State housing in New Zealand

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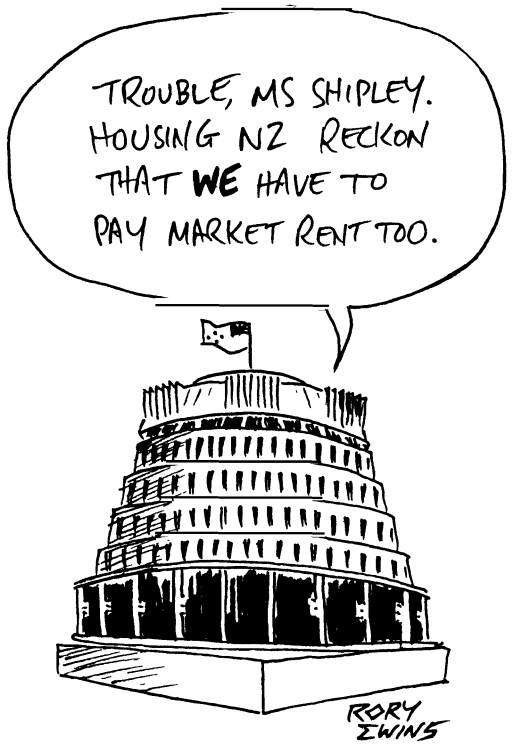
The transition from subsidised rents to market rents.



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For over 50 years in New Zealand, people on low incomes were able to live in houses owned by the state on the basis that they pay rents which were determined according to their capacity to pay: usually, not more than 25% of their income. In 1992, the Government introduced the *Housing Restructuring Act* which set the scene for a new policy of 'market rents' complemented by an 'accommodation supplement' for the needy.

This article discusses the 1992 reforms: their justification; criticism of them; the response of tenants' groups; apparent contradictions in the objective of the *Housing Restructuring Act 1992;* and suggestions for future housing policy.

The background

Until 1992, the policy of successive Governments in New Zealand had been to assist people on low incomes into housing they could afford. This was achieved mainly through subsidising rents of state houses[1] and granting low interest loans to enable people on low incomes to purchase homes in the private sector.

Eligibility for state housing was determined by a points system.[2] Applicants for state housing would be allocated points according to certain defined criteria. The main factors which were taken into account were: (1) the adequacy of the applicant's existing accommodation; (2) the income of the applicant; (3) the affordability of the applicant's existing accommodation; (4) the length of time that the applicant had been on the waiting list; and (5) the health of the applicant. Discretionary points were also allocated on the basis of other housing factors not catered for under the five main heads.

The Governments — both National and Labour — that had maintained this housing policy were generally committed to a high level of state involvement in the economy. This may have contributed to the very large deficit with which the new Labour Government was confronted in 1984.

The Labour Government immediately embarked on a change in direction in which it adopted Thatcherite policies that relied on the logic of 'market forces'. State assets were sold, subsidies to inefficient businesses (particularly farming) were withdrawn and taxation was re-structured so that the burden was borne less by the wealthy and more by the poor.

But throughout the term of the Labour Government — 1984–1990 — the state housing edifice remained substantially intact. And the rights of tenants were generally strengthened by the introduction of the *Residential Tenancies Act* in 1986.[3]

The 1992 reforms

The National Government elected in 1990 continued the thrust of the policies that had been introduced by the previous Labour Government and, in particular, applied them in spheres previously thought to be sacred: health and housing.

The housing reforms introduced in 1992 are as follows:

- Housing New Zealand Limited, a private company with a commitment to being efficient and profit driven, assumed responsibility for the administration of all the state's rental housing (under the *Housing Restructuring Act 1992);*
- subsidised rents for state housing were phased out and replaced by 'market rents';
- an accommodation supplement for the needy was introduced. This is provided by the Department of Social Welfare. It is available to all tenants (i.e. both public and private sector tenants) who meet the criteria.

Justification for the reforms

The Government justified the reforms on the grounds that the existing policies were unfair and inefficient. The following defects in the existing system were identified:[4]

- state tenants, through subsidised rents, received substantially more assistance than private sector tenants;
- state tenants paid the same rent as other state tenants on the same income regardless of the relative rental value of their respective premises;
- In some areas, there were long waiting lists for state houses while private sector houses were empty;
- a tenant in a state house who had a serious housing need at the time of allocation but whose circumstances had changed would be able to stay in that house while families with more urgent needs remained on the Housing Corporation's waiting list;
- the existing policies of assistance were fragmented and uncoordinated: 'Today 115,000 families receive accommodation assistance from the Department of Social Welfare. Another 114,000 families receive support from the Housing Corporation. The Iwi Transition Agency is providing accommodation assistance to a further 11,500 Maori and Pacific Island families.'[5]

The strongest argument for the reforms and the one which is constantly put by the Minister of Housing is that the present system is fairer. The previous system provided benefits only to state tenants in the form of subsidised rent. Now, all tenants who are in need are eligible to apply for an accommodation supplement.

Criticism of the reforms

There have been a number of surveys conducted on the effect of the reforms. Bob Stephens commented on two of them as follows:[6]

> Waldergrave and Sawrey (1994) investigated the extent of serious housing need, and showed a substantial increase in the degree of homelessness and overcrowding following the introduction of market rents and the Accommodation supplement. The findings of a survey of Salvation Army foodbank users showed 'that the increases in the accommodation supplements have not compensated state housing tenants for the change to market rents'. The survey found that 51.8% of respondents spent 50% or more of their income in rent (NZCCSS 1994/95, p.12). These studies indicate an increase in poverty hardship following the introduction of the housing reforms, but as they are not based on surveys of the total population, the results cannot be generalised.[7]

This last point — the fact that the surveys have not been comprehensive — has been the basis of the response of the Minister of Housing and of his Department to any criticism that is made of the reforms. In *Lawson v Housing New Zealand, the Minister of Housing and the Minister of Finance*[8] in which a state tenant challenged the assessment of rent on her home, the reports of Waldergrave and Sawrey and the Salvation Army were presented in evidence but their accuracy was queried by the defence:

> Mr Coppen, Manager of the Ministry of Housing's Policy unit put in evidence a report done by a Dr Crothers entitled *Manukau City Overcrowding Survey* (1993) in which he spoke to the tenants in that area and found only 1%–2% of households suffering from overcrowding, substandard housing or the like, a figure which contrasted with the Rev. Waldergrave's figures for the same area and time. A Ministry of Housing report of 16 May 1994 is critical of the Salvation Army study on the ground of unclear methodology and a lack of information on the Accommodation Supplement making correct calculations about OTIs [outgoings to income ratios] impossible. [at 44]

Of course, it is impossible for organisations like the Salvation Army to carry out the kind of research that the Minister considers to be acceptable.[9] They simply do not have the resources. Nevertheless, the fact that the findings of the various small scale research projects on the effect of the reforms have been consistent may give some cause for concern.

The criticisms that have been made of the 1992 housing reforms may be summarised as follows:

- Tenants should not pay more rent than they can afford. The surveys show that some tenants on low incomes are paying more than 50% of their incomes on rent.
- Tenants are finding the money to pay rent but they may have to go to the foodbank for food. The fact that they *are paying* the rent does not mean that they can *afford* it.
- The significant problem is one of *affordability.* In some areas, there may also be a problem of *availability.*
- Accommodation supplements paid to private sector tenants are frequently passed on to landlords in the form of increased rents.
- As the biggest landlord in the country, particularly in respect of premises occupied by low income tenants, Housing New Zealand is able to arbitrarily determine market rents.

Lawson v Housing New Zealand, the Minister of Housing and the Minister of Finance

In 1996, Mrs Lawson, a state tenant, applied to the High Court of New Zealand for judicial review of decisions to increase her rent to a full market rent. In his judgment of 92 pages, Williams J considered four main issues:

- whether the defendants were amenable to judicial review;
- whether Mrs Lawson had a 'legitimate expectation'[10] that she and other former state house tenants would not be forced out of their homes if they were unable to afford market rents and whether the defendants acted in breach of that expectation;
- whether the conduct of Housing New Zealand in charging market rents was unlawful and in breach of s.8 of the *New Zealand Bill of Rights Act 1990* which provides that 'No-one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice';
- whether the Ministers had failed to have proper regard to international obligations.

There seems to have been little substance in either the second or the third ground, although Williams J discusses them both thoroughly. The first ground could also have been dealt with briefly on the basis that Mrs Lawson's attack was on merits and not on process. It was accordingly outside the ambit of judicial review. However, His Honour's discussion of the ground contains interesting information and comment on the *Housing Restructuring Act 1992* and on the Crown's social objectives. The first ground is discussed below. The last ground raises interesting issues in respect of our obligations to comply with international instruments. It too is discussed below.

Judicial review

Mrs Lawson asserted that Housing New Zealand had failed to have proper regard to the Crown's social objectives and the interests of the community as required by s.4 of the *Housing Restructuring Act 1992*.

This Act provides for the acquisition by the Crown of shares in the capital of a company incorporated under the companies Act — 'Housing New Zealand' — and for the vesting in that company of state housing land held by the Crown. Section 4(1) provides that the principle objective of the company shall be:

> to operate as a successful business that will assist in meeting the Crown's social objectives by providing housing and related services ... and to this end to be —
>
> (a) as profitable and efficient as comparable businesses that are not owned by the Crown; and
>
> (b) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates; and
>
> (c) a good employer.

Under s.15, the social objectives of the Crown in relation to the provision of housing and related services are communicated each year by the Ministers. These are re-expressed in the board of directors annual draft statement of corporate intent. The 4 June 1992 letter to Housing New Zealand outlined the Crown's social objectives for the 1993–94 year in the following terms:

> A well housed population is a key social objective of the Government. The Government's first priority in achieving this objective is to assist those on low incomes to access adequate and affordable accommodation. As owners of Housing New Zealand, therefore, the Government wishes you to direct the business primarily at the accommodation needs of low income New Zealanders. The company's rental housing should therefore be of a type, quality and location that meets this target group. We would expect the Statement of Corporate Intent to elaborate on how the company will meet the requirements of this market segment, especially regarding the proportion of the current stock that will be dedicated to low income housing and how that proportion might be increased.

Williams J said that there was force in the submission made for Mrs Lawson that nothing in the *Housing Restructuring Act* nor in the stated social objectives required Housing New Zealand to increase its rents to market level (at 60). Nevertheless, there was a wealth of material available to the board of directors to the effect that that was the Government's wish. His Honour said:

> the point where the submission on Mrs. Lawson's behalf fails, is that, Housing New Zealand's decision to shift the rents for its houses to market rent and the means by which that was done, was a matter which lay within the discretion of the board acting in accordance with its statutory obligations and within the given objectives. [at 61]

Moreover, Mrs Lawson's concern was not with the decision-making process, but with the fact that the rent had been increased. Thus, Williams J held that her attack was outside the ambit of judicial review.[11]

International instruments on housing

On behalf of Mrs Lawson, it was submitted that the housing reforms did not comply with New Zealand's obligations under international instruments which specify standards in respect of housing. Williams J summarised these obligations as follows:

> The first of these instruments is the United Nations Declaration of Human Rights (UNDHR), Art. 25.1 of which gives everyone ... the right to a standard of living adequate for the health and well-being of himself and his family including ... housing.
>
> The next is the International Covenant on Economic Social and Cultural Rights (ICESCR) ratified by New Zealand on 28 December 1978. Article 2.1 requires each state party to take steps to the 'maximum of its available resources' to achieve progressively the full realisation of the rights recognised in the covenant whilst Art. 11(1) repeats Art. 25.1 of the UNDHR although it adds a right to 'continuous improvement of living conditions' and an obligation on parties to take 'appropriate steps to ensure the realisation of this right'.
>
> The ICESCR was amplified first on 12 December 1991 in *General Comment No. 4 on the Right to Adequate Housing* which described itself as the 'single most authoritative legal interpretation of what the right to housing actually means in legal terms'. Adequate housing is defined as including a number of factors, including affordability and as meaning that housing costs should be such that other basic needs are not compromised, and that the percentage of housing-related costs is, in general, commensurate with income levels.
>
> The ICESCR was further amplified in December 1993 by United Nations Fact Sheet No. 21 entitled '*The Human Right to Adequate Housing*'. That document further defines the phrases in the international instruments earlier discussed. The obligation on a state party is said to have been broadly interpreted and to have obliged Governments to take 'steps which are deliberate concrete and targeted' towards meeting the obligations in the covenant, including development of a national housing strategy, reflecting consultation with all social sectors. The Fact Sheet says that 'any deliberate retrograde measures as far as living conditions are concerned' would require the 'most careful consideration' if a state was to not be in breach of the obligation to 'achieve progressively'.
>
> The Convention on the Rights of the Child ratified by New Zealand in March 1993 was also invoked ... Art.27 of that convention requires state parties to recognise an adequate standard of living for every child and obliges parties to take appropriate measures to assist parents and others responsible for a child to implement that right. [at 41–2]

Of these instruments, New Zealand has not ratified the UNDHR which is a declaration, not an international covenant. However, it has ratified the ICESCR and the Convention on the Rights of the Child. Williams J described the General Comment No. 4 and Fact Sheet No. 21 as appearing to be 'no more than comments by the United Nations Commission on Economic Social and Cultural Rights expanding on its view as to what is encompassed within the broader terms of the Covenant itself' (at 86).

None of these international conventions have been incorporated into New Zealand's domestic law. However, this does not mean that Ministers are entitled to ignore them. In

Tavita v Minister of Immigration [1994] 2 NZLR 247 at 266 the Court of Appeal said:

> If and when the matter does fall for decision, an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

In *Lawson's case,* Williams J did consider whether there had been compliance with the international instruments. As to the UNDHR and the ICESCR, His Honour said that they are both phrased in general terms as far as the matters in issue in the proceedings were concerned and that the policy of the Government on housing since 1990 does not appear to run counter to the obligations under these Conventions given the continuation of the state Housing rental stock and the other measures undertaken such as facilitating transfers to more appropriate accommodation and the Accommodation Benefit (at 88).

The Convention on the Rights of the Child was not applicable to the case as Mrs Lawson had no children living at home.

General Comment No. 4 and Fact Sheet No. 21 were of uncertain status. As to the obligations which they express, Williams J said:

> As the authorities demonstrate, it is not for this Court to judge whether the Government of New Zealand has fully complied with those obligations. It is sufficient for this Court to reach the view that the Government has plainly made efforts to balance the competing factors ... The statement of the Government's Social Objectives and the Statement of corporate Intent demonstrate the efforts of the defendants to acknowledge New Zealand's international obligations concerning housing within the terms of the Housing Restructuring Act 1992. Whether New Zealand has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court. [at 89–90]

This last comment — that it was not for the High Court to judge whether New Zealand has fulfilled its international obligations — does not seem to accord with earlier parts of the judgment. Why discuss these obligations at length and apply them to the facts of the case if to do so is to be just an irrelevant gesture? Moreover, the comments of the Court of Appeal in *Tavita v Minister of Immigration,* which were cited by Williams J in his judgment, indicate that a court should give effect to international obligations.[12]

If the situation for state tenants worsens there may be grounds for a future application to the High Court based on failure to comply with our international obligations.

Housing New Zealand's principle objective and the possibility of applying for a determination of market rent

The application in *Lawson v Housing New Zealand* was doomed to fail simply because it was based on the merits of Housing New Zealand's rent increase policy and not on the process by which the policy was made. Accordingly, it was outside the ambit of judicial review. However, this is not to say that there is no basis for future challenges to market rents of state houses. A challenge may be brought, not by way of judicial review, but by way of application for a determination of market rent.

The essence of this application would be that (1) Housing New Zealand is bound by its stated principle objective to provide public housing at affordable rents and (2) this factor must be taken into account in determining market rents of state houses.

The principle objective of Housing New Zealand

The key words of s.4(1) of the *Housing Restructuring Act 1992* are highlighted below. The section provides that the principal objective of Housing New Zealand shall be:

> to operate as a successful business that will assist in meeting the Crown's social objectives by providing housing and related services ... and to this end to be —
>
> (a) As profitable and efficient as *comparable businesses* that are not owned by the Crown; and
>
> (b) *An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates;* and
>
> (c) A good employer.

Paragraphs (a) and (b) seem to be contradictory. However, it is submitted that the term *comparable businesses* in paragraph (a) is not a reference to the businesses of profit driven landlords in the private sector. It is a reference to businesses that operate in accordance with the statement in paragraph (b): *'An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates'*. Businesses which fit this description include local government housing ventures which provide housing for people with special needs and various church and other charitable housing schemes.

On this interpretation, it may be argued that for Housing New Zealand to comply with its stated objective, it must:

- provide public housing
- of a decent standard
- at affordable rents
- with security of tenure
- for people on low incomes.

Opponents of the reforms would argue that the Government's housing policies do not reflect any of these points.

Application for a determination of market rent

Under s.25 of the *Residential Tenancies Act 1986,* the Tenancy Tribunal may on an application by a tenant make an order that rent be reduced to an amount that is in line with the 'market rent' if it is satisfied that the rent payable by the tenant exceeds the market rent 'by a substantial amount'.

For the purposes of the Act, market rent is defined in subsection (3) as follows:

> ... the market rent for any tenancy shall be the rent that, without regard to the personal circumstances of the landlord or tenant, a willing landlord might reasonably expect to receive and a willing tenant might reasonably expect to pay for the tenancy taking into consideration the general level of rents for comparable tenancies of comparable premises in the locality or in similar localities and such other matters as the Tribunal considers relevant.

Even if the Tribunal is unable to take into account the fact that a state tenant cannot afford to pay a high rent ('the personal circumstances of ... the tenant') it would have to

have regard to the fact that the reasonable expectations of both the landlord and the tenant are predicated by the landlord's obligation to act in accordance with its 'principal objective'.

An application for a determination of market rent would not be entirely satisfactory. It would involve a steady progression by way of appeals from the Tribunal to the District Court to the High Court. An even if the Court ultimately decided that the rent should be reduced, the order would not apply to excessive rents that were paid or payable before the application was commenced. Nor would it apply to tenants who were not parties to the application. However, it seems that, until the *Housing Restructuring Act 1992* is repealed, there is no other way of challenging the Government's state housing rental policies in the courts.

Future housing policy: another survey?

Part of the problem is that the Government does not recognise that there is a problem. The Minister of Housing refuses to acknowledge the findings of the various non-government surveys that have been conducted. And it may be that these small scale surveys do not provide us with enough information to justify some of the criticisms that have been made of the reforms.

It is submitted that, whatever we do, we need more information. Our present situation may be likened to that in 1935 when, in response to widespread concern about the housing situation, the Government passed the *Housing Survey Act.*[13] This Act commissioned a comprehensive survey to be conducted by Borough Councils and other Local Authorities to find out about the type, construction and condition of dwellings, the presence or absence of proper sanitary, washing and cooking facilities, the number of people occupying dwellings, the degree of overcrowding, the storage of food and the provision of light, ventilation, yard and air space. All towns over 1000 people were required to complete the survey.

The survey disclosed problems of inadequate housing and overcrowding. It led to the development of housing policies which aimed to address these problems and which resulted in the acquisition of land by the state, the construction of quality houses and the letting of those houses at subsidised rents to tenants on lower incomes.

These reforms were in response to accurate information about housing problems. The present reforms were introduced without any qualitative research being done to justify them. A survey on the scale of that commissioned in 1935 should give us a good basis for future housing policy. Decisions on the housing policy of a nation are too important to be made on the basis of ignorance.

References

1. Housing New Zealand owns and manages around 65,000 properties. It is the single largest owner of rental housing in New Zealand, accounting for around 24% of all national rental accommodation: Statistics New Zealand *New Zealand Official Yearbook 1998 edition*, pp.460–61.
2. See Petrie, K.L., 'The Housing Restructuring Act 1992 — A major change in direction', LLM research paper, 1994, p.13 for discussion of the points system
3. See Alston, A., *Residential Tenancies,* Wellington, Butterworths, 3rd edn 1998, pp.1–4.
4. Petrie, K.L., above, pp.6–7.
5. Hon. John Luxton, Minister of Housing, 'Housing and Accommodation: Accommodation Assistance', 30 July 1991.
6. Stephens, Bob, 'Housing Expenditures and the Incidence of Poverty in New Zealand', Victoria University of Wellington, New Zealand, 1996, p.4. An earlier version of this paper was delivered at the Ministry of Housing's Research Conference in May 1994 and published in the Conference Proceedings.
7. Waldergrave, Charles and Sawrey, Richard, *The Extent of Serious Housing Need in New Zealand.* Published as part of the Ministry of Housing's Research Conference Proceedings in May 1994; NZCCSS (New Zealand Council of Social Services) 1994–95, p.12.
8. Unreported judgment of Williams J, Auckland High Court 1996, M.538/94. A considerably abridged version of the case has been reported in [1997] 2 NZLR 474. References in this article are to the unreported judgment.
9. Mention should be made of the Social Policy Research Unit, The Family Centre, Lower Hutt, Wellington, which has carried out a number of valuable surveys on housing and policy.
10. 'A legitimate expectation may be created by the giving of assurances, the existence of a regular practice, the creation of machinery for a hearing process, the consequences of the denial of the benefit to which the expectation relates or the satisfaction of statutory conditions, but legitimate expectation has been held not to rise as something inherent in the subject matter': Taylor, (1991) *Judicial Review,* para. 13.06, p.256.
11. at 64. His Honour referred to Lord Brightman's statement in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1173: 'Judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power'.
12. As Williams J himself said at 88, 'Nevertheless, the authorities just discussed indicate the approach which should be taken to this cause of action'.
13. *Housing Survey Act 1935.* The 'Long Title' of the Act is as follows. 'An Act to require certain Borough Councils and other Local Authorities to make Housing Surveys within their respective Districts, preparatory to the Inauguration of a Dominion Housing Scheme'.

Bao-Er references continued from p.237

14. Ban, Paul, 'Implementing and Evaluating Family Group Conferences with Children and Families in Victoria, Australia', in Joe Hudson et al., above, ref. 2, p.143.
15. 'The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals', A Discussion Paper by the NSW Community Services Commission, Surry Hills, NSW, December, 1996.
16. It is the case, though, that in the NSW Burnside Pilot FDM program, as in New Zealand, statutory workers can veto a family plan if they believe it is not safe for the child. In 90% of cases, New Zealand statutory workers have supported plans families have produced. Hirst, J., Family Planning.Community Care, 9-15 May, 1996.
17. Bullock, R., Little, M., and Millham, S. Going Home — The Return of Children Separated From Their Families. Aldershot; Dartmouth, 1993, p. 67 referred to in 'Family Group Conferences in Child Welfare Services in England & Wales' by Peter Marsh & Gilliam Crow in Family Group Conferences — Perspectives On Policy & Practice editors Joe Hudson et al, ref. 2, above, p.156.
18. This is not the case with the NSW Burnside Pilot FDM program which focuses solely on developing action plans for placement.
19. See ref. 12.
20. Fortunately, after considering the feedback from its Discussion Paper the Legislative Review recommended that Alternative Dispute Resolution (ADR) should be available as an early intervention strategy (3.5) and that ADR mechanisms provided for in the Act should include family group conferences (3.6), 'Review of the Children (Care and Protection) Act 1987 — Recommendations for Law Reform', November 1997.
21. The Evaluation of Family Group Conferences: A key to Family Centred Practice in Child Protection. Health and Community Services, August 1995, Victoria, Australia p.15.
22. Swain, Phillip, 'Safe in Our Hands — The Evaluation Report of the Family Decision Making Project', Mission of St James & St John, Melbourne, 1993, referred to by Paul Ban in Joe Hudson et al (eds), ref. 2, above, p.143.
23. As is the case with the establishment by the NSW Government of the Youth Justice Conferencing Scheme in accordance with the *Young Offenders Act 1997.*
24. Alexander, Renata, 'Family Mediation: Friend or Foe for Women?', (1997) *Australian Dispute Resolution Journal,* November p.255.
25. Woo, Lokki, 'Sweet & Sour Law: Does Chinese Mediation Suit the Australian Palate?' (1996) 7(2) *Polemic* Issue 91.