General is popularly so described, in the Canadian provinces, for example. But my prosecution functions are very limited indeed in character. As I said earlier, certain offences can't be prosecuted without my consent. I am in the process of reducing the number of them, if I have enough time left in the next few weeks. They are mostly the most sensitive, but they are not all the most important. A lot of other offences require the Director of Public Prosecution's consent or are customarily prosecuted by him and they are, on the whole, the most serious offences. Now the Director is not a member of

my staff. He is an independent figure. I am, by statute, responsible for his general superintendence, and I am permitted to give him directions, but I never have; I don't think anyone else ever has. We consult together and the process of consultation will normally produce consensus. And the Director in his turn has power to call in and take over any prosecutions, but apart from the few categories where he customarily does, because his consent is required by statute, or because they are particularly important, he does not normally do so and therefore the vast majority of prosecutions are carried out by and under the responsibility of the Police, which means the Chief Constable. And Chief Constables are not responsible to me and indeed in carrying out that function they are probably not responsible to anybody. Just to illustrate the extent of their power, even at the Central Criminal Court, which one almost imagines is virtually run by the Director, in fact some 80 per cent of the prosecutions are Police prosecutions and it is only the remainder, and not even all the remainder, which are the Director's, because there are prosecutions by other Departments, like Customs and Excise and the Revenue as well, over whom I have no control. So you will see that I may be able to exercise some degree of influence but very little control. I can help to set a sort of pattern, as for example, where I promulgated guidance for the Director in relation to identity cases and hoped that the Police would follow. They, broadly speaking, have. And then again I gave guidance on the much misdescribed and misunderstood and rarely exercised practice that has come to be known as "jury vetting." On that I gave guidance to the Director and the Police should follow it, but I cannot exercise any influence on the direction or the standards of Police work and still less can I attempt to shape the prejudices of Chief Constables.

This is something of very considerable importance, because, if you think about it, all the Police resources go into the kind of investigations that the Chief Constables think they ought to go into and if the Chief Constable in Greater Manchester has a particular hate about some aspect of life well a lot of Police resources will go into that. It does not stop there, because the effect of Police resources going into investigating particular types of offence means that it is those types of offence which will most often come to the court and therefore the court resources, which might in certain areas perhaps be better employed than pursuing colourful magazines or over-insolent youths, are put largely on that kind of thing. And then, in addition to that, since Legal Aid is given to those who appear in the courts and since the prosecution services are concerned with prosecuting those who are charged by the Police, and since the courts themselves and the juries and everybody else is dealing with the end product of these investigations, you will see that an enormous amount of public resources really follow the policies of the Chief Constable. They do not follow my policy, because I certainly have only the least bit of influence and I am quite unable to advise them on how they should employ their resources.

My Parliamentary colleagues do very often ask me questions and maybe burn with real or synthetic heat when they complain about the failure to arrest or try or even sometimes impeach pickets or city sharks or racial bigots, or perhaps I should say sturdy trade unionists, influential businessmen and lovers of free speech. Whilst I refer those questions to the Director and ask him to look into them and then I can make a comment, it is really the Police that are doing the job and they who are responsible primarily. So the question really is Is this really the best prosecution system? And this one of the major questions which the Royal Commission on Criminal Procedure will be looking into. It will be looking into questions of course of civil liberties, judges rules, the right of silence and all kinds of matters of that kind, but in addition to that it will be looking into this whole question of whether our system of prosecution is a soundly based one or whether, as in Canada, for example, where I did a little study tour last summer, it is not a better principle that the process of investigation should be totally divorced from the responsibility for prosecution. I happen to think that that is right, that they should be divorced, but we must see in due course what the Royal Commission have to say about that. What I have to ask myself, and what they will have to ask themselves, is whether it might not be a better thing for the Attorney General to be in fact as well as he is in name or in theory at the head of the prosecution service, as he is in Canada and the United States, although there, of course, you have the complications of the federal system and the States and Provinces; whether it would not be better to build up a national or regional prosecution structure and to require of the Police that they should concentrate on their investigating functions, which on the whole they discharge so admirably, and not impose their view of social mores on the area which they control. Because, if the Attorney General imposes his view of social mores, at least he can be called on to account by the elected representatives of the people in the House of Commons. I can't think of any more appropriate place for the very delicate task of balancing all the rights and freedoms of the individual, the right to live in peace and free from violence just as much as the right to say freely and openly and will all the vigour a Member can command that there has been no worse Attorney General for the last 400 years.

THE DOMESTIC VIOLENCE AND MATRIMONIAL PROCEEDINGS ACT 1976

by Kevin Scott*

Introduction

The Domestic Violence and Matrimonial Proceedings Act 1976 (hereafter referred to as the 1976 Act) was enacted in order to provide a more effective and accessible remedy for spouses in need of injunctions to restrain molestation (or regulating occupation) and also to extend the remedy to men and women living together as man and wife although not legally married.

The Act was made necessary because of a number of limitations in the pre-existing law.

The Matrimonial Homes Act 1967 gave a spouse a statutory right of occupation in the matrimonial home which was enforceable against third parties but the House of Lords decision in *Tarr* v *Tarr*[1] held that, while the Act allowed either spouse to apply to the court for an order "regulating" the exercise by either spouse of the right to occupy the dwellinghouse, the court had no power to exclude an owning spouse from the matrimonial home completely. This stifled any use of the 1967 Act as an effective remedy against a spouse perpetrating violence. The decision was reversed by s 3 of the 1976 Act which substitutes for the word "regulating" the words "prohibiting, suspending or restricting."

The courts had power to grant injunctions restraining molestation by a spouse or regulating a spouse's right to occupy the matrimonial home when proceedings for divorce, mullity or judicial separation were pending, but there had to be some sort of matrimonial proceedings pending. This was the main obstacle to providing effective relief for spouses suffering from marital violence. A wife was often in need of immediate protection and in a distraught condition and not able to make an important long-term decision such as divorce, which she would have to do if she sought a non-molestation injunction.

Improved Procedural Remedy

S 1(1) of the 1976 Act, therefore, abolishes the need for injunctions restraining molestation or regulating occupation to be ancillary to matrimonial proceedings. It provides that the county court may grant injunctions on application by a party to a marriage, restraining the other party to the marriage from molesting the applicant or a child

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1 1972 2 AER 295.

living with the applicant or excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included or a part of the matrimonial home; or requiring the other party to permit the applicant to enter and remain in the matrimonial home, "whether or not any other relief is sought in the proceedings."

No reference is made to the High Court since it was felt to be unnecessary to do so. The Lord Chancellor said in the debates on the 1976 Act in the House of Lords that the practice of the High Court only to grant injunctions when they were ancillary to other matrimonial proceedings could be altered by an amendment to the Rules of the Supreme Court, and these have now been amended so as to substantially bring the jurisdiction in the High Court in line with that in the county court under the 1976 Act.

As far as spouses are concerned, the 1976 Act involves no alteration of substantive law but simply improves procedural remedies.

Domestic Violence and Cohabitees

At the Committee Stage of the 1976 Act, a clause was intreduced to enable injunctions to be granted between persons living together without being married provided they were living on a stable basis in the same household. S 1(2) of the Act provides that s 1(1) shall apply to "a man and a woman who are living with each other in the same household as husband and wife" as it applies to the parties to a marriage. The intention of the Act appears plain 'cohabitees' were to be placed in the same position as married couples so far as the new remedies under the Act were concerned. The courts have, however, had great difficulties establishing the meaning of s 1(2).

In *B* v *B*[2] Bridge LJ and the other judges said s 1(2) was entirely procedural and did not alter the substantive law as to the rights of the parties to occupy premises, so where the man was sole tenant of the house the woman had no right to exclude him, and she had no statutory right of occupation to enforce such as a legal wife would have under the Matrimonial Homes Act 1967. In *Cantliff* v *Jenkins*[3] the man and woman were joint tenants but the Court of Appeal saw no distinction between this situation and that where one party was sole tenant. In *Davis* v *Johnson*[4] the Court of Appeal overruled these earlier cases, stating that the Act did enable a woman to exclude a man from a house of which he was sole tenant where it was necessary to prevent violence. The House of Lords upheld the decision, although rebuking the Court of Appeal for departing from the principle of *stare decisis* by overruling their own previous decisions.

The law is now clearly that a cohabitee has the same rights as a spouse under the Act. The clear intention of the Act was to provide a remedy for cohabitees in danger of violence and this has now been upheld, despite a notable division of judicial opinion which arose largely because of concern over whether Parliament could have intend-

2 1978 2 WLR 160. 3 1978 2 WLR 177. 4 94 LQR 324.

ed to override vested rights of property, but as A A S Zuckerman[5] points out, it was not necessary to assume that a sole owner's or tenant's property rights are overridden by injunctions regulating occupation by cohabitees. When a woman moves into a man's house and they set up a joint household, the woman acquires a licence to remain in the house revocable only on expiration of reasonable notice. Orders which are granted to exclude the sole owner when his violence makes the licensee's occupation impossible and only so as to enable other arrangements to be made, only amount to enforcement of existing rights and no more. It is a pity that the Court of Appeal in *B* v *B did* not see that even if s 1 was wholly procedural the sole owner or tenant could still have been excluded by upholding the woman's existing right to be in the house.

There remains a problem as to whether cohabitees can apply to the High Court for orders under s 1 of the 1976 Act. Although the Rules of the Supreme Court have been amended so as substantially to bring the jurisdiction of the High Court in line with that in the county court, Order 90 Rule 17 provides that a "party to a marriage" may apply for an order under s 1(1) of the 1976 Act although no other relief is sought and this may be limited to a party to a legal marriage. It may be, however, that "party to a marriage" is to be interpreted in accordance with s 1(2) of the 1976 Act so as to include cohabitees. The point is unclear and undecided.

The Criteria for Granting Injunctions

The 1976 Act is silent as to the criteria to be considered when the courts are exercising their jurisdiction to grant injunctions but it seems that the court will exercise its discretion under the 1976 Act in the way it did previously. The approach of the courts before the 1976 Act may be illustrated by the case of *Walker* v *Walker*[6]. In this case the Court of Appeal said that where there was a finding that life would be impossible for the wife and children if the husband remained in the house, a heavy burden was cast upon any person who said that the husband should remain in the home. In the recent case of *Spindlow* v *Spindlow*[7] under the 1976 Act, the parties were unmarried and the applicant left the respondent and went with the two children to live with neighbours in overcrowded conditions. The county court judge's order to exclude the respondent was upheld. Ormrod LJ said that someone had to provide a home for the children, and even though there was no real evidence of violence, it was impossible for the parties to live together and in the circumstances of the case only the applicant could provide a home for the children so she must go back and the respondent must leave. It seems, therefore, that the court will continue to approach the problems raised by applications for injunctions in the broad fashion in which they did before, weighing all the circumstances, and thinking particularly in terms of whether or not it is possible for the parties to live together nad in terms of homes for the children and the parties to the marriage.

5 1978 2 WLR 182.

6 8 Fam Law 1978 p 143.

7 1978 3 WLR 777.

The Power of Arrest

The injunction may still, however, be an inefficient remedy if it is not backed by effective enforcement procedures. Usually an injunction can only be enforced by civil law enforcement agencies and there are several problems with this method of enforcement. If satisfied that an injunction has been breached the court may order the breaker to be imprisoned or fined and must then issue a warrant for the arrest of the spouse in breach of the injunction which will be carried out by a tipstaff in the High Court, and bailiffs in the county court, but these only have jurisdiction in the court area and only work in the daytime. Delay is caused which can be fatal in cases of serious violence. The police have a duty to assist the bailiffs but not to take the initiative in making an arrest. They have adequate powers under the criminal law to intervene in cases of domestic violence but discretion to prosecute is absolute and the police have been reluctant to intervene in what they see as domestic disputes.

The role of the police is extended by s 2(1) of the 1976 Act, which provides that a power to arrest may be attached to an injunction containing a provision.

> "(a) restraining the other party to the marriage from using violence against the applicant, or
>
> (b) restraining the other party from using violence against a child living with the applicant, or
>
> (c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included."

if the judge is satisfied that the other party has caused actual bodily harm to the applicant or to the child concerned and considers that he is likely to do so again.

If a power of arrest is attached to an injunction, a constable may arrest without warrant a person whom he has reasonable cause to suspect of being in breach of such a provision of that injunction as falls within s 2(1)(a) (b) or (c).[8] The constable must bring the arrested person before a judge within 24 hours and he shall not be released within this period of 24 hours except on the discretion of the judge but must not be detained longer than 24 hours.[9] As soon as he arrests the person suspected of breaching the injunction, the constable must seek the directions of the High Court or county court as to the time and place at which that person is to be brought before a judge.[10] The Rules of the Supreme Court[11] provide that a copy of the injunction to which a power to arrest is attached must be delivered to the officer in charge of the police station for the applicant's address. The Rules also provide that a judge before whom the arrested person is brought may exercise the power to punish him for disobedience to the injunction notwith-

8 s 2(3) Domestic Violence and Matrimonial Proceedings Act 1976.

9 s 2(4) Domestic Violence and Matrimonial Proceedings Act 1976.

10 s 2(5) Domestic Violence and Matrimonial Proceedings Act 1976.

11 SI 1977 Nos 534 and 615

standing that a copy of the injunction was not served on him, and no application for committal was made.

In *Lewis* v *Lewis*[12] the Court of Appeal said that the power of arrest could be attached in any matrimonial proceedings in which injunctions were sought in one or other of the three forms set out in s 2(1) and was not limited to applications under the 1976 Act. They also emphasised, however, that the power of arrest was not to be regarded as a routine remedy but as "a very useful remedy in exceptional cases where men and women persistently disobey injunctions and made nuisances of themselves to the other party and to others concerned."[13]

His Lordship Ormrod LJ also said that notice should be given to the other party in an application for an injunction, that it is proposed to ask for a power to arrest, because the other party may wish to submit to the injunction but oppose the addition of a power to arrest.

In *Crutcher* v *Crutcher*[14] a wife sought by originating summons in the Family Division an injunction to restrain her husband molesting her, a power to arrest to be attached. Payne J said that if it was desired to obtain in the High Court a power to arrest at the same time as an injunction, proceedings for some other substantial relief must have been started or there must be the usual undertaking to take proceedings forthwith. This case is, however inconsistent with *Lewis* which holds that the power of arrest is available in any proceedings where injunctions are sought in one of the three forms set out in s 2(1) and it is submitted that *Lewis* should prevail as it is a Court of Appeal decision.

How much is the power of arrest used in practice? It is difficult to evaluate precisely the attitudes of judges and police to the procedure, but the following observations can be made.

There still appear to be grounds for concern regarding the attitude of the police to the new procedure.[15] A small pilot survey carried out by Michael Rodney and Jane Ansell in an inner city borough included interviews with local solicitors and social workers who felt that the police treated women who complained of a breach of an injunction unsympathetically. Indeed one solicitor found that most police stations were ignorant of the power of arrest, which is surprising as the Act had been in force for about nine months at the time. The Police public liaison officer was, however, fully aware of the police powers under the Act. He stressed that it was up to each individual officer to decide whether or not the terms of the injunction had been broken and that officers were often handicapped in taking any action by the lack of corroberative evidence supporting a woman's account of the breach.

Disquiet concerning the attitudes of judges to the new procedure was expressed in a number of letters to the Legal Action Group Bulletin in October 1977 and December 1977.[16] There was a consensus of opinion in the letters that a power of arrest was not being attached on *ex-parte*

12 1978 2 WLR 644.

13 Ormrod LJ 1978 2 WLR 644 at p 646.

14 Times July 18 1978.

15 LAG Bulletin February 1979, p 31.

16 LAG Bulletin 1977, pp 185, 246.

hearings but only when the husband was present in court. The courts seem here to be taking note of and extending what was said in *Lewis* about the need to give notice to the other party.

Figures available from the Lord Chancellor's Office for June-October 1977[17] show that during this period injunctions granted under the 1976 Act were running at about 350 a month. About 9% of the applications were refused and about one third of the injunctions granted under the 1976 Act had powers of arrest attached but not many led to arrest. No firm conclusions can be drawn from these statistics. The figures do, however, give some support to the view that the power of arrest is not used as much as it could be.

The liberty of the individual is very important and should not be taken away without just cause or without the chance of a fair hearing. However, it seems the judges are being overcautious. David Robinson in an article in the New Law Journal[18] alleges that since the 1976 Act came into force the judiciary appear to have run away from the idea of actually using the power of arrest. He points out that the power of arrest involves nothing more than giving the police the power to call upon a man and arrest him if he breaks an injunction and he must be brought before a judge within 24 hours. It should be recognised that protection from violence is at least as serious as the liberty of the individual.

Apart from the attitudes of judges and police there are possible criticisms of the procedure itself. The power of arrest only arises after what has already been fairly serious violence, where the injunction is initially granted on the basis that actual bodily harm has occured. This limitation ignores evidence which suggests that escalation of violence is common and there may be an incident which does not amount to "actual bodily harm" but may nevertheless involve a threat of future violence. In effect, also, before the police can arrest anybody for breach of the injunction, a woman may be seriously injured twice once in order to satisfy the judge to grant an injunction and attach a power of arrest, and again in breach of the injunction.

Conclusion and Suggestion for Reform

The present law relating to occupation or exclusion orders is complex Occupation or exclusion orders can be obtained by spouses under the the Matrimonial Homes Act, under the inherent jurisdiction of the court in applications ancillary to other matrimonial proceedings, and under the 1976 Act. Non-molestation orders can be obtained by spouses in all the above ways except under the Matrimonial Homes Act 1967. Cohabitees can only obtain exclusion or non-molestation orders in the county court under the 1976 Act, or, arguably, in the High Court as a result of the 1977 High Court rules.

A power of arrest can be attached in any matrimonial proceedings according to *Lewis* but, according to *Crutcher,* only in the High Court

17 and in LAG Bulletin February 1978.

18 NLJ March 8 1979.

where other proceedings are pending or in the county court under the 1976 Act.

There is need for these complex provisions to be consolidated in a statutory code, which should set out the courts' powers to grant non-molestation and occupation injunctions regardless of other relief sought as well as ancillary to other matrimonial proceedings. Cohabitees should be able to apply in the High Court and county court and a power of arrest should be capable of being attached in all jurisdictions.

The above reforms would, it is hoped, provide a more rational system and improve the protection the law affords to battered women. However such protection cannot be achieved solely by reform of the substantive law.

This must be accompanied by a sympathetic approach by solicitors to the problems of battered women and judges must deal with injunction applications with fairness both to the woman and to the man but not being unduly fearful about attaching a power of arrest. The police should see domestic violence as just as serious as other violence and be ready to intervene in cases of domestic violence.

Ultimately, the battered woman, requires advice to enable her to cope with her problems. The Select Committee of the House of Commons on Violence in Marriage recommended the setting up of family crisis centres providing an emergency service and developing close liaison with local medical, social and legal and police services. A few 24-hour crisis centres have been set up namely in Andover, Leicester and Ormskirk, but it is unlikely that these will be set up on a nationwide basis. An alternative is the proposal of Shelter to establish a "Primary Advisory Service" for battered women, which would not require a fixed centre but could be based in a Citizens' Advice Bureau. In some way or other, coordinated expert and sympathetic advice is crucial if many of the women who suffer are to be relieved of their fears and feelings of impotence.

The problem is rooted in the structure of society and there must be a programme of education to show why women are being battered and how the problem can be overcome. At the moment too little research has been carried out into the societal factors at the root of the problem, and such research should be undertaken.

In the end, legal reforms cannot solve the problem of battered women but only alleviate them. "No matter what legal changes are made, men will continue to batter women until there are profound changes in the structure of our society."[19]

19 Gill and Coote "Battered Women How to Use the Law" Cobden Trust 1975, p 19.

THE SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES

by PAOLO PICOZZI*

1. GENERAL BACKGROUND[1]

The International Bank for Reconstruction and Development (World Bank) as a development institution is greatly concerned with the flow of private capital from the developed to the developing countries. The Bank therefore formulated the S.I.D. Convention with the view to contributing to the improvement of the investment climate by reducing the likelihood of unresolved conflicts between host countries and the investor's national State.

The legal background on which the foreign investor must operate in the event of a conflict with the host State can be outlined as follows:

a) - unless otherwise agreed between foreign investor and host State, any remedy which the investor may seek by direct access to that State is governed by local laws, as are the investor's rights and obligations;

b) - if the foreign investor has found no redress through the exercise of local remedies, he may seek the protection of his national government - however: (i) in many instances the host State may require as a condition of entry that the foreign investor waives diplomatic protection; (ii) even where such a waiver is not required, there is no guarantee that the host State will be willing to submit a dispute with a foreign investor to the jurisdiction of an international tribunal; (iii) the foreign investor's State may be unwilling, for political reasons, to take up even a most meritorious claim;

c) - foreign investors may negotiate with host governments arbitration agreements, providing for detailed rules of procedure and even the law to be applied by the arbitral tribunal - however, the host State may deny the validity of the arbitration agreement or repudiate it thus throwing the investor back on such protection as his own government may be willing and able to afford him.

In 1963 the World Bank promoted the preparation of a convention which could establish an efficient institutional mechanism for the settlement of international investment disputes.

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1 This note is based on "The Convention of the Settlement of Investment Disputes between States and Nationals of Other States", by Aron Broches, Academie de Droit International, Racueil des Cours, 1972, II, p. 337 et seq.

The S.I.D. Convention was submitted to the members of the World Bank on March 18th, 1965 and came into force on October 14th, 1966 (one month after the twentieth country had deposited its instrument of ratification). This international treaty has achieved wide acceptance: signed at present by 73 States (Contracting States) of which 69 have completed the ratification process (the Convention has been made enforceable in Great Britain by the Arbitration (International Investment Disputes) Act, 1966) including most capital exporting and importing countries; the only group that is totally unrepresented is Latin America.

Proceedings under the Convention may be initiated by the investor as well as by the host State. The character of the entire scheme of facilities created by the Convention is doubly voluntary: not only Contracting States are free to join the International Centre for Settlement of Investment Disputes (ICSID), the international institution created under the Convention, but even after they have joined the ICSID, they are still free to decide whether or not to utilize its facilities by consenting to its jurisdiction.

The Convention in fact, like the Statute of the International Court of Justice, imposes no obligation upon Contracting States to submit any specific dispute to the jurisdiction of the ICSID.

2. ADVANTAGES OF THE S.I.D. CONVENTION

From the legal point of view the predominant feature of the Convention is that it firmly establishes the capacity of a private person to proceed directly against a State in an international forum. On the other hand, the investor's own State, unless the host State should fail to comply with an award rendered in a dispute, may not give diplomatic protection or bring an international claim in respect of that dispute.[2]

In the light of these principles the advantages offered by the S.I.D. Convention may be summarized as follows:

a) For the host State.

(i) Minimized opportunities for outside interference in its affairs. The host State is assured that the foreign investor's State may not give him diplomatic protection or bring an international claim on his behalf (Conv., art. 27).

(ii) Very flexible procedural requirements, that allow litigation to be conducted without imposing on governments burdens they might consider unacceptable for their status in a confrontation with a private person.

(iii) A host State may require as a condition of its consent to the ICSID jurisdiction, the exhaustion of its domestic remedies (Conv., art. 26).

(iv) Unless otherwise agreed, the laws of the host state shall be applied in any arbitration (Conv., article 42).

(v) The possibility of offering to investors an invulnerable dispute settlement procedure. The Convention creates a complete jurisdictional system, thus there will be no need for submitting to some foreign jurisdiction or undertaking inter-governmental litigation with the investor's government.

b) For the private Investor
   (i) The only forum available for litigating with a foreign government.
   (ii) The possibility to ground firmly in International law at least the dispute clause agreed with the host State. If an investor makes an agreement with a foreign government any repudiation of such agreement asserted under the law of the host State cannot deprive the investor of his day in court.

c) Mutual Advantages.
   (i) Wide recognition given to the awards of the Centre and enforceability of their pecuniary provisions (Conv., article 54).
   (ii) Certainty and efficiency of proceedings, that may be expected to cause a reduction in number and intensity of possible differences.

d) For the Investor's State.
   Diminished possibility of disputes at intergovernmental level, if its investors are induced to rely on the ICSID.[3]

3. FACILITIES OF THE ICSID.

The S.I.D. Convention provides for conciliation (articles 28 - 35) and arbitration (articles 35 - 55) proceedings.

The two proceedings are different in nature.

Conciliators may recommend, arbitrators must decide. Thus whilst parties to conciliation proceedings are only under the duty to give their most serious consideration to the recommendation of the Conciliation Commission (Conv., art. 34), parties to arbitration proceedings are under the obligation to "abide by and comply with the terms of the award (Conv., art. 53)."

Conciliation and arbitration proceedings are administered by the ICSID, which has its seat at the headquarters of the World Bank in Washington.

The governing body of the ICSID is the Administrative Council, consisting of members appointed by each Contracting State and an ex officio Chairman in the person of the President of the World Bank. The Admin. Council adopts administrative and financial regulations, rules of procedure for the institution and conduct of proceedings under the S.I.D. Convention.

The principal officer of the ICSID is the Secretary-General, elected by the Admin. Council upon nomination of the Chairman of the Admin. Council.

3 See: Paul C, Szasz, A Practical Guide to the Convention on Settlement on Investment Disputes, unpublished study based on an article with the same title originally published in I, Cornell International Law Journal 1-35 (1968).

The ICSID maintains a Panel of Conciliators and a Panel of Arbitrators whose members are appointed by each Contracting State and by the Chairman of the Admin. Council. However, the ICSID does not itself conciliate or arbitrate, but ensures proper functionment and continuity of conciliate or arbitration proceedings in accordance with the provisions of the Convention, and the parties to a dispute are not obliged under the Convention to appoint conciliators or arbitrators from the Panels.

4. THE RELEVANT INSTRUMENTS.

An introductory note on the S.I.D. Convention would be incomplete without some indications of the several instruments that, in addition and subject to the Convention, govern the proceedings to be conducted under the auspices of the ICSID and the ancillary documents that may be used for their construction. Here we give a hierarchical listing of such materials.[4]

Adopted by the Administrative Council, with effect from 1 January 1968:

a) The Administrative and Financial Regulations of the Centre, that deal with the procedures of the Administrative Council, the organization of the ICSID Secretariat, the budgetary arrangements of the ICSID, its priviliges and immunities. Certain Regulations are designed to have direct impact proceedings.

b) The Rules of Procedure for the institution of Conciliation and Arbitration Proceedings. To regulate the procedure for the submission of requests for the institution of conciliation or abritration proceedings, in compliance with the jurisdictional requirements of the Convention.

c) The Rules of Procedure for Conciliation Proceedings and the Rules of Procedure for Arbitration Proceedings. To regulate the conduct of proceedings from registration of the request for instituting a proceeding to communication of the conciliation report or the tendering of an arbitral award and the exhaustion of of all the possible post-award remodies.

These Rules are subject to some extent to the Regulations, they may however be superseded by the agreement of the parties to a particular proceeding.

Ancillary Documents.

To facilitate the use and construction of the above instruments account should be taken of several documents containing explanatory material.

(i) **Report of the Executive Directors**: accompanying the Convention in the official publications of the ICSID.
It reflects the understanding of the body which elaborated the final text of the Convention, and was made available to each Contracting State before signing and ratification

4 Paul C. Szasz, op. cit., pp 7-13.

of the Convention

(ii) **History of the Convention**: documents of the travaux preparatoires published by the Centre (Washington D.C., Oceana Publications Dobbs Ferry N.Y.).

(iii) **Explanatory Notes for the Rules**: inserted in the official publication of the Institution, Conciliation and Arbitration Rules by the ICSID Secretariat.

(iv) **Model Clauses Recording Consent to the Jurisdiction of the ICSID**: designed for insertion into investment contracts, to assist parties to such contracts in formulating submission clauses.

(v) **Model Clauses Relating to the S.I.D. Convention**: designed for insertion into bilateral inter-governmental agreements.

(vi) **Published Reports and Awards**: minutes and other records of conciliation or arbitration proceedings, published by the Secretary General subject to the previous consent of the parties.

- II -

5. JURISDICTION OF THE ICSID[5]

According to Article 25 (1) of the Convention four conditions must be satisfied if the Centre is to have jurisdiction:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

Therefore, the dispute submitted; (i) must be a "legal dispute"; (ii) must arise out of "an investment"; (iii) one party must be a State (or a State agency); (iv) the other party must be a national of "another" Contracting State.

The purpose of the writer is to examine the first two jurisdictional requirements, which may be grouped under the heading of jurisdiction "ratione materiae", and to evaluate whether they may be met by disputes arising out of a certain type of business transaction: the international construction contract.

It is noted that the Convention does not provide definitions of the terms "investment" and "legal dispute". These unfilled blanks reflect the uncertainty shown by the draftsmen of the Convention during the preparatory works in delimiting the ambit of the jurisdiction of the Centre. It has been observed that the many definitions which were extensively discussed by various committees: "proved either in-

5 On this subject: A. Broches, op. cit., pp. 351-365;
C.F. Amerasinghe, Jurisdiction "Ratione Personae" under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

adequate from a technical point of view or, more significantly, unacceptable to the one or other country or group of countries because they did not coincide with their view of the type of transaction for which they would in fact be willing to accept the jurisdiction of the Centre".[6]

This statement is indicative of the time and effort spent during the preparatory works of the Convention to find a satisfactory definition of the types of disputes which might be submitted to conciliation or arbitration under the auspices of the Centre.

The numerous committees raised to carry out the drafting of the Convention found themselves in a dilemma situation: a broad (or no) definition would have encountered the disfavour of the States wishing to sign the Convention, whilst a narrow definition might have proved inconvenient, as recourse to the Centre might in a given situation be precluded because the dispute in question did not precisely qualify under the definition of the Convention. A narrow definition could also be dangerous as it might provide a reluctant party with an opportunity to frustrate or delay proceedings by questioning whether the dispute was encompassed by the definition.

However, it was generally understood that the Convention was designed to deal primarily with investment disputes and that its scope had to be limited to the legal issues of such disputes.

In the end it was agreed that no detailed definition of the category of disputes in respect of which the facilities of the Centre would be available could be included in the Convention. The use of the term "investment dispute" coupled with the requirement that the dispute be of a legal character as distinct from political, economic or purely commercial disputes was thought adequate to limit the scope of the Convention in this regard. To include a more precise definition could open the door to frequent disagreements as to the applicability of the Convention.

Nevertheless, in spite of the above understanding, several attempts were made during the preparatory works to define the expressions "legal dispute" and "investment dispute".

We have at least some elements for the interpretation of the former in the Report of the Executive Directors on the Convention where it is said that:

> "the expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation or the nature or extent of the reparation to be made for breach of a legal obligation".

6 A. Broches, op. cit., p. 362.

In the same Report, conversely, the Executive Directors expressly refused to give any indication leading to the interpretation of the term "investment".

This reflects the conclusion reached during the preparatory works by the consultative body of Legal Experts that it was not advisable to define further the term "investment dispute" in view of the likelihood of jurisdictional controversies arising out of such definition.

However, attempts were made to elaborate a non exclusive list of the types of investment which could be involved.

In the present context it is useful to compare some definitions of investment adopted by States, either in their municipal legislation or in international agreements, which were considered by the Legal Committee of the Convention during the "travaux preparatoires".[7]

1) **Investment promotion and protection agreement between Federal Republic of Germany and Pakistan.**

The term "investment" shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived from and ploughed back into such "investment".

Any partnerships, companies or assets of similar kind, created by the utilisation of the above mentioned assets shall be regarded as "investment".

2) **Investment promotion and protection agreement between Federal Republic of Germany and Federation of Malaysia.**

The term "investment" shall comprise every kind of asset and more particulary, though not exclusively:

a) movable and immovable property as well as any other rights *in rem,* such as mortgage, lien, pledge, usufruct and similar rights;
b) shares or other kinds of interest in companies;
c) title to money or to any performance having an economic value;
d) copyright, industrial property rights, technical processes, trade-names, and goodwill;
e) such business concessions under public law, including concessions regarding the prospecting for, or the extraction or winning of, natural resources, as give to their holder a legal position of some duration.

7 History of the Convention; Documents Concerning the Origin and formulation of the Convention, Volume 2, part 2nd, pp. 843, 844 (Doc. 101).

3) **Definition suggested by Mr. Ghachem (Tunisia) at the Addis Ababa Consultative Meeting on the basis of Tunisian investment promotion legislation.**

The term "investment" comprises all categories of goods and includes but is not limited to:

a) the ownership of movables and immovables as well as all other rights *in rem* such as mortgages, pledges;
b) the right of participation in companies and all other participations;
c) credits (pecuniary obligations) and rights to a performance having an economic value;
d) copyrights, industrial property rights, technical processes, goodwill;
e) concessions under public law, including exploration and extraction concessions.

4) **United States Legislation on investment guarantee (22 U.S.C.A. 2183).**

The term "investment" includes any contribution of capital commodities, services, patents, processes, or techniques in the form of:

1 loan or loans to an approved project,
2 - the purchase of a share of ownership in any such project,
3 participation in royalties, earning, or profits of any such project, and
4 - the furnishing of capital commodities and related services pursuant to a contract providing for payment in whole or in part after the end of the fiscal year in which the guarantee of such investment is made.

It was noted that all the above definitions had apparently been drafted for the purposes of the substantive provisions of the respective agreement or legislation and not for jurisdictional purposes. Therefore the Secretariat of the Centre prepared its own draft definition:

"The term "investment" means the acquisition of: (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commerical, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities".[8]

In Article 30 (i) of the Draft Convention of September 11, 1964 ("the First Draft") "investment" was defined as follows:
"investment" means any contribution of money or other assets of economic value for an indefinite period or if the period be defined for not less than 5 years".[9]

8 History of the Convention, Volume 2, part 2nd, p. 844.

9 History of the Convention, Volume 2, Part 2nd, p. 610 (Doc. 43).

All attempts to provide a more detailed definition of investment disputes were frustrated by the difficulty of reaching consensus, and were finally abandoned in consideration of the fact that such definition is not strictly necessary. As the Executive Directors pointed out in their Report on the Convention, in any event the parties must consent to the jurisdiction of the Centre, Moreover, the Convention provides under Article 25 (4), the mechanism through which Contracting States can notify the Centre in advance of the classes of disputes which they would or would not consider submitting to the jurisdiction of the Centre.

It should be noted however that (i) no Contracting State has yet made a notification under Article 25 (4) and (ii) though the consensual nature of the Convention leaves a large measure of discretion to the parties, this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention itself.

Thus, in spite of the consent of the parties a Commission or Tribunal would have to decide that the Centre has not jurisdiction on disputes which evidently do not relate to an investment. Indeed, according to Articles 28 (3) and 36 (3) of the Convention, a request for consiliation or arbitration may not even reach a Commission or Tribunal if, when the request is filed, the Secretary-General finds that it is manifestly outside the jurisdiction of the Centre and, on this ground, refuses its registration.

Therefore, in order to be able to avail themselves of the facilities of the Centre, the parties to a transaction will have to meet the preliminary and fundamental issue of whether the transaction would be considered as an "investment" within the meaning of the Convention. It is suggested that this question may better be dealt with by means of a negative approach, namely by identifying which types of transactions would not be considered investments.

It has been observed that ordinary sales, even if they involve substantial supplier credits, probably would not be considered as constituting investments.[10] Construction contracts would be on the edge. Depending on the terms of the transaction construction contracts may in fact have aspects in common with contracts for the sale and purchase of goods.

However, due to the complexity of the subject matter regulated by the construction contract the legal principles and assumptions applicable to it would not in general apply to the contract of sale.

It should be remembered, e.g., that the construction contract is one in which there are frequently a number of sub-contractors which rely upon the presence of a constructional site and upon common services supplied by the contractor.

10 Paul C. Szasz, op. cit., p. 23.

Moreover, it has been observed that an arrangement, where the entrepreneur is required to commit substantial resources for extended periods of time to the project, might qualify as an investment.[11]

Finally, it should be noted that the Centre has jurisdiction upon "disputes" arising directly out of an investment. This means that the legal nature of the transaction during the performance of which the dispute arises is not the sole element which determines whether the dispute falls within the jurisdiction of the Centre. It is in fact the the nature of the dispute which must satisfy the jurisdictional requirements of the Convention.

The term investment has a precise meaning in economics but is not, strictly speaking, a legal term; therefore a dispute may arise out of "an investment" even though the legal right or obligation in question is regulated under a contract which may not be classified as investment contract. The subject matter of the contract must be considered in its entirety as well as in all of its components, thus even if a construction contract does not belong to the category of the investment contracts there may be aspects of "investment" in it which may give rise to a "legal dispute".

In this case the consent of the parties would be of paramount importance.

It has been suggested that though the act of submission is in itself indicative of the intention of the parties to consider the dispute as one arising directly out of an investment, it might still be advisable that the parties stipulate that they consider the entire transaction in question to constitute an investment. A generic consent, contained in a contract clause of a complex business arrangement might not in fact furnish sufficient coverage in doubtful cases.[12]

11 Paul C. Szasz, op. cit., p. 22.

12 P.C., Szasz, op. cit., p. 21.

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RELEASE OF COMPULSORY ADMITTED MENTAL HEALTH PATIENTS

Martin Macpherson*

The majority of admissions to hospitals under the Mental Health Act 1959 are not compulsory but voluntary. Voluntary admission is achieved by the joint consent of the proposed patient and the hospital authority, which means that a patient may withdraw his consent and leave the hospital at any time. Currently about 7% of patients in mental hospitals are compulsorily admitted under the relevant sections of the Mental Health Act.[1] Briefly, a person is likely to be compulsorily admitted where he is suffering from a mental disorder[2] and he satisfies the criteria in the sections concerning admissions.

There is a lack of information about the way in which compulsorily admitted mental health patients are released.[3] This is particularly so with regard to patients released internally by Responsible Medical Officers. Release of a patient from a "section" can be achieved in two ways. Firstly, internal release by the RMO, Hospital Managers or the patient's nearest relative.[4] Secondly, by an appeal to a Mental Health Tribunal.

INTERNAL RELEASE

All compulsorily admitted patients are on sections of a fixed duration except those subject to unlimited restriction orders.[5] The RMO can release unrestricted patients[6] from a section at anytime.[7] It is not clear how an RMO arrives at this decision to discharge a section It seems that, once a patient satisfies certain criteria for discharge (eg an ability to function in an "acceptable manner") then the RMO will consult interested persons and a team decision will be taken.[8] There is nothing in the 1959 Act to prevent the RMO from discharging the section, even though the statutory grounds for compulsorily admission still exist.

Conversely, he is not under a duty to discharge the section once the grounds for admission cease to exist, but he will be unable to renew the section.

There is safeguard for the patient in that the hospital managers, the Area Health Authority, can discharge a section.[9] It is unlikely that this would ever happen in practice however, because it is unrealistic

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to expect them to disregard the advice of the RMO.[10] This safeguard would seem to have little practical significance and it is doubtful whether retention in its present form is warranted.

The nearest relative may order the patient's release from a section.[11] The relative must give not less than seventy two hours notice in writing.[12] Within the seventy two hours, the RMO may furnish a report to the hospital managers stating that in his opinion the patient "would be likely to act in a manner dangerous to other persons, or himself". The discharge order will then be void.[13] No further discharge order can be made by the nearest relative for a period of six months, but the nearest relative does have the right of appeal to a Mental Health Review Tribunal, requesting the release of the patient from the section.[14]

The most common form of release from a section is by the lapse of the detaining section.[15] The patient then ceases to be a compulsory patient and is free to leave or remain in hospital.[16]

Although many hospitals do inform the patient of his changed status there appears to be no obligation on the hospital to do so. It could be argued that where a positive decision is taken to release a patient from a section or where a section lapses it should be mandatory for the hospital to inform the patient of his changed legal status.[17]

RELEASE BY MENTAL HEALTH REVIEW TRIBUNAL

The MHRT was seen as the main safeguard for long term compulsory patients by the Percy Commission.[18] These Tribunals are governed by the Mental Health Act 1959, and MHRT Rules 1960.

There is one Tribunal for each of the fifteen Regional Health Authorities. Each Tribunal is administered through one of four offices in London, Nottingham, Cardiff and Liverpool respectively, with a clerk responsible to three or more chairmen.[19]

A Tribunal is staffed from legal, medical and lay panels.[20] It can sit with a minimum of three people, one from each panel.[21] The chairman is appointed from the legal panel. He has overall responsibility for selecting members for hearings and implementing policy. Legal members are appointed by the Lord Chancellor, and when the Tribunal is sitting the legal member acts as President. Medical members and lay persons are appointed by the Lord Chancellor, in consultation with the Department of Health and Social Security.[22]

APPLICATIONS

Long term compulsory patients and nearest relatives have a right to make an application to a MHRT for release from a section.[23] The DHSS can refer an application to a Tribunal, for example where a patient's previous application failed because of a technicality.[24] Patients subject to restriction orders can request the Home Secretary to refer their case to a Tribunal, and he must do so within two months of receiving the request.[25]

There is no statutory duty on the hospital or anyone else, to make patients aware of their rights.[26] The DHSS has instructed hospitals to provide the patient and nearest relative with leaflets on admittance and on renewal of a section explaining the patient's legal position. These leaflets are written in technical language, for example

> ". . . after any renewal of the authority for detention the patient (if aged 16 or over) may apply to the Tribunal at any one time in the period for which the authority is renewed. Renewals may take place (for any patients who need to stay in hospital as long as this) at the end of the first and second years, and thereafter at two year intervals . . . ."[27]

Some patients, eg severely subnormal patients, may be unable to understand the information given. The DHSS is considering drawing up a more suitable leaflet.[28] It would seem reasonable to suggest that there should be a statutory duty on the hospital to take reasonable care to ensure that a patient comprehends his legal situation.[29] This task could be carried out by medical social workers in the hospital.[30]

A patient may be represented by anyone, except patients at the same hospital or compulsory patients at another hospital.[31] The legal advice scheme allows a lawyer to claim costs for advising a patient but not for representation at the hearing.[32] It is probable that the Government will extend legal aid when resources permit.[33] Representation is important, because a representative is more likely to obtain copies of hospital reports, including information confidential to the patient.[34] If the recommendations of the Committee on MHRT Procedures are accepted, representatives will have a right to see and hear all evidence put to the Tribunal.[35]

THE PRELIMINARIES

An application for release is made on a prescribed form obtainable from the hospital or the Tribunal Clerk.[36] The Committee on MHRT Procedures suggests that an application in writing should suffice, although a simple form would continue to be available.[37] Having received the application the clerk sends a copy to the hospital managers.[38] They then return a statement giving details of the patient and reasons why they are not prepared to release him from the section.[39]

Information which the hospital does not want the patient to see is contained in a separate document.[40] The withholding of facts and issues relevant to the disposition of the case appears to be contrary to the fundamental principle of fairness. The courts will uphold this principle as can be seen by Lord Denning's judgment in *R* v *Race Relations Board, ex parte Selvaranjan*:

> "The fundamental rule, in the case of bodies required to investigate and form an opinion, was that if a person might be subjected to pains or penalties or proceedings, or deprived of remedies or redress, or in some such way adversely affected by investigation and report, then he should be told the case made against him and afforded a fair opportunity of answering it"[41]

Withholding information is probably justified where it would affect the patient's health,[42] but such information should represent a "real danger" to the patient's health. It is expected that this will be made clear in a change of the Rules.[43]

Notice of the proceedings must be given to the patient (when he is the applicant) and the nearest relative. There is no duty to notify the patient when he is not the applicant.[44]

HEARING PROCEDURE

A hearing may be formal or informal.[45] The formal hearing may be in public or in private.[46] Informal hearings take place in private but the Tribunal can admit anyone it chooses.[47] Cases referred by the DHSS or Home Office, are always informal.[48] A relative who is also the applicant may demand a formal hearing.[49] When the applicant is the patient a request for a formal hearing will be granted, unless it would be detrimental to his health or interest.[50] The formal hearing

resembles a court with the calling and cross examination of witnesses.[51] Persons may be asked to leave during the hearing, thus avoiding confrontation, for example between the RMO and the patient or nearest relative.[52]

With informal hearings the Tribunal may proceed as it wishes, providing it takes proper steps to gather relevant information and allows the parties to state their case.[53]

In practice, the Tribunal has such wide powers that there seems little point in retaining a distinction between the two forms of hearing.[54] The Committee on MHRT Procedures favours a set of common rules governing all hearings.[55]

Although a Tribunal does have a considerable degree of flexibility in the way it exercises its powers there is a duty to act in accordance with the principles of natural justice. If the rules of natural justice are not compiled with, then application could be made to the High Court for judicial review, with a view to quashing the decision. There appears to have been no such applications since the passing of the 1959 Act.[56]

POWERS OF THE MHRT

A MHRT can release anyone from a section who is not the subject of a restriction order.[57] Where a restriction order is in force the Tribunal may only advise the Home Secretary as to how the case should be dealt with.[58]

The Tribunal in directing release from a section is not limited to any particular grounds on which it may come to its decision.[59] Release from a section is obligatory (a) where the patient is no longer suffering from a mental disorder, or (b) where it is not in the patient's interest that he should continue to be subject to the section, or necessary for the protection of other persons, or (c) that the patient is suffering from subnormality or psychopathy, as opposed to mental illness or severe subnormality, is over 25 years of age and is not a danger to himself or others.[60] Should the Tribunal decide that the patient is suffering from some form of mental disorder, other than that for which he was admitted, then the documents will be amended.[61] This may result in release from a section, for example where a previously severely subnormal patient over twenty five years of age is reclassified as subnormal and is not considered to be a danger to himself or others.[62]

The Tribunal's powers are limited. According to the Mental Health Act 1959 there can be no conditional release from a section, or delay-

ed release from a section to permit the arrangement of aftercare facilities.[63] In practice however, Tribunals are willing to co-operate in delaying release of a patient from a section, if it will enable a smooth transition from hospital or community care.[64]

The decision is communicated to the applicant and the hospital within seven days.[65] A reasoned decision may be requested but it can be withheld from the patient, if it would be detrimental to his health.[66] Often, the reason given is vague. It has been suggested that it should therefore be obligatory to give full and detailed reasons with each decision.[67] This would be beneficial to the patient because he would then know what improvements he would have to make before the Tribunal would release him.[68] It also means that the Tribunal would have to think carefully about its reasons before arriving at a decision.[69] A full statement would also provide guidance, to RMO's when considering the release of a patient.[70]

COMMENTS ON MENTAL HEALTH REVIEW TRIBUNALS

Ninety two per cent of all patients compulsorily admitted to hospital are admitted on short term orders.[71] They have no right to apply for a Tribunal hearing.[72] The National Association for Mental Health (MIND) proposes that even patients on short term orders should have a right to appeal to a MHRT.[73] A right of appeal to an independent body should be available where there is deprivation of liberty, in order to comply with the standards of justice enunicated in the European Convention of Human Rights 1950, Article 5, para 4

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be speedily decided by a court and his release ordered if his detention is not lawful."

Article 6, para 1

> "In determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Of those patients who are eligible to apply, only 12% exercise that right. It is suggested that the burden of coming forward should be placed upon the hospital rather than the patient. Instead of the patient having to argue why he should be released from the section, the hospital would have to show why the patient should continue to be detained under a section. The burden of coming forward should not be placed on the patient because he may be on sedatives, or his mental disorder may make any application difficult, or he may not be aware of his rights. Patients should also be relieved of the burdens of asking for a formal hearing or a public hearing, or a reasoned decision.

THE WHITE PAPER: A REVIEW OF THE MENTAL HEALTH ACT 1959[74]

The recent White Paper proposes to halve the periods of detention. This means that patients would be entitled to apply for a Tribunal hearing at double the present frequency. Those patients who do not exercise their right to apply would have their case automatically reviewed after 6 months, then within 3 years, and thereafter at 3 yearly intervals. The Home Secretary would also be required to refer cases of restricted patients automatically at a Tribunal at the end of any 3 year period in which the case had not otherwise been referred. There would be an automatic reference to a Tribunal when a restricted patient is recalled to hospital, this would take place within a month of recall. The automatic review would probably be made more frequent when resources permit.

It is likely that Tribunal powers would be increased. Firstly, they would be able to delay release from a section for a period not exceeding 3 months. Secondly it would be possible to recommend leave of absence for a trial period. Thirdly, it would not be possible to withdraw an application without the consent of the Tribunal. This would help to alleviate the possibility that some doctors, on learning that a patient has made an application, might try to persuade him to withdraw it.

Generally, it is proposed to broaden the expertise of MHRT, with social workers and forensic psychiatrists being appointed where appropriate.[75]

CONCLUSION

This century has seen improvements in mental health services but this field remains the poor relative of general medicine.[76] Many more patients could be released by hospitals and Tribunals, if the necessary services were available in the community. Increased expenditure is justified, given that one in twelve men and one in eight women can expect to be admitted to a psychiatric hospital at sometime in their life.[77]

FOOTNOTES

1 DHSS, Annual Reports.

2 Mental disorder is defined by the Mental Health Act 1959, section 4, it includes severe subnormality, subnormality, psychopathy and mental illness.

3 Greenland C, Thesis on Mental Illness and Civil Liberty
Gostin L, A Human Condition.

4 MHA, 1959, section 49.

5 Ibid, Section 65(1).

6 The RMO can only advise the Home Secretary on the discharge of a patient subject to a restriction order, section 65(3)(c).

7 Section 47.

8 Climent and Plutchik, Use of discharge potential scale as a monitoring technique for psychiatric patients, soc Psychiatry 1975.

Spencer D, From hospital to community, Apex Vol No 3 1976.

9 MHA 1959, section 47.

10 Gostin op cit Vol 1 P 45.

11 MHA section 47(2)(b)(c).

12 Section 48(2).

13 Ibid.

14 Section 48(3).

15 Hoggett, op cit, P 140.

16 Ibid P 138.

17 Ibid.

18 The Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, 1954-1957, Cmnd 169.

19 Gostin, op cit, Vol I P 60.

21 Section 3.

22 MHA Schedule I.

23 Patients sections MHA 31(4), 34(5), 38(2), 41(5), 122(2), 44(3), 63(4) and 66(7).

Nearest Relative sections 48(3), 52(6), 63(4), and 44(3).

24 MHA Section 57.

25 Section 66.

Edwards, Mental Health Services, 1975, P 229.

27 Mental Health Leaflet No 10 part C.

28 This information was given in a letter from the DHSS to the author.

29 Gostin and Rassaby, MHRT Procedure, 1978.

30 Hoggett, op cit, P 152.

31 The MHRT Rules, 1960, R 10(1).

32 Hoggett, op cit, P 152.

33 DHSS, A discussion paper by the Committee on Mental Health Review Tribunals Procedures, 1978, 2.29.

34 Gostin, op cit, Vol I Pp 91-2.

35 DHSS, Discussion paper on MHRT, op cit, 2.32.

36 MHRT Rules, op cit, R3.

37 Ibid 2.04.

38 MHRT Rules, op cit, R5.

39 R6.

40 Ibid.

41 The Times, August 1st 1975, P 12

42 Discussion paper on MHRT, op cit, 2.15.

43 Ibid.

44 MHRT Rules, op cit, R7.

45 R21.

46 R24.

47 R27.

48 R17 and 18.

49 R21.

50 R23.

51 Hoggett, op cit, P 156.

52 MHRT Rules, op cit, R24(3).

53 R17(1).

54 Discussion paper on MHRT, op cit, 2.54.

55 1.03.

56 Gostin, op cit, Vol II P 158-159.

57 MHA section 123(1).

58 Section 66(6).

59 Section 123(1).

60 Section 123(1)(a)(b)(c).

61 Section 123(3).

62 Hoggett, op cit, P 158.

63 MHA Section 123.

64 Wood, MHRT and Social Work, SWT Vol 7 No 11, 19.8.76.

65 MHRT Rules op cit R27(3).

66 R27(5).

67 Greenland, Mental Illness and Civil Liberty, 1970, Pp 87-88.

68 Discussion Paper on MHRT, op cit, 2.71.

69 Ibid.

70 Ibid.

71 MHA Sections 25, 29, 30, 135 and 136.

72 Edwards, op cit, P 228.

73 Gostin, op cit, Vol II P 77-78.

74 Cmnd 7320.

75 Gostin, op cit, Vol I, P 80.

76 White Paper, op cit, 6.7 and 6.8.

77 Smith T, Community Care October 12, 1977, P 19.