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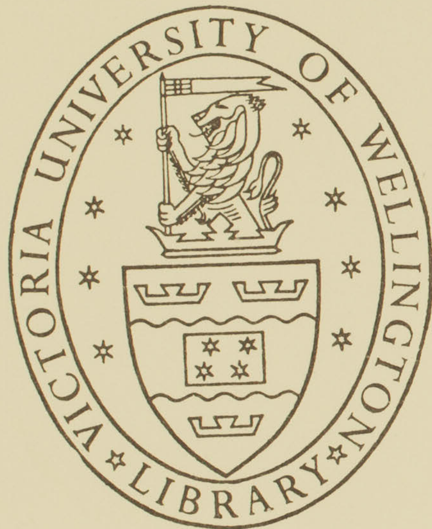
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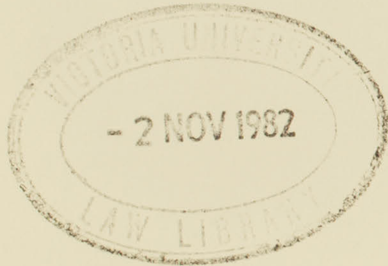
JOHN DARCY COLLINS

JUDICIAL DISCRETION AND AUDIENCE IN THE DISTRICT COURTS

Mihaka v. *Police*

Submitted for the LL.B. (Honours) Degree at the Victoria University of Wellington

1 September 1982



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NOTES

JUDICIAL DISCRETION AND AUDIENCE IN THE DISTRICT COURTS:

Mihaka v. Police

> "The right of the Judge or other judicial officer to regulate the proceedings of his Court is an essential attribute of judicial independence, itself one of the cornerstones of our liberty. The denial of recognition to other than suitably qualified persons should not be regarded as protection of any privilege or monopoly." [1]

I INTRODUCTION

Judicial officers are entrusted with ensuring that the interests of justice are served in the conduct of Court proceedings. They are to do this by ensuring that all parties appearing before them are given the opportunity to present their cases to best advantage. Their independent discretion also prevents outside interests from influencing judicial proceedings. It enables the efficient administration of the Courts and of the judicial process generally.

Sometimes, however, the exercise of a judicial discretion may be seen by a party as unfair. It appears to impinge on a perceived right. The very existence of the discretion in a particular area may be challenged, either on grounds of common law or in terms of statute law.

An example of such a challenge is reported in Mihaka v. Police.[2] It involved the discretion of judicial officers in the District Courts to refuse audience to unqualified advocates. Such a refusal of recognition can be interpreted as interference with the "right" of accused to representation by advocates of their choice. Mr Mihaka claimed that he had a statutory right as a "Maori agent" to represent another person and that Justices of the Peace could not prevent him from doing so. Attempts to assert this right in Court led to his arrest and later conviction for disorderly behaviour. However he developed his thesis in an appeal to the High Court.

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Strictly, the claim was irrelevant to the appeal but Hardie Boys J. considered it at some length in obiter dicta. He concluded that Mr Mihaka had no right of audience as a Maori agent but that judicial officers in lower courts do have discretion to allow laymen to appear before them as advocates. If the latter conclusion is accepted, then the discretion of judges in the lower courts is greater than some have assumed.[3]

This paper uses the obiter dicta from Mihaka v. Police as a basis for analysing the limits of judicial discretion as to recognition of advocates in the District Courts. The Maori agent is considered as a special type of unqualified advocate before the position of advocates generally in the District Courts is investigated.

In the next Part of this paper, the judgment of Hardie Boys J. is outlined. In Part III, the history of Maori agents is investigated and their legal status discussed. Part IV considers judicial discretion as it is affected by the rights of representation and assistance given by common law and statute. Part V considers the effect of the Law Practitioners Act 1955 - in particular the effect of section 16 which prohibits an unqualified person from acting "as a solicitor in any Court". Foreign case law and policy considerations are discussed and a test is suggested for classifying acts in Court which are restricted to lawyers. The Conclusion summarises the limitations of judicial discretion as to representation in the District Courts under the present law.

NOTE: (1) Statute law is discussed in this paper as it was in 1981 when the report of Mihaka v. Police was published. This paper is written in 1982. There is now before Parliament a Law Practitioners Bill which will supersede the Law Practitioners Act 1955 when passed into Law. Clause 63 of that Bill reorganises the provisions of the present section 17 but does not alter their effect.[4] The present sections 14 and 16 are combined in clause 53, so that acting "as a barrister in any Court" and acting "as a solicitor in any Court" come under the same provision. The proposed changes do not substantially affect the discussion which follows.

(2) The legal status of lay advocacy in the District Court is discussed in the context of hearings of statutory offences only. Mr Mihaka claimed rights of audience in such a context and it has the greatest implications for the judicial system.

II JUDGMENT IN MIHAKA v. POLICE

A. Introduction

The judgment of Hardie Boys J. will be summarised as follows: Facts of the Case; Decision on the Appeal; Maoris and the Legal System; Representation and Legal Assistance in Court; The Maori Agent; Conclusions.

Mr Mihaka's view of the background to the case is described in Appendix 1.

B. Facts of the Case

Mr Te Ringa Mangu Mihaka appealed to the High Court from a conviction in the District Court on a charge of behaving in a disorderly manner in a public place.[5] On 27 March 1980 he had accompanied Miss Diane Prince to the Number 3 Courtroom of the Wellington District Court. Miss Prince was to appear before Justices of the Peace for the taking of depositions. When the case was called, Mr Mihaka claimed the right to represent Miss Prince as a Maori agent. The Justices refused him permission to act as an advocate. They read him a memorandum which had been prepared by the Chief District Court Judge. The memorandum stated on the authority of Collier v. Hicks[6] and McKenzie v. McKenzie[7] that no unqualified person has a right to act as an advocate before Justices of the Peace without permission. It concluded that an unqualified person may act as a "friend" - only giving advice - but that he "should not be permitted to address the Court by way of making submissions or asking questions".[8] Mr Mihaka, however, refused to acquiesce in the decision and protested forcefully and loudly. After some twenty minutes, during which two supporters in the public gallery had to be removed from the Court, he was arrested. Although he had repeatedly invited arrest for contempt of court[9], he was charged with disorderly behaviour. Subsequent events at the hearing are described in R. v. Prince.[10]

C. Decision on the Appeal

After describing the facts, which he pointed out were not really in dispute, His Honour considered the conviction in their light. He referred to the test for disorderly behaviour as derived from the leading case of Melser v. Police[11] and summarised in O'Connor v. Police.[12] Disorderly behaviour is conduct which, considered objectively in the circumstances, is likely to cause serious annoyance or disturbance to those present. The learned District Court Judge had not stated the test he applied to the evidence. However, in His Honour's opinion there was ample evidence to warrant the conviction.

His Honour then considered the appellant's contention that he had a right to represent Miss Prince and could not be guilty of disorderly behaviour by asserting that right in good faith. He said that the appellant had the right to make his submissions to the Justices of the Peace but also a corresponding duty to do it with decorum and to accept their ruling. The appellant's failure to perform this duty had satisfied the requirements for conviction. Hence his claimed rights were strictly irrelevant to the appeal. However, His Honour considered the claim to be important. In view of the trouble the appellant had taken to develop his thesis, His Honour felt that he should deal with it.

D. Maoris and the Legal System

Mr Mihaka had restricted his claim to that of a right to represent members of his own Maori race in Court. Before considering the applicable legal principles, His Honour made some general remarks about the position of Maoris in the New Zealand legal system. He said that the early colonisers had chosen Westminster-style parliamentary democracy and the common law system because they were the best they knew. Subsequently, they had to persuade the Maori to accept and trust the new

institutions and ensure that the trust was justified. The present system was not ideal. However, increasing understanding of the Maori way and the work of lawyers in various assistance agencies meant, in His Honour's opinion, that Maoris were not disadvantaged in the Courts.

E. Representation and Assistance in Court

1. Introduction

His Honour said that there were three aspects to the right of representation and assistance in Court and that they were correctly summarised in the memorandum of the Chief District Court Judge. They were the statutory rights, the rights at common law and the rights of a judge to regulate proceedings. His Honour discussed the three aspects as follows :

2. The statutory rights

Section 37 of the Summary Proceedings Act 1957 gave every defendant in criminal proceedings in a District Court the right to representation by a barrister or solicitor of the High Court.

The appellant based his claim on a provision of the Law Practitioners Act 1955. In a subsequent part of the judgment, His Honour said that that Act regulated the conduct and discipline of the profession and not the conduct of the Courts.[13]

3. The common law rights

There was a common law right, also, to have a qualified legal practitioner as an advocate. Lawyers had a right of audience which had been established by usage.

In addition there was a common law right to have a "friend in Court". It was stated by Lord Tenterden C.J. in Collier v. Hicks[14] that any person might attend the proceedings, take notes and make suggestions and give advice.

4. The rights of a judge to regulate proceedings

The rights of a judicial officer to regulate the proceedings of his own Court were subject only to the requirements of statute and common law. A judge had discretion to allow an accused more assistance than the law requires. Following O'Toole v. Scott[15] the discretion should not be exercised only where it was strictly necessary. It should be exercised whenever it would help the administration of justice. This discretion was essential to judicial independence and a refusal to recognise an unqualified person was not intended to protect a monopoly. It protected the defendant from the consequences of unskilled assistance.

F. The Maori Agent

The appellant argued that he could represent Miss Prince on the basis of section 17(2) of the Law Practitioners Act 1955. The subsection appealed to was as follows :

> "Every person commits an offence against this section who, not being duly enrolled as a solicitor under this Act, carries on business as a solicitors' agent, or in any way advertises or holds himself out as a solicitors' agent:
> Provided that it shall not be an offence under this subsection for a person to carry on business as a Maori agent or to advertise or hold himself out as a Maori agent."

His Honour stated that the proviso to subsection 2 did not authorise a Maori agent to appear in Court. It merely exempted him from the prohibition earlier in the subsection.

He then considered the meaning of the term "Maori agent" which appeared also in section 57 of the Law Practitioners Act 1955 but was not defined in any Act. He thought that the meaning could be found in the history of Maori land legislation and considered the provisions governing the operation of the Native Land Court. That Court was from the first an inquisitional Court. In an 1873 Act, the judge was

to proceed "without the intervention of any counsel or other agent"[16] although the claimants could select a "spokesman". An amendment of 1878 provided that the judge could allow "counsel or agent" to appear for either party.[17] In 1880 the wording was altered so that nobody could appear or be assisted "by counsel or agent" without permission.[18] A similar provision was still current as section 58 of the Maori Affairs Act 1953.

His Honour considered it significant that for as long as the Maori Land Court had had discretion to allow representation by counsel, the Court had also had discretion to allow representation by an "agent". He concluded that the Maori agent referred to in section 17 of the Law Practitioners Act 1955 was a person who appeared by permission before the Maori Land Court in accordance with section 58 of the Maori Affairs Act 1953. Any authority he might have was derived from that Act and did not include authority to appear in another court.

G. Conclusions

His Honour then summarised his conclusions.

(a) Maoris and Pakehas appear before a District Court or the High Court in the same position. They may be represented by solicitor or counsel as advocate or they may have a friend to assist them but not as an advocate unless the Court permits.

(b) The judge or Justice of the Peace has discretion to allow more help than the law requires but if his discretion is exercised properly, his decision may not be challenged.

(c) The final part of the memorandum from the Chief District Court Judge, saying that any friend assisting the litigant should not be allowed to make submissions or ask questions is no more than general advice. According to His Honour, this part should not be regarded as imposing a limitation on the discretion of Justices of the Peace.

(d) The Justices of the Peace had exercised their discretion properly in this case.

III MAORI AGENTS

A. Introduction

In Mihaka v. Police, Mr Mihaka claimed that the Justices of the Peace did not have a discretion to refuse him audience. He interpreted the proviso to section 17(2) as being a statutory limitation of the discretion and giving a right of audience to a "Maori agent". Hardie Boys J. rejected this interpretation.

Mr Mihaka's claim raises questions as to the nature and status of the Maori agent. After describing the few statutory references to Maori agents, I shall consider some historical evidence of different uses of the term. I shall then describe the functions of the Maori agent as presently understood and consider the status of such an agent under the Law Practitioners Act 1955 and in the District Courts.

B. Legislative History

The phrase "Maori agent" does not currently appear outside the Law Practitioners Act 1955. It appeared first in the form "Native agent" in section 34 of the Supreme Court Act 1882 which provided that if "any solicitor acts in any capacity or in any Court for any Native, whether as a Native agent or as a solicitor" his charges should be taxable. That section was included in the Law Practitioners Act 1908 and in subsequent Acts until it appears almost unchanged as section 57 of the Law Practitioners Act 1955.

As Hardie Boys J. pointed out, the section seems to have been a response to the case of In re T.R. Cash[19] in 1880. In that case, a solicitor had pleaded that his actions for a Maori client were performed as a Maori agent, not as a solicitor, and consequently his bill of costs was not taxable. His contention was rejected but the Legislature forestalled any similar and subsequent claims.

The phrase "Native agent" was also used in section 36 of the Law Practitioners Amendment Act 1935. That section appears, slightly amended, as section 17 of the Law Practitioners Act 1955 - the section discussed in the present case. The proviso appears in the original section and does not appear to have been prompted by any case.

C. Historical Status

The term "Maori agent" (originally "Native agent") has a long history in New Zealand. It appears to have had several connotations during that time. In 1861, one Gaston Charon, "Native Agent and Interpreter", is shown as being one of the "Extra Employés in connexion with the Native Insurrection" on the staff of the Native Secretary's Department.[20] He was Interpreter to the Forces at Otahuhu. Presumably he acted as liaison officer and negotiator with Maoris as well as interpreter.

The term may have been applied to the officers who were employed to purchase Maori land for the government. The term Native Land Purchase Agent is mentioned in correspondence, for instance.[21] Some of these officers were among the government representatives who were expected to report on the state of the Natives in their district when requested.[22]

Regular reports from government officers or representatives in Native districts were made between 1868 and 1890. The reports were signed in various styles including Government Native Agent and Native Agent.[23] One Resident Magistrate described himself as a Native Agent[24] which suggests that the term was not associated with land dealings in that context. Officers of the Native Department are also described as "Native Commissioners or Agents" elsewhere.[25] Native Agent would seem to have been a fairly common description of a government representative dealing with Maori affairs and not necessarily an officer of the Land Purchase Branch of the Native Department.

The term was also applied to a group of people who made a business of dealing in Native land and, in particular, appearing in associated proceedings in the Native Land Court. When the Hon. Mr Ballance had various meetings with Maoris in 1885, many complaints were made to him about the expense of having "lawyers and agents" in the Native Land Court[26]. In 1891, a Commission reporting on Native Land Law said that there had "arisen during the past few years a race of Native agents, or Maori lawyers, whose influence generally seems to have been pernicious".[27] They were "known as 'agents', 'conductors' or 'managers' - in Maori, kaiwhakahaere"- and had "established an almost complete control of the Native Land Court proceedings".[28] The submissions to the Commission contain many complaints about the expense of hiring these agents and allegations of dishonesty.[29] Native agents were subject to no training or control but there was a licence fee of five pounds.[30] Unlicensed people were apparently not allowed by the Court to act for Maoris.[31]

Some changes were subsequently made. In 1907 a list of fifteen people who had that year been granted general licences to appear as agents before the Native Land Court was laid on the Table of the House of Representatives.[32] It noted that all qualified lawyers could also appear, as well as a trustee or a person acting on behalf of a relative. Also, special licences to appear in a particular case would be granted on payment of a fee.

The activities of Native agents were probably not restricted to the Native Land Court. Agents were usually also licensed interpreters. Licensed interpreters had a statutory monopoly on the translation of any documents involved in business transactions.[33] The Cyclopedia of New Zealand[34] lists thirteen "Interpreters and Native Agents" amongst the businessmen of the North Island. Most describe themselves as Licensed Interpreters only, including one who is listed elsewhere as having a general licence to appear in the Native Land Court.[35] Four are also described as Native Agents[36] although only one says that he is a Licensed Native Agent. Entries have an element of advertisement and thus indicate the nature of the business which was carried on. Native agents usually emphasise exper-

ience in arranging land deals. Thus Mr Knocks of Otaki "takes a prominent part as an interpreter and native agent in Otaki, acting for Europeans and Maoris. He has already had a great many transactions touching the sale or lease of native lands".[37] Two men who did not call themselves Native Agents were obviously also involved extensively in land dealing.[38] They would all probably appear in the Native Land Court for their clients when it was necessary.

Thus it would seem that toward the turn of the century, Native agent was also a convenient business description applying to people who arranged business deals in Maori land. Qualifications as licensed interpreters enabled them to translate the necessary business documents and they could appear before the Native Land Court in order to get approval for transactions.

D. Present Status[39]

The term "Maori agent" is one that is familiar to those involved with the business of the Maori Land Court today. They are closely involved with that Court. A Judge of the Maori Land Court has written:[40]

> "Over the years much good work has been done in the Court by Maori agents and I believe that generally their activities have been welcomed by an overburdened legal profession. Although they be unqualified in law they are expected by the Court to emulate the profession in their conduct and respect for the Bench and to display a reasonable degree of maturity".

Representation in the Maori Land Court is not necessary. Proceedings are conducted with a minimum of formality. Emphasis is on oral evidence. There is little procedural detail and the originating document is an application which gives bare details of the claim. Anybody who seeks audience is always granted it[41] - or almost always.[42] It is fairly common for a party to a claim to be represented by a relative for instance. No fee is charged.

However, the Maori Land Court makes its decisions based on Maori custom[43] and it is also the sole authority on what shall be recognised as Maori custom.[44] Maori agents are hired for their knowledge of the practice of the Maori Land Court and also as advocates if they appear before the Court. The qualifications for a Maori agent described in the early case of In re T.R. Cash (1880)[45] as being acquaintance with "Maori customs and language" are still applicable.

Some of the Maori agents who have operated since 1945 are listed in Appendix 2. In the last few decades it seems that the great majority of people who have called themselves Maori agents have been past employees of the Maori Land Court. Most have also been licensed interpreters. Of the three Maori agents interviewed, two had been licensed interpreters and clerks of the Court and one had been a deputy registrar. There do not seem to have been many agents at any time during the last few decades. There are no licensing requirements. People who regularly represent bodies such as Trust Boards are also commonly called Maori agents.

Much of the work performed by a modern Maori agent resembles that of a law clerk. A full-time Maori agent can spend a large part of his time searching Maori land titles. Partition schemes are drawn up and genealogies compiled to support applications for succession orders. Paperwork for matters not directly connected with the land Court, such as the preparation of trust deeds, would be left to a lawyer. Meetings of owners are also organised so that the presence of a quorum is assured and proxy votes are arranged.

A lot of work comes from lawyers whose clients are involved in actions in the Maori Land Court. Contacts made while working for the Court would help in this respect. Most pakeha lawyers prefer to leave such matters to a Maori agent if one is available.

Agents may appear in other hearings associated with Maori land. Thus section 451 of the Maori Affairs Act 1953 provides that the Court may tax charges made to any Maori in connection with proceedings in the Maori Land Court, Maori Land Appellate Court or "before Parliament or any committee thereof".

It seems fair to say that a Maori agent is now a person (usually a layman) who performs the work of a solicitor or law clerk in business connected with Maori land and the proceedings of the Maori Land Court. His professional interests are restricted to those matters. In the past, the term has also been applied to government officials and to businessmen arranging deals in Maori land.

E. Status under the Law Practitioners Act 1955

Mr Mihaka based his claim to a right of audience on the terms of section 17(2) of the Law Practitioners Act 1955. That subsection refers only to solicitors' agents. The effect of the proviso is that Maori agents do not need legal qualifications when they act as solicitors' agents. "Solicitors' agent" has a special meaning in this context. It refers to a person who acts as a solicitor on behalf of other solicitors. A business relationship such as agency, employment or partnership is involved. For example, the Judge in Black v. Slee[46] treated it as axiomatic that an accountant who had gone into partnership with a qualified solicitor had contravened an equivalent provision.

The proviso permits a Maori agent to act on behalf of a solicitor. Its inclusion suggests that at least some activities of Maori agents can be classified as acting as a solicitor on behalf of another solicitor. It follows that the same work performed for a lay client would be acting as a solicitor. However the proviso does not protect

an agent acting as a solicitor even although a large part of a Maori agent's business would be commissioned directly by laymen. Presumably the Legislature intended to protect Maori agents who were acting in their legitimate sphere of interest, whether on behalf of a lawyer or on their own behalf. The resemblance of the terms "Maori agent" and "solicitors' agent" may have produced the present form of the provision. However the protection conferred appears inadequate. A specific provision dealing with Maori agents seems desirable.

F. Status in the District Courts

Mr Mihaka did not claim to be acting on behalf of a solicitor, but directly for Miss Prince. Since he was not acting as a solicitors' agent, he was not protected by the proviso to section 17(2) of the Law Practitioners Act 1955. He could come under the provisions of section 17(1), forbidding acting "as a solicitor", or section 16 which forbids acting "as a solicitor in any Court". Neither of those provisions contains a proviso as to the activities of a Maori agent.[47] Mr Mihaka was acting in a District Court. That is undoubtedly a Court covered by section 16 of the Act. If the Act applied, it did so by way of section 16 and not by section 17(2) as he claimed.

G. Summary

It is submitted, with respect, that although Hardie Boys J. did not refer to all of the above points, they completely justify his conclusion as to the proviso to section 17(2) of the Law Practitioners Act 1955. The only legal activities associated with the Maori agent in the past have been in the Maori Land Court. In that Court agents appeared only by permission. In any event, section 17(2) did not apply to Mr Mihaka's activities in Court. Hence the proviso to section 17(2) cannot be interpreted as a limitation on the

discretion of a District Court Judge or Justice of the Peace to refuse audience to a lay advocate.

The above conclusion is fortified by an observation from the Court of Appeal when it considered an application for leave to appeal from the decision in R. v. Prince.[48] Davison C.J. delivered the judgment refusing leave to appeal. He said that that was not "the appropriate time to deal at length with the rights of a Maori agent except to say that, whatever they may be, they are limited to activities concerned with the Maori Land Court. A Maori agent as such has no right of audience in the High Court".[49]

IV OTHER LIMITATIONS ON JUDICIAL DISCRETION

A. Introduction

Hardie Boys J. identified three aspects to the right to representation and assistance in a District Court. These were statutory rights, common law rights and the rights of a judicial officer to control his Court.[50] We can treat the first two aspects as possible limitations on the third. I shall consider first the discretion in common law to grant audience to qualified lawyers. I shall then consider the position of lay advisers in Court and then the statutory rights of representation.

B. Legal Practitioners in Common Law

Hardie Boys J. stated that legal practitioners have, in addition to their statutory rights, a right of audience in the District Courts which was established by usage.[51] However, in the case of Collier v. Hicks[52], it was decided that Justices of the Peace have complete discretion as to who shall appear as advocates before them. That was a case in which the lawyer had attempted to act as "attorney and advocate" before Justices of the Peace who were adjudicating upon an information for a penal offence. The Justices told the lawyer that they did not allow anybody to appear before them in that role. When he insisted, they had him evicted. The lawyer alleged trespass for assaulting and turning him out of the police office but the information was dismissed. Parke J. said:[53]

> "In the Superior Courts,by ancient usage persons of a particular class are allowed to practice as advocates,and they could not lawfully be prevented; but justices of the peace,who are not bound by such usage,may exercise their discretion whether they will allow any,or what persons,to act as advocates before them".

It would appear that in Common Law, the right of audience referred to by His Honour does not exist. Any rights of audience in the lower Courts are conferred by statute.

C. McKenzie Advisers

The English Court of Appeal in McKenzie v. McKenzie[54] drew authority from Collier v. Hicks[55] for the principle that if it is requested, a person must be allowed to attend a hearing as the friend of either party. He can take notes, make quiet suggestions and give advice.

The McKenzie case involved the hearing of divorce proceedings. The husband, although not legally represented, took an Australian barrister into Court with him for advice and assistance. However the Judge ruled that since the lawyer was not qualified to act as a barrister in that Court, the husband was not entitled to his assistance. The Court of Appeal ruled that the Judge did not have a discretion to prevent anyone from giving such help. People acting as lay advisers in Court are now commonly known as "McKenzie men" or "McKenzie advisers". The House of Lords appears to have accepted the concept. It approved an order for costs which included those of a litigant's solicitor who acted as a McKenzie adviser.[56]

In the early nineteen-seventies several organisations were set up in England which sought to exploit the concept in order to fight the legal system.[57] The best-known was called "Up Against the Lawyer". It was founded in 1973 and ceased its activities in 1976. Apparently not much use of the possibility is now made in the English Courts.

Quite extensive use of the concept has occurred recently in New Zealand District Courts, particularly in cases arising from the tour of the South African rugby team in 1981.[58] However, Sinclair J. in a recent judgment refused an application by two defendants for permission to have McKenzie advisers attend their impending High Court trial.[59] He approved a comment by the Court of Appeal of New South Wales that the idea was "an abuse of the court's procedures".[60]

The McKenzie case was distinguished on its facts. It is not clear whether the above judgment will affect the attitude of District Court Judges and cause them to claim a discretion in the matter of McKenzie friends in District Courts. The New Zealand Court of Appeal has not yet ruled on the status of lay advisers in our Courts. A fuller account of the judgment of Sinclair J. is given in Appendix 3.

D. Statutory Rights of Representation

1. Introduction

Charges may be heard in a District Court under either the Summary Proceedings Act 1957 or the Crimes Act 1961. As indicated by Hardie Boys J., section 37 of the Summary Proceedings Act 1957 makes provision for representation in any proceedings under the Act. The first two subsections read as follows :

> "(1) At the hearing of any charge, the informant and the defendant may appear personally or by a barrister or a solicitor of the High Court.
>
> (2) Except as provided in this section or in any other enactment, no person other than the informant may appear at the hearing of any charge and conduct the proceedings against the defendant."

Subsections (3) and (4) provide that a constable may conduct proceedings on behalf of another constable and an officer of a Department of State or local body may appear for a fellow-officer.

The Crimes Act 1961 does not provide for the representation of any informant. However, section 354 of that Act states that any "person accused of any crime may make his full defence thereto by himself or by his counsel".

The above provisions limit the discretion of a District Court Judge in that he cannot deny audience to anybody who seeks audience within their terms.[61] The only explicit limitations on representation are those of prosecutors in summary proceedings. The significance of the difference between that provision and the statutory

treatment of other situations is not immediately obvious.[62]

2. Summary proceedings

Hardie Boys J. assumed that the effects on the rights of an accused of section 37 of the Summary Proceedings Act 1957 were limited to giving the accused a right to counsel. In effect, he assumed that a judge could permit someone other than counsel or defendant to appear for the defence. Such an assumption can be justified by arguing that the absence of an express limitation, combined with the presence of such a limitation elsewhere, indicates that other forms of representation are to be allowed.

However, it can be argued with equal plausibility that the specified alternatives are the only ones to be permitted and that an express limitation is not necessary because there are no exceptions to be provided for. On that argument, the judge is not permitted to exercise his discretion to allow an unqualified person to appear before him.

An argument similar to the second one above was considered by the Privy Council on an appeal from Australia in O'Toole v. Scott.[63] That was a New South Wales case involving a minor traffic offence. The argument centred on a provision which stated that "the prosecutor or complainant may himself, or by his counsel or attorney, conduct his case" and may examine and cross-examine witnesses.[64] The validity of the initial proceedings was challenged on the ground that an unqualified police officer had conducted the prosecution on behalf of the informant and that the Magistrate did not have the discretion to allow this. Alternatively, it was argued that any discretionary power should only be exercised in exceptional cases. Both arguments were rejected.

Their Lordships briefly considered early English cases which affirmed the discretion of Justices to grant audience. They then considered statutory intervention in the area. The provision being considered was very similar to a provision of the Summary Jurisdiction Act 1848 (U.K.) which had been adopted by New South Wales in 1850. Their Lordships said that if the intention of the 1848 statute had been to abolish the discretion of the magistrates then express words to that effect would have been used. The right to be represented by counsel can co-exist with a discretion to permit unqualified advocates. In addition, it would have been unreasonable in 1848 to intend a restriction of unqualified advocates. At that time, many people could not have afforded to employ counsel but would have been incapable of conducting a case themselves.

Turning to the second submission, their Lordships said that there was no statutory limitation of the discretion. The discretion "is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his court."[65] In the passage quoted by Hardie Boys J.[66] they said that it could be exercised on either general or specific grounds "in order to secure or promote convenience and expedition and efficiency in the administration of justice".

Relating O'Toole's case to New Zealand law, we find that the English Act of 1848 was adopted by the New Zealand legislature in the Justices of the Peace Act 1858. Although the wording of section 37(1) of the Summary Proceedings Act 1957 now differs from that of the English Act, there is still no explicit limitation of discretion. For reasons similar to those given by the Privy Council it is submitted that section 37(1) does not restrict judicial discretion for summary proceedings.

3. Proceedings on indictment

The reasoning in O'Toole does not apply so directly to

section 354 of the Crimes Act 1961. That provision derives from section 391 of the Criminal Code 1893 and not from an English Act. Again in contrast, it applies to proceedings which traditionally have been held in the High Court. The question arises whether the traditional limitations on representation in the High Court should also apply in the District Courts for proceedings under the Crimes Act 1961. If they do not, then a District Court Judge might have discretion to allow an unqualified police prosecutor or a lay defence advocate to appear in a jury trial.

Although the powers of District Courts were increased when their jurisdiction was extended to some proceedings under the Crimes Act 1961, the nature of the Court was not affected. It is submitted, albeit tentatively, that the discretion granted by common law to a District Court Judge lies in the Court and is not a function of the type of proceedings. Accordingly, it is submitted that the lack of any express limitation of discretion in section 354 of the Crimes Act 1961 means that District Court Judges may permit unqualified advocates to appear in trials under that Act. In practice, however, police prosecutors are unlikely to seek audience, and audience is unlikely to be granted to lay defence advocates.

E. Summary

The analysis so far supports the conclusion of Hardie Boys J. that District Court Judges and Justices of the Peace retain full discretion to permit unlicensed advocates to appear before them. Rights of audience are conferred on qualified lawyers by statute but audience is not necessarily denied to others. His Honour presented that conclusion as being compatible with the opinion of the Chief District Court Judge, as expressed in the last point of the memorandum.[67] It is respectfully submitted, nevertheless, that the two are inconsistent since the memorandum did not allow for the exercise of discretion.

In reaching the result he did, however, His Honour said that the Law Practitioners Act 1955 does not affect the conduct of the Courts and so was essentially irrelevant to the question. It is submitted, with respect, that some provisions of that Act are indeed relevant. Sections 14 and 16 will be investigated. They raise the question whether an unqualified advocate must be refused audience because he "acts as" a lawyer.

V LAW PRACTITIONERS ACT 1955

A. Introduction

The Law Practitioners Act 1955 does not contain a provision which gives law practitioners a right of audience before specified courts and tribunals although many similar overseas Acts do contain such provisions.[68] Thus the Act does not limit judicial discretion by conferring any "rights".

Hardie Boys J. treated the Law Practitioners Act 1955 as not affecting judicial discretion at all. He said that it "regulates the conduct and discipline of the profession and its dealings with the public. It does not regulate the conduct of the Courts or the conduct of the profession in the Courts".[69] However, it is submitted that in some respects the Act regulates both the profession and the Courts.

Both sections 14 and 16, for instance, explicitly regulate the conduct of unqualified persons in Court. Under section 14 no person who is not enrolled as a barrister "shall act as a barrister in any Court". Similarly, under section 16 no unenrolled person "shall act as a solicitor in any Court". It is submitted that the discretion of Judges and Justices of the Peace in the District Court is limited accordingly. They cannot allow unqualified people to "act as" barristers or solicitors in Court. To do so would be to permit the contravention of a statute without specific statutory authority. It follows that the activities of a lay advocate are permissible only if, and to the extent that, they are not the actions of a qualified lawyer.

The Act does not define the actions which should be considered either those of a barrister or those of a solicitor. Both "barrister" and "solicitor" are defined in terms of procedure only.[70] In practice, the difference between the actions of a barrister in Court and those of a solicitor in Court is irrelevant in New Zealand. There are two reasons

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for saying this. Firstly, the functions of a barrister and those of a solicitor are much the same when they act as advocates.[71] Secondly, the distinction between barristers and solicitors has never been very marked in New Zealand, although separate rolls have been kept for the two professions. At present, lawyers may only practice as barristers or as barristers and solicitors. They may not practice as solicitors only. After the passage of the Law Practitioners Bill, all lawyers will be enrolled as barristers and solicitors. Also, actions "as a solicitor in any Court" and actions "as a barrister in any Court" are covered by the same clause of the Bill.

In view of this situation, the actions of a lay advocate need only be compared with those of a qualified lawyer. For reasons of convenience, however, they will be compared with the actions of a solicitor in the discussion following. Relevant New Zealand authority will be considered first and then the appropriate approach to foreign authority. Some foreign cases are considered next, in terms of factors which have been regarded as being relevant to the question. Some relevant policy considerations are discussed.

B. New Zealand Authority

The meaning of "acts as a solicitor" in sections 16 and 17(1) is not defined by statute. It must be determined from the Common Law.

The only New Zealand case on a similar point seems to be McCulloch v. Anderson,[72] where the meaning of the phrase "acts as a conveyancer" was in question. An accountant had drawn up a tenancy agreement and charged for his services. It was submitted that this was not acting "as a conveyancer" under the then section 18 of the Law Practitioners Act 1955. Mr Justice Hutchison traced the history of the provision to a conveyancing ordinance of 1842.[73] The phraseology had remained relatively unchanged since then. His Honour considered it "to be beyond

doubt"[74] that the meaning of the phrase had not changed in that time. The Imperial Act applying at the time was the Stamp Duties Act of 1804. It provided that it was not an offence for an unqualified person to draw up any "agreement not under seal". Hutchison J. decided that since a tenancy agreement was not under seal, no offence had been committed.

Parliament signified its disagreement with the learned Judge's opinion in section 2 of the Law Practitioners Amendment Act 1962. The Hon. J.R. Hanan, in introducing the bill, said that it "clarifies the law as it was believed to be".[75] The amendment substituted a new section stating in detail the documents that only qualified lawyers could prepare.

The fate of the decision of Hutchison J. warns us that old and foreign authority must be treated with caution in this area. However, foreign case law should still be useful as illustrating possible approaches for the New Zealand courts. It will be considered next.

C. Approach to Foreign Authority

Legislatures may give their Courts some guidance as to the range of legal activities which laymen are not to perform. The approach of each Court to the problem of defining forbidden acts must thus be affected by the wording of the relevant statute. It is also influenced by the types of activities which are specifically permitted or prohibited by other statutes and by customary practices. These influences can differ between similar common law jurisdictions. Overseas cases must thus be viewed in their context.

Many overseas cases deal with non-advocate activities. They attempt to define the limits of legal work outside the courtroom which is permitted for laymen. Activities within the courtroom are more clearly identified with legal practitioners. The closer activities come to being appearances

in Court, the greater the likelihood of their being restricted to qualified lawyers. Various cases[76] have emphasised the unique function of the advocate in the common law system and the great responsibility which rests on his shoulders. Some caution must be exercised if acts in the courtroom are to be classified as not restricted to lawyers. Nevertheless, it is not clear that all of the functions that a lawyer may perform when addressing the Court are essential parts of his role. They may be incidental aspects which can also be performed by laymen. Foreign cases can help in formulating a test for classifying activities in this way.

D. Relevant Factors

1. Introduction

There is the possibility that a particular action is restricted to solicitors by statute or common law. It is then obvious that an offence has been committed if it can be proved that the action was performed. There may, however be no specific penalty attached to the prohibition. An example of that situation is the English case of re Ainsworth. Ex parte The Law Society[77] where rules relating to procedure were broken.

Analysis of the cases suggests five other factors which may be considered relevant in determining whether an unqualified advocate "acts as a solicitor" under section 16 of the Law Practitioners Act 1955. These are : background; pretending to be a solicitor; acting for reward; acting habitually; acting in a way that requires legal judgment and training. The relative importance which these factors have been given by different Courts will be examined for sample cases from the following countries: England; Australia; Canada; the United States of America.

2. Background

(a) England

The wording of the provision forbidding laymen from

acting as solicitors is given in the section below that deals with pretending to be a solicitor. It has not changed substantially since 1843.

Various cases have emphasised the idea that lower courts have discretion to decide who may appear before them as advocates, including laymen. For example, in Duncan v. Toms[78] it was ruled that a lower court could permit an R.S.P.C.A. inspector to examine witnesses on behalf of the society. The Privy Council in O'Toole v. Scott[79] referred to several other English cases which supported judicial discretion in the granting of audience. The possibility that a lay advocate might be illegally acting as a solicitor was not considered in O'Toole's case, however, and the point has usually not been referred to in the cases.

The point has been raised occasionally. Police officers commonly conduct prosecutions in the Magistrates' Courts by permission, on behalf of an officer who is the complainant. The learned editor of Cordery on Solicitors comments that if such a police prosecutor were to examine a witness "it is not easy to see why" this would not constitute an offence.[80] There was comment in the case of Verlander v. Eddolls[81] also. That case involved a layman who had been allowed to appear in the county courts as an agent for litigants in minor civil actions. Although lay representation in a county court was authorised by statute, a judge remarked that the activities of the agent might well have been an offence under another statute.[82]

The Lord Chancellor has recently been given power to grant persons in "relevant legal employment" rights of audience in county courts.[83] It will be interesting to see how this development affects future attitudes.

(b) Australia[84]

The terms of relevant statutes vary between the states of Australia. However, most are based on English originals and English case law is applicable.

The Privy Council in O'Toole v. Scott[85] considered authority from many of the states when it decided that a magistrate had discretion to grant audience to lay prosecutors. However, the question that such people might be illegally acting as solicitors was not raised in that case or in the cases considered.

The decision of the Victorian Supreme Court in Hubbard Association of Scientologists International v. Anderson and Just[86] considered the point directly. A person sought to speak as agent for a company but was not permitted to do so by the trial judge because of a provision prohibiting persons who were not solicitors from doing certain things "as solicitors". The Full Court held that the provision did not apply to a person who did not purport to act as a "solicitor" but, for example, merely acted as a "spokesman". The provision did not "in terms prohibit the granting of audience to an unqualified person irrespective of the circumstances in which he seeks to be heard".[87] Unfortunately, the Court did not analyse the elements of "acting as a solicitor" which distinguish it from "acting as a spokesman" or any other possible activity in Court. Whether Mr Mihaka would have been acting as a "spokesman" in their eyes cannot be determined, for instance. The lack of analysis may have been due to the Court's finally deciding that Mr Tampion should be refused permission to appear, anyway.

(c) Canada

The statutes regulating legal activities in Canada vary between provinces. Usually, the practice of law or the practising or acting as a barrister or solicitor by an unqualified person is forbidden. All states are

subject to the Federal Criminal Code, however. Section 737(2) of that Code provides that in a court of summary conviction the "prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent". The interpretation of the local statutes is necessarily affected by that provision. The Courts appear to have chosen to define offences so as not to include the representation provided for by the Code, rather than treating the Code as providing an exemption.

In addition, trained "professional agents" in Ontario are allowed to appear in small claims tribunals and family courts.

(d) The United States of America[88]

In the U.S.A., offences equivalent to acting as a solicitor when unqualified are labelled unauthorised practice. Not all states have laws prohibiting unauthorised practice. The statutes in other states vary greatly in the detail of their prohibitions. Not all Courts take their provisions into account, anyway.

This situation arises because the Courts in the U.S.A. have claimed for themselves the power to control the legal activities of laymen.[89] They regard themselves as the dominant branch of government in this field and may declare legislation invalid unless it "helps" the judiciary. The wording of the statute may thus have little influence on a Court's attitude. In State v. Kirk[90] a layman had acted as an agent preparing pleadings and conducting cases in a Justice Court. The relevant statute prohibited unqualified people from practising in a Court of record. It was objected that the Justice Courts were not Courts of record but the Court said that it was the nature of the activity that was important, not where it had occurred.

It has been said that in the U.S.A., "unauthorized practice as a body of abstract legal concepts is undeveloped, sketchy and uncertain".[91] Various specific tests have been applied by different courts[92] but there is disagreement among them as to which are acceptable and which are not. In general, it is assumed that appearance in Court constitutes unauthorised practice and the problem of definition involves activities outside the courtroom. Thus one Court has said that the "practice of law (in addition to conduct of litigation in courts of record) consists generally, in the rendition of legal service to another...".[93] However, the facts of particular cases may modify this approach. In People v. Alexander[94] a law clerk had appeared before the Court to ask for a continuation and had helped in the preparation of an order which the trial judge had requested. It was held on appeal that the clerk had not engaged in the unauthorised practice of law. Administrative convenience appears to have been the primary consideration.

3. Pretending to be a solicitor

(a) England

This has been a significant factor in decisions on whether a person has acted as a solicitor in England. The equivalent to section 16 of the Law Practitioners Act 1955 (N.Z.) is section 20(1) of the Solicitors Act 1974 (U.K.). It states that :

> "No unqualified person shall - (a) act as a solicitor or as such issue any writ or process or commence, prosecute or defend any action, suit or proceeding, in his own name or in the name of any other person in any court of civil or criminal jurisdiction (b) act as a solicitor in any cause or matter, civil or criminal to be heard or determined before any Justice or Justices or any Commissioners of Her Majesty's revenues."

The division of paragraph (a) into two branches can be said to imply that to "act as a solicitor" means

something other than the doing of one of the listed actions. Otherwise the second branch of the provision would be redundant. Accordingly, acting as a solicitor would seem to involve pretending to be a solicitor. Such a contention was made concerning a similar provision of 1843 in re Simmons.[95] An unqualified person had issued a writ in the name of another. The language of the reported judgment is obscure but Grove J appears to have accepted that "as a solicitor" means in the character of a solicitor[96] although he rejected counsel's full argument.

The case of Dockings v. Vickery; re Symons[97] involved the same statute of 1843. An accountant had issued a writ which appeared to have been issued by a solicitor. It was held that there was not enough evidence to show that Symons had put himself forward as actually acting as a solicitor. For that reason, the Court would "let him off"[98] upon payment of costs.

It would seem that an element of pretence is required by the English Courts. This is despite the fact that there is a separate offence of wilfully pretending to be a solicitor.[99] Presumably the phrase "acts as a solicitor" has the same significance in paragraph (b) as it does in paragraph (a).

(b) Australia

The case of re Sanderson, Ex parte The Law Institute of Victoria[100] involved threats of legal action by a debt collector. The relevant statute was the English statute of 1843 considered in re Simmons.[101] Cassen J. referred to that case and interpreted the judgment of Grove J. as saying that professing to be a solicitor is sufficient for acting as a solicitor. However, he ruled that "if a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor...then he does act as a solicitor".[102]

The same test was subsequently used in a very similar Victorian case.[103] It was also referred to in a New South Wales case[104] in which a company secretary prepared particulars of claim in the name of an ex-employee and presented them to the court registrar. He was held to have done something ordinarily done by a solicitor in the name of an allegedly qualified person.

(c) Canada

In some cases, pretence of being a solicitor has been an important factor in determining whether an offence has been committed. A company official in Saskatchewan who issued a writ of summons on behalf of his company was held to have committed contempt of court by holding himself out as a solicitor.[105] In the case of Barreau de Trois-Rivieres v. Kinraeco Ltee,[106] a collection agency sent out a final notice which said that if the debt were not paid within a week, the claim would be placed in the hands of advocates. The Court held that this usurped the functions of an advocate and constituted an unlawful practice of law.

A person who appeared regularly for people in the summary criminal courts was ruled to have held himself out as a lawyer although he had specifically told his clients that he was not a lawyer.[107] The fact that he had offered his services and conducted himself in the same manner as a lawyer was sufficient.

(d) The United States of America

The element of pretence is not a necessary one but activities which would otherwise be permissible may be labelled as unauthorised practice if given the appearance of professional authority. Thus in Crawford v. State Bar of California,[108] a disbarred lawyer had acted independently "both in regard to matters involving advice and to matters that can be characterised as such because performed in a law office".[109]

4. Acting for reward

(a) England

The acting for reward has also been a significant factor in English decisions. In Re Hall; Ex parte The Incorporated Law Society[110], an architect and surveyor had entered a personal appearance to an action on behalf of a client and had charged a fee for doing so. Although any layman could legally have performed the law-related part of his services, he was held to have acted as a solicitor.

The case of Verlander v. Eddolls[111] involved an "agent" who, under a provision of a statute[112], was allowed to assist parties with cases before a County Court and, with permission, to represent them in Court. The question before the Court was whether a provision forbidding the recovery of fees by Court action applied to all of an agent's charges. Grove J. commented that he thought the agent might have acted as an attorney or solicitor under the Solicitors Act 1843 (U.K.) despite the other statute.[113] It is not clear that he thought the fee was the significant element, but it seems likely.

The fact that the accountant in Dockings v. Vickery; Re Symons[114] did not receive any fee for his action may have contributed to the Court's lenient attitude towards him.

Where a statute has required an expectation of reward as an element of an offence, English Courts have been satisfied with indirect rewards. Thus in Pacey v. Atkinson[115] a debt collector who prepared statements of claim and attended in Court was held to have acted in expectation of "fee, gain or reward" because of his usual expectation of commissions. Similarly, the Court of Appeal decided that where a person had done conveyancing work for members of an association, with all fees going to other members, he had still performed his work for a fee.[116]

(b) Australia

The absence of a fee was held to be decisive by the Court in Andrews v. Wilson .[117] A debt collecting agency had acted for another in a Local Court for the recovery of a small debt. The agency was held not to have committed an offence because no fee was charged apart from its usual commission.

In the cases of re Sanderson[118] and Law Society of N.S.W. v. Newlands[119], sums were mentioned as being fees. The judges in those cases treated such mentions as tending to give the impression of communications from qualified solicitors. A fee seemed to be neither a necessary nor an aggravating factor in the offence.

Where reward or gain has been a necessary part of an offence, some Australian Courts have not been so ready to include indirect benefits as those in other jurisdictions have been. In Barristers' Board of Western Australia v. Opie[120] a public accountant who had incorporated several companies was appointed a salaried officeholder in each but it was held that he had not performed his work for remuneration. In Re Crowley[121] the manager of a life assurance society who prepared a mortgage discharge did not commit an offence because the fee went to the Society's funds.

(c) Canada

The charging of a fee for a legal service has not always been regarded as establishing an offence in Canada. In R(Smith) v. Ott[122] an accountant charged a fee for incorporating a society. He was held by the Ontario Court of Appeal not to have acted or practised as a solicitor because anyone over 21 might incorporate a society in Ottawa.

In R. v. Nicholson[123], the Alberta Court of Appeal held that a law student who incorporated companies for the public using standard forms had not practised law although he had made it a business and advertised

his services.

(d) The United States of America

Payment is not regarded as a necessary element: "The character of the service and its relation to the public interest, determines its classification - not whether compensation be charged therefor".[124] In State v. Kirk[125] the agent charged no fees in some cases but this was held to be irrelevant. In Delaware State Bar Assn. v. Alexander[126], the defendant was director of two divorce reform groups and sometimes asked clients to take out membership but no other payment is mentioned. The Court did not seem to regard remuneration as important. Similarly, it did not matter that the law clerk in Clements v. State[127] received a salary, rather than fees.

5. Acting habitually

(a) England and Australia

English Courts seem to have regarded a single incident as constituting unlawful action as a solicitor. The cases of Re Hall[128], Dockings v. Vickery[129] and Re Ainsworth[130] all involved a single transaction. Repetition would presumably be an aggravating factor rather than a necessary one.

Australian Courts have taken a similar attitude. In Law Society of New South Wales v. Newlands[131], for instance, the company secretary prepared only the one set of papers but was convicted.

(b) Canada

Repeated conduct has been regarded as essential for an offence by some Canadian Courts. In the case of R. v. Campbell and Upper-Canada Business Administrators Ltd.[132] an Ontario Court required "a frequent, customary or habitual course of conduct" involving legal proceedings, advice or drafting, before people could be said to have acted as solicitors. In R(Smith) v. Ott[133], an isolated incident was held by the Ontario Court of Appeal to not satisfy the requirements for acting as a solicitor.

(c) The United States of America

Repetition has been taken into account by some Courts. One of the conclusions by the Special Master who reported to the Court in Delaware State Bar Assn. v. Alexander[134] was that for various reasons the activities could not "be excused as mere isolated incidents of assistance to a person needing legal advice".[135] The Court does not comment on this statement. On the other hand, the law clerk in People v. Alexander[136] appeared before the Court in the course of only one case but that appears to have been sufficient for the trial judge who convicted him of unauthorised practice.

6. Acting in a way that requires legal judgment and training

(a) England and Australia

English Courts have not regarded legal expertise as being required before actions are made as a solicitor. The architect's actions in Re Hall[137], for instance, could have been performed by any layman. However, the straightforward nature of the transaction was regarded as merely a factor in mitigation. Much the same could be said of other cases involving the filing of documents. Of course, cases that did require legal skills would be regarded as particularly serious.

Similar attitudes have been shown by Australian Courts.

(b) Canada

The legal judgment and skill involved in an activity has not always been regarded as important by Canadian Courts, especially where there is an element of pretending to be a solicitor. Thus in Barreau de Trois-Rivieres v. Kinraeco Ltee[138], the sending of a letter threatening legal proceedings cannot be said to have required legal training but the debt collection agency was convicted.

Such requirements have been considered necessary in several cases, however. In R. v. Ballett[139] an Ontario

Magistrate considered that legal advice should be given before a company is incorporated. In convicting a defendant who incorporated several companies, he said it was unnecessary to prove that such advice was actually given. The case of R(Smith) v. Mitchell[140] involved a real estate agent who dealt with real estate transactions as if he were a solicitor. It was said there that practising as a solicitor involved every service that imperatively required the exercise of the skill and learning of a solicitor. Similarly, in R. v. Nicholson[141], the Alberta Court of Appeal said that the test for practising as a solicitor was whether the action should only be done by qualified lawyers in order to protect the public.

(c) The United States of America

This factor is one that the Courts commonly state is the basis of their judgment, e.g. "The practice of law... is engaged in whenever and wherever legal knowledge, training, skill and ability are required".[142]

Fairly straightforward activities have, however, been classified as requiring legal expertise. Thus, a debt collection agency that had debts assigned to it and then sued on them through a licensed attorney was held to have practised law.[143] The Court objected to various aspects of the activity but in particular the agency had usurped the lawyer's position in advising the creditor that a suit was appropriate. Nevertheless, it would apparently have been acceptable if such advice had been given and the attorney had been hired directly by the creditor.

In general, it seems that any personalised advice touching legal matters may be regarded as the practice of law. Choosing a form and helping a person fill it in is not permissible for a layman, for instance[144].

7. Summary

The cases considered above are samples only. They serve to illustrate the different factors that Courts may take into account in determining whether activities are to be restricted to qualified lawyers.

Courts in all jurisdictions would seem to regard a need for legal judgment and training as being a very important factor. Some Canadian Courts have regarded it as a pre-requisite for an offence. The interpretation in practice of such a test is very important, since it can be extended to cover a wide variety of activities. Pretending to be a solicitor is also frowned upon in all jurisdictions. However, it is often made a separate offence by legislatures. The emphasis placed on it in English Courts might be an historical accident of drafting. Different attitudes have been taken towards the payment for law-related services. Some Courts have ruled that payment does not alter the legality of otherwise permissible activities but others have ruled that it does. Only Canadian Courts seem to have required repetitive or habitual actions before an offence is committed.

The different factors are present to varying degrees in different types of lay representation. There can be said to be a spectrum of lay advocacy. At one extreme might lie pleading in mitigation by an unpaid relative or friend of the accused. At another extreme would be the activities of a full-time police prosecutor. The Courts must decide whereabouts on that spectrum lies the boundary between activities which are restricted to lawyers and those which are not.

A Canadian Court, for instance, with its experience of having lay defenders at summary hearings, would probably have drawn the line so that Mr Mihaka would not be considered to have acted as a lawyer. With the lack of statutory constraints on New Zealand Courts, there seems to be no a priori reason why they should not follow the Canadian example, even if the legislative background is different in New Zealand.

E. Policy Considerations[145]

1. Introduction

Courts in New Zealand lack statutory guidance in the formulation of a test for acting as a solicitor. The relevant case law is not binding or strongly persuasive. Policy factors must play a major role in the approach to the question. The following discussion does not pretend to exhaust the issues raised by the possibility of lay advocacy. However, I shall try to illustrate the types of issue which must be considered. Policy will be considered under the following headings: Lawyers' professional interests; Availability of representation; Quality of representation; Quality of representation; Administrative interests.

2. Lawyers' professional interests

As has been said, lawyers "are proud to belong to 'an ancient and learned profession'. Yet the lawyer is in business to make a profit and a legal practice is little different from any other small business".[146] There is a tension between the lawyer's role in producing practical "justice" for all the members of society and his interests as a businessman selling his skills. Hardie Boys J. in Mihaka v. Police said that the denial of a right of audience to unqualified people "should not be regarded as protection of any privilege or monopoly".[147] The fact remains that such denial, if routine, does indeed protect a monopoly.

Practising lawyers submit to the control of an organising body which lays down requirements, enforced by statute, of qualifications and a code of conduct for members.[148] They are forbidden to employ various common commercial practices. They cannot advertise, go out and solicit custom, diversify into law-related fields or set up limited liability companies. Their personal conduct and business accounts are subject to scrutiny by the Law Society. They must charge prescribed fees for particular services and they may not refuse a request for representation by a person who is willing to pay the fees.

In return, regulation of competition from unqualified practitioners is provided by statute. The regulation in a particular field could take two forms:[149]

i) complete monopoly: a total ban on non-certified persons doing prescribed work. For example, only pharmacists can legally dispense certain classes of drugs.

ii) partial monopoly: a ban on non-certified persons holding themselves out as practitioners in a prescribed field. It may be coupled with a ban on the charging of fees by a layman. For example, a layman can legally provide various medical services but he cannot advertise himself as a "doctor".

If District Court Judges and Justices of the Peace have discretion to grant audience to unqualified advocates, then the monopoly of the legal profession in the District Courts is only partial. In that case, competition would still be controlled by the exercise of the Court's discretion, of course. The effects of lay competition on the professional interests of lawyers must be considered.

Commercial competition with lawyers is obviously possible if lay "agents" are allowed to work for reward. This has been demonstrated in, for example, the Maori Land Court by the Maori agent, in the English county courts by the case of Verlander v. Eddolls[150] and in the Canadian summary courts by the case of R. v. Woods.[151] Competitors would not be restricted by the code of ethics imposed on lawyers. For instance, they would be able to use business practices which are forbidden to lawyers. However, the legal profession is unlikely to suffer greatly in purely financial terms from lay competition in the District Courts. Work in those courts is largely unprofitable. It is regarded by many firms as a public service to be subsidised by profits from work in other areas.

Nevertheless, other professional interests are at stake. Advocacy is the activity which is traditionally regarded as the essence of a lawyer's profession. It links him most

closely with ideas of justice for the individual. Lay competition, combined with the greater financial and professional rewards available in the superior courts, might cause a complete withdrawal of qualified lawyers from work in the lower courts. That could well create an image of an elitist profession. Lawyers would be seen as only being interested in defending the rights of people who can afford high fees. Poor people must make do with less competent advocates.

Lawyers could also be concerned at the effects which lay advocates might have on the image of the justice system and thus indirectly on the image of lawyers. Business practices such as advertising which are forbidden to lawyers could reflect on the ideals of the system. It would be an unedifying spectacle, for instance, to see open competition between businessmen offering rival brands of "justice" to the public.

If a system of trained lay advocates were instituted, then the profession could be concerned at the diversion of resources from the training of lawyers and perhaps a lowering of standards. The lengthy and expensive training that lawyers receive is designed to produce a grasp of the law as an integrated whole. The expense is justified on the grounds that lawyers with such a grasp provide a better quality of service. Specialised laymen would not have this overall view of the law but their training would require resources that might otherwise have been used for training lawyers.

3. Availability of representation

The service that lawyers provide in the courts has been criticised on various grounds.[152] Some critics object to the whole structure of the Court system and see lawyers as a powerful group with a vested interest in preserving the status quo. Many others, however, criticise lawyers for not performing adequately their assigned role

within the system. The latter group can point to large sections of society whose legal needs are not being met.[153]

In general, the organisation of the legal system is based on the assumption that people in need of legal services will seek them out. However, many people who appear in the District Courts do not know how to obtain legal representation even if they are aware of its availability and desirability. Most legal firms do not provide a service which is readily available to such people. They are concentrated in inner-city areas where more profitable work is likely to be forthcoming. The position and hours of their offices are likely to be inconvenient for working people. In addition, legal offices are regarded as intimidating places by the diffident and unsophisticated, even if their location is known. The above problems are accentuated for members of racial minorities who have language problems. They are not likely to know how to contact a lawyer who can speak their language.

The duty solicitor scheme is intended to remedy many of the above defects. It provides representation for many people who would otherwise lack it. But few lawyers appear regularly in the District Courts except as part of the scheme. The present system is hard-pressed to produce an adequate service. Lay advocacy could well relieve the pressure on the qualified lawyers. It could take various forms. It might consist, for instance, of a plea in mitigation by a relative, friend or employer. Speeches in mitigation after an accused has pleaded guilty require no legal expertise and yet they make up much of a lawyer's work in the District Courts. Many lawyers do not know much about their clients - the duty solicitors, in particular, do not have the time to form a picture of an accused. It would seem sensible to leave such work to somebody who knows the person.

Submissions to the Royal Commission on the Courts suggested that such laymen be allowed to address the Court before a decision is made. For instance, it was said that they should be allowed "to speak as to matters relevant, but not necessarily material to a finding".[154] It was pointed out that rules of evidence which might prevent such addresses are not really relevant when there are no laymen to be influenced.

There seems to be no reason in principle why lay people making pleas in mitigation should not be paid for their services. In a flight of fancy, a class of professional "apologists" can be envisaged whose services would be available for a fee to all accused who pleaded guilty. Alternatively, social workers could provide a similar service without a fee. In either case, a solicitor would conduct the preliminary interview with an accused and advise him as to his plea. If the accused decided to plead guilty, he would be referred to an apologist and otherwise to a lawyer.

It has been suggested that laymen might be specially trained as "criminal advocates" to make appearances in the lower courts.[155] Such people would perform all the advocacy functions of lawyers. They would provide an alternative and specialised source of trained representation and would presumably be more readily available than lawyers who didnot specialise in the same way.

4. <u>Standard of representation</u>

Many of the objections to the idea of lay representation are based on the assumption that lay advocates will provide an inferior service. The adversary trial process relies on the competent exposition of opposing views to test the validity of each party's case. If the advocate for one party fails to assert valid claims or objections, then the rights of a litigant may be irreversibly prejudiced. As Hardie Boys J. said,

"an unqualified and inexperienced person may do more harm than good to the person he assists: if only because of his ignorance of the law which may support that person's cause."[156]

Such harm can occur under the present system when untrained defendants conduct their own cases. Daemar v. Gilliand[157] is an example of a case where a layman's inability to cross-examine effectively was fatal to his case. Judges usually give defendants who conduct their own cases as much help as is consistent with the appearance of impartiality. However, a layman who presumes to conduct the case on behalf of another would have to be treated on the same footing as opposing counsel.

Canada has not been deterred by such arguments and has allowed lay representation in its summary courts without apparent ill-effect. The record shows that untrained laymen under pressure of circumstances may deal very effectively with the law and procedure of even the superior courts. For instance, in Reid v. Reid[158] one party took his case in person to the Privy Council. With training and experience, laymen have produced very effective service in various courts and tribunals on a regular basis. Thus, police prosecutors have had the statutory right to appear before the lower courts in New Zealand for many years. In England, legal executives have been given the right to appear in county courts in limited circumstances which seem likely to be widened in the future.[159] In Ontario, trained "professional agents" are allowed to appear in small claims courts and family courts. Administrative tribunals in many countries, including New Zealand, allow lay representation before them. For instance, specialised lay advocates have proved extremely competent in industrial matters.

Lay representation in tribunals can be justified on the grounds that procedure is usually fairly simple and the area of law involved is limited to the particular interest of the tribunal.[160] However, the District Courts deal with the

very wide field of criminal law. The effects of a mistake on a client's interests may also be very serious. Nevertheless, it has been suggested that laymen with appropriate training can provide a cheap and effective service as "criminal advocates" in the lower courts.[161] One advantage of such a specialised group of para-professionals would be that members would continue practising in the lower courts and their clients would benefit from their advocates' increasing experience. In contrast, lawyers tend to drift away to more lucrative and prestigious activities as they gain seniority and experience. A controlling body could be set up to set standards of conduct and ethics for its members in the same way that lawyers are controlled by the Law Society.

5. Administrative interests

Both judges and lawyers are interested in the efficient administration of the Court system as it affects their work loads and the tax payers are concerned that there should be a minimum of waste. Lay advocates may disrupt the judicial process because of their inexperience and ignorance of procedure and are regarded as undesirable for this reason also. The argument would not apply to trained para-professionals, of course, but if carried to its logical conclusion would require that no layman be allowed to appear without a trained advocate. That would conflict with what has traditionally been regarded as the "right" of an accused to present his own case if he wishes to do so.

Judges are especially likely to restrict defendants' "rights" which they consider are being deliberately exploited to disrupt proceedings. Thus, Speight J. said recently that people who appealed to the High Court from a District Court and wished to appear in person would in future have to file memoranda as counsel did: "That will be the policy in the future with all the judges of this Court because we are not going to be used as sounding boards for irrelevancies".[162] The effect of this policy is that most

defendants wishing to appeal will need to consult a lawyer. However that aspect does not seem to have been mentioned.

A similar attitude was taken by Sinclair J. when he declined an application by two accused to have McKenzie friends at a High Court trial.[163] It had been thought on the basis of the English case of McKenzie v. McKenzie[164] that there was a common law right to have lay advisers in the High Court. However His Honour noted with approval some comments from a New South Wales court that the practice was regarded there as an abuse of the court's procedures because the friend "was not subject to control or criticism".[165] His Honour said that those comments "are very apt to the past experiences of the Courts in this country".[166] His Honour did not specify what these past experiences were.

The past experiences of the Courts may well justify the above attitudes in particular cases. However, the result is that the opportunities of defendants to appear in Court other than by a qualified lawyer have been significantly reduced. The unfortunate impression may be given that legal "rights" in Court are theoretical rather than practical. If their exercise proves inconvenient for the Court, they will be limited or eliminated. Such an impression could be ultimately more detrimental to public respect for the Courts than disruption caused by particular individuals.

There are strong arguments for increased lay participation in the legal system.[167] In particular, there is a need for public involvement in order to maintain public confidence in the Courts. The involvement of laymen in the system would enable the public to see that the law operates fairly and increase the understanding of its action and importance. Devices such as McKenzie advisers may be desirable for giving people the feeling that they have some control over their own fate rather than being helpless pawns in the hands of others.[168] It is submitted that considerations such as these should be balanced carefully with the interests of efficiency and order in the system before the opportunities for laymen to play a part in the process are reduced.

VI CONCLUSION

It is concluded that judicial officers of the District Courts have very wide, although not unlimited, discretion to control representation and assistance of parties in their courts. A recent High Court judgment has suggested that even the common law "right" to an adviser in Court may be subject to judicial discretion in New Zealand. If that is so, then the only limitations on the discretion are statutory.

Statutes confer on both parties a right of representation by a qualified lawyer which is not subject to discretion. The appearance of lay advocates for the complainant in summary proceedings is expressly restricted to police officers and officers of particular bodies. However, it is concluded that some discretion remains in the Courts to hear lay advocates in other roles. It is submitted that the discretion is further limited only by the particular provisions of the Law Practitioners Act 1955 which apply to actions in Court. In particular, it is submitted that the proviso to section 17(2) of that Act, as relied on by Mr Mihaka, has no effect on the discretion. Neither the historical status of Maori agents nor the terms of the statute justify Mr Mihaka's claim to audience.

However, it is submitted that judicial discretion to grant audience to lay advocates is limited by section 16 of the Law Practitioners Act 1955. That section prohibits an unqualified person from acting "as a solicitor" in Court. The statute and New Zealand cases provide no guidance for the Courts on the interpretation of this provision. Courts overseas have approached similar problems in different ways but the foreign case law suggests factors that may be relevant.

It is concluded that a significant factor in determining whether a layman has acted as a solicitor is whether the actions in question required legal training and judgment. It is submitted that such a test provides adequate protection of individuals against the prejudicing of their rights by unskilled third parties. It protects the interests of the legal profession so far as is justified by lawyers' specialised training and discipline. It

also safeguards the workings of the legal system from disruption by laymen who are ignorant of its technical requirements. At the same time, the use of such a test would not exclude laymen entirely from participation in the legal process.

Of the other factors considered, the element of pretending to be a solicitor would seem to constitute a separate offence which is already provided for by statute. Acting for reward and repeated actions would be aggravating elements. Their presence would not be sufficient to constitute an offence if the primary test were not satisfied.

When applying the test to actions in the District Courts, it seems desirable to impose a minimum restriction on judicial discretion. Judges should be encouraged to allow lay appearances. It is submitted that the actions of a lawyer in the District Courts should be defined as being the examination of witnesses and the making of submissions on points of law. Addresses to judicial officers by lay "apologists" on matters relating to the alleged offence should be permitted under the present law.

It may be necessary to introduce trained lay "criminal advocates" to remedy the present undersupply of legal services in the District Courts. The actions of such paraprofessionals would be indistinguishable from those of lawyers. They would undoubtedly constitute "acting as a solicitor" and would need specific statutory authorisation such as is provided for police prosecutions at present. Mr Mihaka seems to have regarded the Maori agent as having rights equivalent to those necessary for such advocates. It is submitted that under the present law the Justices of the Peace had no discretion to allow him to examine witnesses. They might, however, have permitted him to address them after the depositions had been taken. This conclusion contrasts, with respect, with both the view of the Chief District Court Judge, who said that laymen should not be permitted to address the Court at all, and the view of Hardie Boys J. who thought that the Justices of the Peace had nearly complete discretion as to audience.

Appendix 1: Background to Mihaka v. Police

This Appendix is based on an interview with Mr Mihaka. It describes the ideas which prompted him to take the stand that he did. It also describes some of the events which led up to the reported case. I should like to thank him for his help.

Mr Mihaka's researches into the history of Maori land dealings have led him to identify the historical Maori agent with officers of the Land Purchase Department as well as with lay advocates in the Maori Land Court. He cites the case of Nireaha Tamaki v. Baker[169] as showing the extensive powers of such officers. In that case, the Court of Appeal said that the mere assertion of the claim of the Crown [by the Commissioner of Crown Lands] is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony".[170] Mr Mihaka does not regard the subsequent reversal of that decision by the Privy Council[171] as affecting the validity of his view. He points to appearances by the Commissioner before the Maori Land Court and Parliamentary Committees as showing that such Native agents had extensive rights of advocacy.

Emphasis is placed on the uncertainty of the legal status of the Maori agent. Mr Mihaka maintains that since there has been no statutory redefinition of the term, both meanings survive. In particular, the Maori agent still has extensive rights of advocacy, extending beyond the Maori Land Court and even beyond the District Courts. Mr Mihaka uses the proviso to section 17(2) of the Law Practitioners Act 1955 in support of this contention. In interpreting that provision, section 5(j) of the Acts Interpretation Act 1924 should be applied to give a "fair large and liberal construction and interpretation" of the term "Maori agent". He believes that his claims of a right of audience were refused because judges and lawyers are unwilling to break the lawyers' monopoly in the Courts. He had expected that unwillingness but believed his claim to be valid.

The proceedings which led to Mihaka v. Police were not the first at which he had sought audience. The episode was part of a campaign to open the Courts to people other than lawyers. On the first occasion, he had asked if the police were intending to bring charges against some Maoris who had been held in custody over the weekend. He said that he would like to speak to them as a Maori agent. The District Court Judge did not object to his addressing the Court in this way and referred his inquiry to the police. The second occasion was in the Wellington District Court when he asked a judge for compensation for a young man who had been remanded in custody several times before the police finally withdrew all charges. The judge refused to recognise him in the role of Maori agent but allowed him to speak as a friend in Court - although addressing the Court is strictly outside the functions of a McKenzie friend.

The next two attempts received less co-operation from the Courts. In Auckland, the judge refused to let him speak and ordered his removal. Mr Mihaka was finally arrested and charged with using obscene language and resisting arrest.[172] In Christchurch, the judge also refused to

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hear him. He apparently ordered the police to hold Mr Mihaka in custody until the end of the Court session.

In his judgment, Hardie Boys J. refers to Mr Mihaka's inviting arrest for contempt of court.[173] His Honour assumed that Mr Mihaka was referring to section 206 of the Summary Proceedings Act 1957. However, it seems that Mr Mihaka was inviting arrest for acting as a solicitor in the Court. That is a contempt of court under section 16(2) of the Law Practitioners Act 1955. His Honour says in the same passage that a "police officer somewhat indelicately indicated the reason for the choice of charge".[174] Apparently the officer thought that it might "prick" Mr Mihaka's ego.

Appendix 2: Some Maori Agents since 1945

The following is a list of people who, I am informed, have operated as Maori agents since 1945. It is by no means exhaustive. Those known to be deceased have been indicated D.

Foxton:	Mrs May Haeata
Gisborne:	Mr James Ferris (D), Mr Erueru Hooper (D), Mr Mafeking Pere (D), Mr Monty Searancke.
Hamilton:	Mr Ian Bell, Mr Mat Findlay (D), Mr Ronald Graham(D), Mr William McIver, Mr Norman Palmer, Mr Robin Ray.
Hawera:	Mr Waipaina Awārau (D), Mr Michael Rotohiko Jones (D), Mr Pei Tehurinui Jones (D), Mr Harper Takarangi.
Northland:	Mr Louis Parore.
Opotiki and Gisborne:	Mr Wiremu Nikora.
Rotorua:	Mr Bertram Kingi, Mr Riini Paraire, Mr Tahi Tait.
Tauranga:	Mr Solomon Kanapu, Mr Peihiriri Rewiti, Mr Timothy Smith (D).
Te Kuiti:	Mr Gabriell Elliott (D), Mr Dick Ormsby(D).
Tolaga Bay:	James Marino.
Wairoa:	Mr Ra Bartlett (D), Mr Syd Carroll (D), Mr Wi Kaipuke, Mr Dick McGregor (D).

Appendix 3: R. v. Hogan and Pene

This case involved an application by two people for permission to have McKenzie friends at a forthcoming High Court trial. They were charged with twelve others with riotous destruction of a motor vehicle during protests at the time of the third rugby test between New Zealand and South Africa. The remaining defendants had been granted legal aid and were to be represented by three counsel.

Sinclair J. had asked the two applicants to file an informal application giving the names of the proposed advisers and their qualifications. Hogan provided a list of seven women who were prepared to "roster" their time to assist her. Their qualifications were that they were also young Maori women. Pene named only one person. His Honour commented that all of the eight persons named were known to the Courts, usually in the role of defendant in a police prosecution.

Before giving his reasons for declining the application, His Honour said that he was prepared to consider a grant of legal aid if the applicants should change their mind and apply for it. His Honour then said that no New Zealand decision has considered the issue of whether or not a McKenzie friend is available to people appearing before the Courts in the same situation as the applicants. His Honour considered that McKenzie v. McKenzie [176] must be viewed with close regard to the facts of the case, the nationality of those involved and the issues which were involved. Collier v. Hicks[177] ought also to be regarded in the light of its facts and the contrast between conditions in 1831 and those in the present day.

His Honour then said that on his reading of the depositions, the facts of the forthcoming case were not involved and that the questions of law would not be complex. The applicants would be represented by counsel, on legal aid if necessary. But the trial was not of a sort where McKenzie friends ought to be available. If all fourteen accused sought to have advisers then there would be twenty-eight people sitting in the body of the Court taking part in proceedings. The presence of a McKenzie friend would "inevitably lead to a deterioration in the manner in which the trial could be conducted and indeed the whole proceedings could be rendered chaotic."[178] Having regard to the persons put forward as advisers an abuse of the Court's procedures was almost inevitable.

His Honour then referred to a passage from the judgment of the Court of Appeal of New South Wales in Re B.[179] That case involved an appeal from a decision refusing a person admission as a barrister. The appellant had been involved as a McKenzie friend in some trials. Moffit P. commented that that device was "applied here as a technique in criminal cases usually on the trial of hardened criminals where the accused would appear to defend himself with the advantages of that course"[180] but with an adviser. The adviser would bear no responsibility for any impropriety and was not subject to control or criticism. The procedure had come to be seen as an abuse of the Court's procedures and had been stopped.

Sinclair J. said that those comments were applicable to the experiences of the Courts in New Zealand with McKenzie friends. The procedure should not be encouraged or even allowed.

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It is not clear what relevance the straightforward nature of the case had to the decision of Sinclair J. It might almost be inferred that the applicants would not need any legal help. That inference would contrast with the way in which His Honour urged the applicants to get counsel, however. It seems unlikely that the decision would have been any different if the trial had been complex - if only because the advisers would not then have been of much assistance. Nor, with respect, does the number of people who would need to be accommodated in Court seem particularly relevant. Exactly the same situation would arise if all the accused wished to have their own counsel.

It seems clear that the main objection to McKenzie friends was to the type of person who acted as adviser and to their likely behaviour in Court. His Honour might have taken a different attitude if the applicants had named lawyers as advisers, for instance. It is difficult to comment on His Honour's attitude without knowing more about the experiences of the Courts with McKenzie friends. However, assuming that the availability of advisers is a matter for the discretion of a judge, it is submitted that a blanket ban on McKenzie friends is undesirable. Individual situations should be dealt with on their facts.

FOOTNOTES:

1. Mihaka v. Police [1981] 1 N.Z.L.R. 54, 58.

2. Ibid.

3. E.g. Mapp W.D., "Representations by Non-Lawyers", [1978] N.Z.L.R. 220.

4. Law Practitioners Act 1955, s.17:

   "(1) Every person commits an offence against this section who, not being duly enrolled as a solicitor under this Act, acts as a solicitor, or holds himself out as being qualified to act as a solicitor, or takes or uses any name, title, addition, or description implying or likely to lead any person to believe that he is qualified to act as a solicitor.

   (2) Every person commits an offence against this section who, not being duly enrolled as a solicitor under this Act, carries on business as a solicitors' agent, or in any way advertises or holds himself out as a solicitors' agent: Provided that it shall not be an offence under this subsection for a person to carry on business as a Maori agent or to advertise or hold himself out as a Maori agent...".

   Law Practitioners Bill, cl.63:

   "(1) Every person commits an offence against this Act who, not being duly enrolled under this Act -

   (a) Acts as a solicitor; or
   (b) Holds himself out as being qualified to act as a solicitor; or
   (c) Takes or uses any name, title, addition, or description implying or likely to lead any person to believe that he is qualified to act as a solicitor; or
   (d) Carries on business as a solicitors' agent, or in anyway advertises or holds himself out as a solicitors' agent.

   (2) It shall not be an offence under subsection (1)(d) of this section for a person -

   (a) To carry on business as a Maori agent, or to advertise or hold himself out as a Maori agent; ...".

5. Police Offences Act 1927, s. 3D (since repealed by the Summary Offences Act 1981).

6. Collier v. Hicks (1831) 2 B. & Ad. 663, 109 All E.R. 1290.

7. McKenzie v. McKenzie [1971] P. 33, [1970] 3 All E.R. 1034.

8. Supra n.1 at 56.

9. Summary Proceedings Act 1957, s.206. But also Law Practitioners Act 1955, s.16(2).

10. R. v. Prince [1981] 1 N.Z.L.R. 47.

11. Melser v. Police [1967] N.Z.L.R. 437.

12. O'Connor v. Police [1972] N.Z.L.R. 379, 381.

13. Supra n.1 at 58.

14. Supra n.6 at 669.

15. O'Toole v. Scott [1965] A.C. 939, [1965] 2 All E.R. 240.

16. Native Land Act 1873, s.44.

17. Native Land Act 1873 Amendment Act 1878, s.3.

18. Native Land Court Act 1880, s.63.

19. In re T.R. Cash, ex parte Utiku Potaka (1880) O.B. & F. (S.C.) 82.

20. Return of the Native Secretary's Department New Zealand. Parliament. House of Representatives. Appendix to the journals, 1861, E.5:2.

21. Correspondence relative to the employment of Native Land Purchase Agents New Zealand. Parliament. House of Representatives. Appendix to the journals, 1875, vol.2, G.7.

22. E.g. Reports from officers in Native districts New Zealand. Parliament. House of Representatives. Appendix to the journals, 1862, E.7.

23. E.g. Reports from officers in Native districts New Zealand. Parliament. House of Representatives. Appendix to the journals, 1886, vol. 3, G.1.

24. Ibid. at 2.

25. E.g. Report by Hon.Colonel Haultain on charges by H. Alley against officers of the Native Dept. New Zealand. Parliament. House of Representatives. Appendix to the journals, 1876, vol.2, H.14.

26. E.g. Notes of Native meetings New Zealand. Parliament. House of Representatives. Appendix to the journals, 1885, vol.2, G.1:31.

27. Report of the Commission appointed to inquire into the subject of the Native Land Laws New Zealand. Parliament. House of Representatives. Appendix to the journals, 1891, sess.2, vol.2, G.1:xviii.

28. Idem.

29. Not only agents charged high fees. A report mentions a solicitor who charged 100 guineas per day for attendance at the Native Land Court. (Report of Commission on charges against William Williams New Zealand. Parliament. House of Representatives. Appendix to the journals, 1894, vol.2, G.4:16).

30. Supra n.27 at 115, Q1545-Q1548.

31. Supra n.27 at 61.

32. Return by the Chief Judge of the Native Land Court, showing Persons authorised to appear as Agents in the Native Land Court New Zealand. Parliament. House of Representatives. Appendix to the journals, 1907, vol.3, G.5B. In the same session the Native Minister was asked "Whether he will this session introduce a Bill dealing with Native

32 (cont) land agents or attorneys?". He replied "If opportunity is afforded, a Bill will be submitted" (N.Z. Parliamentary debates vol.140, 1907; 511). It appears that no Bill was submitted.

33. See N.Z. Parliamentary debates vol.111, 1900; 557.

34. Cyclopedia of New Zealand (6 vols., Cyclopedia Co.Ltd., Christchurch, 1897-1908).

35. Ibid.: J.H. Walker (vol.6; 138). See also supra n.32.

36. Ibid.: A. Knocks (vol.1; 1096); A.R. MacFarlane (vol.1; 886); C.W.P. Seon (vol.2; 620); F.G. Skipworth (vol.2; 983).

37. Ibid.: A. Knocks (vol.1; 1096).

38. Ibid.: W. Iorns (vol.1; 962) S. Cook (vol.1; 1096).

39. Much of this section is derived from interviews with the Chief Registrar of the Maori Land Court, Mr Harris, and three people who have acted as Maori agents: Mr Bertram Kingi of Okere Falls, who conducted a business as Maori agent from 1965 to 1977; Mr Riini Paraire of Mt Maunganui who conducted a business as Maori agent and real estate agent from 1964 to 1974; Mr Ian Bell of Hamilton, a lecturer at Waikato University, who has acted as a part-time agent for the last four years. I should like to thank these people for their help.

40. Re Richard Katerama Whitau S.I. Minute Book 49/142, 143.

41. Haughey E.J. "The Maori Land Court" [1976] N.Z.L.R. 203.

42. But in re Richard Katerama Whitau, supra (n.40) it was decided that a particular person would not be allowed audience from that time.

43. But see J.M. Bouchier "Discretion in the Maori Land Court" (1979) 3 A.U.L.R. 381, 386-390.

44. Airini Tonore v. MacKay (1894) 12 N.Z.L.R. 743.

45. Supra n.19 at 83-84.

46. Black v. Slee [1934] N.Z.L.R. s.108.

47. Presumably the phrase "any Court" in s.16 of the Act does not include the Maori Land Court, since any actions before that Court would be protected by permission obtained under s.53 of the Maori Affairs Act 1955. This interpretation contrasts with the ruling in In re Hori te Wehi (deceased) [1935] N.Z.L.R. s.146 which held that the same phrase in the predecessor to s.57 of the Act included the Maori Land Court.

48. R. v. Prince supra n.10.

49. R. v. Prince (1981) Unreported, CA 12/81. See Ed.note [1981] 1 N.Z.L.R. 60.

50. The judicial officers of the District Courts are Justices of the Peace or District Court Judges. The District Courts are inferior courts. A short history of inferior courts in New Zealand and their judicial officers is given in the Report of the Royal Commission on the Courts (infra n.154 at paras 19-55, pp.5-13). The District Courts were set up as Magistrates' Courts by the Magistrates' Courts Act 1893. That Act gave every Magistrate appointed under it all the powers of two Justices of the Peace. The powers of the judges have since been expanded so that they have jurisdiction over all summary offences and can hold summary hearings of most indictable offences. They can also hear some defended charges with a jury under the Crimes Act 1961. The powers of Justices of the Peace have been restricted. They now have jurisdiction over only a few minor criminal offences but they can hear many traffic offences. Two Justices may also preside at the preliminary hearing of an indictable charge to be tried in the High Court. They often do so.

51. Supra n.1 at 58.

52. Supra n.6.

53. Ibid at 672.

54. Supra n.7.

55. Supra n.6.

56. Malloch v. Aberdeen Corporation (No.2) [1973] 1 W.L.R. 71, [1973] 1 All E.R. 304.

57. M. Zander Legal Services for the Community (Temple Smith, London, 1978) p.321. See infra n.84 at 485 for a publication from the group.

58. E.g. report of retrial of John Bernard Minto on charges of unlawful assembly, The Evening Post, Wellington, New Zealand, 13 July 1982, p.7.

59. R. v. Hogan and Pene (1982) Unreported, Auckland Registry, T.21/82.

60. Re B [1981] 2 N.S.W.L.R. 372, 385.

61. Representation might still be refused in other circumstances. Thus, a similar provision in the Justice Act 1958 of Victoria was held to apply only to proceedings in the Magistrates' Court. Consequently, a Visiting Justice at a prison had the right to refuse legal representation to a prisoner (R. v. Visiting Justice at Her Majesty's Prison, Pentridge; Ex parte Walker [1975] V.R.883).

62. Section 37(1) of the Summary Proceedings Act 1957 can also be contrasted with s.57(1) of the District Courts Act 1947 which specifically limits representation in civil suits. Section 57(1) provides that a "party to any proceedings may appear and act personally or by a barrister or solicitor of the High Court and not otherwise: Provided that under special circumstances the Court may permit any party to appear by an agent..." or person with power of attorney. Similar arguments based on principles of statutory interpretation can be made about the contrast above as about the contrast within s.37 of the Summary Proceedings Act

62 cont. 1957. None appears to be decisive.

63. Supra n.15.

64. Justices Act 1902 (N.S.W.) s.70(2).

65. Supra n.15 at 959.

66. Mihaka v. Police supra n.1 at 58.

67. Ibid. at 60.

68. Such provisions may be interpreted restrictively. In R. v. Visiting Justice at Her Majesty's Prison, Pentridge; Ex parte Walker (supra n.61) such a provision was interpreted as conferring a right of audience on the practitioner without conferring a right to representation on the accused.

69. Mihaka v. Police supra n.1 at 58.

70. Law Practitioners Act 1955, s.2: "'Barrister' means a person enrolled as a barrister of the Court..."; "'Solicitor' means a person enrolled as a solicitor of the Court...".

71. See Saif Ali v. Sydney Mitchell & Co [1980] A.C. 198, [1978] 3 All E.R. 1033; Rees v. Sinclair [1974] 1 N.Z.L.R. 180. Both Courts suggested that the immunity of barristers from liability for negligence when they act as advocates would extend to solicitor-advocates.

72. McCulloch v. Anderson [1962] N.Z.L.R. 130.

73. Conveyancing Ordinance 1842, sess.2, no.10, s.54.

74. Supra n.72 at 132.

75. N.Z. Parliamentary debates Vol. 332, 1962; 2281.

76. E.g. Rondel v. Worsley [1969] 1 A.C. 191; Saif Ali v. Sydney Mitchell & Co supra n.71.

77. In re Ainsworth. Ex parte The Law Society [1905] 2 K.B. 103.

78. Duncan v. Toms (1887) 56 L.J. (M.C.) 81.

79. Supra n.15.

80. G.J. Graham-Green (ed) Cordery's Law Relating to Solicitors (7 ed., Butterworths, London, 1981) p.39.

81. Verlander v. Eddolls (1881) 51 L.J. (Q.B.) 55.

82. Ibid. at 57.

83. Administration of Justice Act 1977 (U.K.), s.16.

84. See J. Disney, J. Basten, P. Redmond, S. Ross Lawyers (Law Book Sydney, 1977).

85. Supra n.15.

86. Hubbard Association of Scientologists International v. Anderson and Just [1972] V.R. 340.

87. Ibid. at 342.

88. See Q. Johnstone, D. Hopson Lawyers and their work (Bobbs-Merrill, New York, 1967) ch.5.; Comment "Control of the unauthorised practice of law: Scope of inherent judicial powers" 23 U.Ch. L.Rev. 162.

89. E.g. State ex rel. State Bar of Wisconsin v. Bonded Collections Inc., 36 Wis. 2d 643, 154 N.W. 2d 250, 27 A.L.R. 3d 1138. (1967).

90. State v. Kirk 276 N.W. 380 (1937).

91. Q. Johnstone, D. Hopson Lawyers and their work (Bobbs-Merrill, New York, 1967) p.168.

92. Ibid. at 165-167.

93. Tumulty v. Rosenblum 48 A.2d 850, 852 (1946).

94. People v. Alexander 53 Ill.App.2d 299, 202 N.E. 2d 841, 13 A.L.R. 3d 1132 (1964).

95. In re Simmons (1885) 15 Q.B.D. 348.

96. Ibid. at 354-355.

97. Dockings v. Vickery; Re Symons (1882) 46 L.T. 139.

98. Ibid. at 140.

99. Solicitors Act 1974 (U.K.), s.21. This provision was first introduced by the Attorneys and Solicitors Act 1874 (U.K.), s.12.

100. In re Sanderson, Ex parte The Law Institute of Victoria [1927] V.L.R. 394, 49 A.L.J.3.

101. Supra n.95.

102. Supra n.100 at 397.

103. In re Barry & Gulliver; Ex parte Law Institute of Victoria [1929] V.L.R. 224.

104. Law Society of N.S.W. v. Newlands (1964) 81 W.N. (N.S.W.) 341.

105. Western Producers Mutual Aid Insurance Co. v. Stewart [1928] 1 W.W.R. 320.

106. Barreau de Trois-Rivieres v. Kinraeco Ltee [1964] Que. S.C. 38.

107. R. v. Woods [1962] O.W.N. 27.

108. Crawford v. State Bar of California 54 Cal. 2d. 659, 355 P.2d 490 (1960).

109. Ibid. at 495.

110. Re Hall; Ex parte The Incorporated Law Society (1893) 69 L.T. 385.

111. Supra n.81.

112. County Courts Act 1846 (U.K.).

113. Supra n.81 at 57.

114. Supra n.97.

115. Pacey v. Atkinson [1950] 1 K.B. 539, [1950] 1 All E.R. 320.

116. Reynolds v. Hoyle [1975] 3 All E.R. 834.

117. Andrews v. Wilson (1899) 1 W.A.L.R. 155.

118. Supra n.100.

119. Supra n.104.

120. Barristers' Board of Western Australia v. Opie [1971] W.A.R.99.

121. Re Crowley (1899) 20 N.S.W.L.R.150.

122. R(Smith) v. Ott [1950] 4 D.L.R. 426, 97 C.C.C. 302.

123. R. v. Nicholson (1979) 96 D.L.R. (3d) 693, 46 C.C.C. (2d) 230.

124. Grievance Committee v. Dean 190 S.W. 2d 126, 129 (1945).

125. Supra n.90.

126. Delaware State Bar Association v. Alexander 386 A.2d 652, 12 A.L.R. 4th 637 (1978).

127. Clements v. State 147 S.W. 2d 483 (1940).

128. Supra n.110.

129. Supra n.97.

130. Supra n.77.

131. Supra n.104.

132. R. v. Campbell and Upper-Canada Business Administrators Ltd. (1974) 45 D.L.R. (3d)522, 17 C.C.C. (2d) 400.

133. Supra n.122.

134. Supra n.126.

135. Ibid. at 660.

136. Supra n.94.

137. Supra n.110.

138. Supra n.106.

139. R. v. Ballett 62 D.L.R. (2d) 151, [1967] 3 C.C.C.21.

140. R(Smith) v. Mitchell [1953] 1 D.L.R. 700, 104 C.C.C. 247.

141. Supra n.123.

142. Stack v. P.G. Garage Inc. 7 N.J.118, 80 A.2d 545, 546 (1951).

143. State ex rel. State Bar of Wisconsin v. Bonded Collections, Inc. 154 N.W. 2d 250, 27 A.L.R. 3d 1138 (1967).

144. People v. Divorce Associates & Publishing Ltd. 407 N.Y. Supp.2d 142 (1978).

145. See D.L. Rhode "Policing the professional monopoly: A constitutional and empirical analysis of unauthorised practice prohibitions" (1981) 34 Stan. L. Rev 1, 74-99; Disney et al. supra n.84 at 484-525; Johnstone and Hopson supra n.91 at 173-179.

146. R. Ludbrook "Lawyer and Community. Part I: The Needs of the Community" [1974] N.Z.L.R. 374.

147. Supra n.1.

148. New Zealand Law Society Code of Ethics New Zealand Law Society, Wellington, New Zealand.

149. After Disney et al., supra n.84 at 459.

150. Supra n.81.

151. Supra n.107.

152. E.g. see Disney et al., supra n.84 at 484-525.

153. E.g. P. Davies, R. Ludbrook "The Gaps in the Existing Legal Services in New Zealand" [1978] N.Z.L.R. 457.

154. Report of Royal Commission on the Courts New Zealand. Government Printer, 1978; para. 965, p.297.

155. J. Basten, J. Disney "Representations by Special Advocates" 1 U.N.S.W.L.J. 168.

156. Supra n.1 at 58.

157. Daemar v. Gilliand [1981] 1 N.Z.L.R. 61.

158. Reid v. Reid Unreported, Privy Council Appeal N.27/1981, [1982] Butterworths Current Law 452.

159. Supra n.57 at 300.

160. Legal Action Group "Submissions to the Lord Chancellor's Advisory Committee on Legal Aid in Tribunals" (1974) 124 New L.J. 401, 402.

161. Supra n.155.

162. The Evening Post, Wellington, New Zealand, 25 March 1982, p.36.

163. Supra n.59.

164. Supra n.7.

165. Supra n.60 at 385. See Appendix 3 for more detail.

166. Supra n.59 at 5.

167. E.g. J.H. Wallace "Addendum of J.H. Wallace, Q.C." supra n.154 at 337-341.

168. P. Moore "The Litigant's Friend" (1974) 124 New L.J. 868.

169. _Nireaha Tamaki_ v. _Baker_ (1894) 12 N.Z.L.R. 483.

170. Ibid. at 488.

171. _Nireaha Tamaki_ v. _Baker_ [1901] A.C. 577.

172. _New Zealand Herald_, Auckland, New Zealand, 8 November 1979.

173. Supra n.1 at 56.

174. Idem.

175. Supra n.59.

176. Supra n.7.

177. Supra n.6.

178. Supra n.59 at 4.

179. Supra n.60.

180. Ibid. at 385.

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