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FOREWORD

HON. ANAND SATYANAND
GOVERNOR-GENERAL OF NEW ZEALAND

Greetings, Kia Ora, Kia Orana, Fakalofa Lahi Atu, Taloha Ni.

As Governor-General of New Zealand, and a former lawyer, Judge and Ombudsman, it gives me great pleasure to contribute the foreword to the second issue of *The New Zealand Law Students' Journal.*

The articles contained in this issue are by law students who have recently graduated or are about to graduate and begin their careers or continue on further study. As such they, like the hundreds of law students from New Zealand's five law schools, are about to embark on a wide variety of careers, not all of them confined to the law.

But for all those educated in the law, its prinicples and values will be a key guide. One should never forget that the law is more than just statutes and judicial decisions. As one of New Zealand's foremost jurists – the Rt Hon Sir Kenneth Keith, ONZ – recently said:

> I see the law as a wise restraint that makes us free. Obviously it controls people—you only have to look out on the street to see that in terms of traffic laws—but it also makes you free so you can make your own decisions. As a judge, you're keenly aware that the law is not just about order, but also about freedom and justice.[1]

Those decisions about order, freedom and justice are being made in a society that differs dramatically from that of even 25 years ago. New Zealand's family and relationship structures and its ethnic, religious and cultural mix are increasingly diverse. Almost a quarter of the people living in New Zealand were born overseas.

In a rapidly changing society, there is a need to engage with communities and to promote the rights and responsibilities of being a citizen in New Zealand's democracy. Those with a legal background

[1] "Working for World Justice", *Victorious,* Summer 2006, 15.

have much to offer in assisting community groups and by doing things like serving on local authorities and school boards. Likewise, articles such as those in this volume contribute to the wider professional understanding of some of the complex issues facing New Zealand. While framed in legal language, the papers deal with some of the defining issues of our time.

In conclusion, I wish to congratulate the editors on bringing together such a diverse and thought-provoking set of articles and opinion pieces. I also congratulate the authors of the papers in this volume. In having your article selected for publication you have met an exceptionally high standard for legal scholarship.

No reira, tena koutou, tena koutou, kia ora, kia kaha, tena koutou katoa.

Hon Anand Satyanand, PCNZM, QSO
Governor-General of New Zealand

EDITORIAL

TIMOTHY WILSON

Law students in New Zealand offer a unique and valuable perspective on the legal systems of the world. It is the aim of the New Zealand Law Students' Journal to give voice to this perspective.

The value of the student perspective lies in the ability of students to take academic freedom to its fullest extent. Students are not constrained by any fear of jeopodising long established reputations or any pressure to impress. Their work is motivated by an interest in the subject and a belief in the advocated position.

The perspective of a New Zealand law student is also unique. Conceptions of the law that are at an early stage of development in the minds of our future professionals can be refreshingly honest in their approach and instructive of the true rationale beneath the detail. Combined with the demographic and institutional elements of the New Zealand student population, our students offer an insight into the law that is inimitably homegrown.

The following ten articles carry on a very high standard of student scholarship established in our inaugural edition last year. I very much hope that you find them engaging and feel enriched from their perspective on contemporary issues. They would not be possible without the support of the academic community from around New Zealand. The Chief Editorial Board is sincerely grateful for the involvement, advice and support of the academic and professional communities that have made a second step towards our vision a reality.

Tim Wilson
Editor

PORNOGRAPHY AS IDEOLOGY: DOES THE CONSUMPTION OF PORNOGRAPHY PROMOTE A MALE HEGEMONY?

TIM COCHRANE*

Introduction: The Issue of Pornography

Pornography is considered by many to be a taboo subject. Yet the production and consumption of sexually explicit media is a right for New Zealanders under law. Many have defended this as necessary to live in a liberal democratic society. However, some philosophers have questioned this approach, claiming pornography operates as ideology to support a patriarchal society. This essay will conduct a three-stage critical legal studies (CLS)[1] analysis of the treatment of pornography under New Zealand law to consider the validity of such concerns.

A. Does the legislation regulating pornography contain hidden philosophical and moral commitments?

A variety of laws regulate pornography in New Zealand.[2] These laws have three underlying elements, all of which are considered fundamental tenets of liberal philosophy.

1. The Public/Private Dichotomy

This is the idea that the state should limit its involvement in the

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[1] Defined as 'A school of thought advancing the idea that the legal system perpetuates the status quo in terms of economics, race, and gender by using manipulable concepts and by creating an imaginary world of social harmony regulated by law – Bryan A. Garner (ed) *Black's Law Dictionary* (8th ed., 2004); See generally Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard Uni Press, 1986); Mark Kelman *A Guide to Critical Legal Studies* (Harvard Uni Press, 1987); See especially; Matthew H. Kramer, *Critical Legal Theory and The Challenge of Feminism: A Philosophical Reconception; Contra* Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton Uni Press, 1990).

[2] See generally the Bill of Rights Act 1990 (BOR); Films, Videos and Publications Classification Act 1993; Privacy Act 1993.

personal lives – or 'private sphere' – of citizens. Various pieces of legislation in New Zealand support this approach.[3]

Dyzenhaus believes this public/private distinction in relation to pornography reinforces 'the consumption [of this material as] a matter of private […] morality. […] The state must allow individuals maximum space in which to live according to their own lights.'[4]

2. Freedom of Expression

Another concept underlying liberalism is the 'free marketplace of ideas' – a forum in which all citizens freely debate and scrutinise ideas. [5] To ensure this, liberals endorse a wide freedom of expression, outlined in the Bill of Rights Act 1990.[6]

This extends to the production and consumption of pornography. McRae explains that liberals believe that 'what one person finds unappealing and even offensive, another person might find erotic and artistic.'[7] Protecting different notions is important, liberals believe, because individuals should be free to achieve their own conceptions of 'the good life'.[8]

Tipping J explains that this right 'is as wide as human thought and imagination'[9] and should be subject, under section 5 of the Bill of Rights, to 'only such reasonable limitation[s] on freedom of expression as can be demonstrably justified in a free and democratic society.'[10]

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[3] See Privacy Act 1993, above n 2.

[4] D Dyzenhaus 'John Stuart Mill and the Harm of Pornography' (1992) 102(3) *Ethics,* 534-551, 535.

[5] Ibid.

[6] Bill of Rights Act 1990, above n 2, s 14; See also *R v Secretary of State for the Home Department, Ex Parte Simms* [1999] UKHL 33: 'the free flow of information and ideas informs political debate. It is a safety valve.'

[7] H McRae 'Morality, Censorship, and Discrimination: Reframing the Pornography Debate in Germany and Europe' (2003) 10(3) *Social Politics*, 314-345.

[8] Dyzenhaus, above n 4, 536.

[9] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (*'Moonon'*).

[10] Bill of Rights Act 1990, s 5, above n 2.

3. The Harm Principle

The final concept concerns how and when harm is recognised under the law. The only 'reasonable limitation[s]' to the freedom of expression occur when 'expression' causes harm[11] to another. There are two important points: first, clear causation must be shown between the 'harm' and the alleged cause[12]; second, harm is defined very narrowly.[13]

This principle supports allowing most pornography because, as Vadas advises '[i]f you don't like the pictures, friend, just don't look.'[14] But to quell fears, material can be classified as 'objectionable' under the Films, Videos and Publications Classification Act 1993 if 'injurious to the public good'[15]

Prima facie, these underlying assumptions seem positive. They appear to support freedoms of all citizens equally. However, on closer inspection, the operation of these elements in terms of pornography reveals they support a male hegemony at the cost of freedoms of females in society.

B. Do these underlying commitments in the law tend overall to support the continued power of some groups over others?

The groups in issue are males and females. Pornography operates to support a patriarchal society through, initially, the portrayal of women in pornography and, subsequently, the effects this portrayal has on society. Each element will be re-examined to reveal this support.

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[11] Dyzenhaus, above n 4, 536. Harm is defined as more than just offence.

[12] This was described, in *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* [2005] 3 NZLR 403 as 'a real or material or substantial risk' of harm; in 'in marginal cases', explained Tipping J in *Moonen* [2000] 2 NZLR 9, above n 10, the court will 'favour freedom of expression over objectionability [sic]'.

[13] Dyzenhaus, above n 5, 535; See also, *Bill of Rights*, above n 2, s 6. This requires a narrow definition of 'harm' in legislation for consistency with s 14.

[14] M Vadas 'A First Look at the Pornography/Civil Rights ordinance: Could Pornography by the Subordination of Women?' (1987) 84 *The Journal of Philosophy* 9, pp. 487-511.

[15] For example, under s 3(2) material that 'tends to promote or support' illicit behaviour can be banned.

1. Public/Private Dichotomy

The belief that the state should limit involvement in the private sphere necessarily requires that individuals should be free to pursue their own interests there. For pornography, this has three effects:

Firstly, '[p]orn is consumed in a private realm'.[16] By claiming that intervention in this arena is wrong, the state leaves men free to 'consume' as much pornography as they desire. This material directly affects how citizens view the roles of the sexes.[17]

Furthermore, as Dyzenhaus writes, 'the particular character of pornography is that its consumption generally takes place in private, in the same place of much of the relationship of subordination of women to men is acted out.'[18] Thus, the state, by distinguishing between spheres, leaves men free to exert their dominance simply because this is done in 'private'.[19]

Thirdly, without proof of 'overt violence or coercion', the state is reluctant to interfere in this sphere. This disproportionately affects women, who spend more of their lives in this arena, as opposed to the 'public' sphere.[20]

Lacey believes 'the private consumption of porn inevitably impacts on this public status of women'.[21] The distinction is said to protect the rights of all citizens. In reality, it allows the reinforcement of male dominance through the consumption of pornography and the freedom (supported through this consumption) for males to constrict the rights of females in this 'private' arena.[22]

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[16] Dyzenhaus, above n 4, 536.

[17] C R. Sunstein 'Pornography and the First Amendment' (1986)(4) *Duke Law Journal* 4, pp. 589-627.

[18] Dyzenhaus, above n 4, 537.

[19] N Lacey 'Theory into Practice? Pornography and the Public/Private Dichotomy' 20(1) *Journal of Law and Society* 1, pp. 93-113.

[20] McRae, above n 8; See also Catherine Itzen *Pornography: Women, Violence and Civil Liberties* (Oxford, Oxford University Press, 1992), 577. 'A […] woman's home is the place where she is most vulnerable to exploitation and abuse'.

[21] Lacey, above n 19.

[22] Dyzenhaus, above n 4, 537.

2. Freedom of Expression

Some limitations are considered acceptable to this freedom.[23] Liberals claim pornography is already quite limited. For example, any material that is 'degrading or dehumanising' to women can be declared 'objectionable'[24]. However, this limitation also operates to reinforce male dominance.

By justifying material on the grounds of freedom of expression, the dominant group attempts to legitimise their view of females, on both an individual and a societal level. This is achieved because, as Sunstein remarks, much of this material – promoting male dominance – 'bypasses the process of […] debate that underlies the concept of the marketplace of ideas'. Pornography as expression does not operate in the manner in which expression is meant to – to facilitate debate and discussion. It works in precisely the opposite way, at 'a subconscious level, providing a form of social conditioning that is not analogous to the ordinary operation of freedom of speech.'[25]

Pornography typically depicts females in submissive roles, portraying the 'inferior' party.[26] Viewing females consenting to such submissive sexual roles has the effect of legitimising such female submission in society in general. As Dyzenhaus explains: [I]t is the portrayal of consent, not of force and coercion […] that legitimises inequality and subordination".[27]

Furthermore, by disguising the consumption of pornography as a fundamental 'freedom' it is legitimised in the eyes many individuals of both genders:[28] Shaw describes a survey of females who expressed

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[23] For example, the Defamation Act 1992 prohibits untrue attacks in order to protect people's characters.

[24] *Films, Videos and Publication Classification Act*, above, n 3, s 3(2) (explained above n 13).

[25] Sunstein, above n 17.

[26] For example, pornography involving anal sex, blow jobs and similar are often considered worthy of an 'R18' rating. C.f. the New Zealand Censorship Database - http://www.censorship.govt.nz/oflcdd/home.asp - lists, as some titles classified R18: 'Anal Takeover', '…Like a Dog', and 'Anal Fever'.

[27] Dyzenhaus, above n 4, 538.

[28] Ibid. Dyzenhaus explains this may create a 'false consciousness' which would render the views of women who support pornography as 'false'. These women cannot know

'reluctance to speak out against this type of activity. […] The women seemed to feel that their opinions and feelings were somehow not 'legitimate' because of their partners' freedom of choice and individual rights.'[29]

Diamond explains that conceptualising the consumption of pornography as involving 'abstract rights and principles' disconnects pornography from the 'grim reality in actual communities'.[30] Despite this 'freedom', women are subjected in a variety of ways, ranging from feelings of obligation – that the woman's place is at home with the children – to physical acts of assault and rape.[31]

Analysis of these two concepts has shown how males use underlying assumptions to support their consumption of pornography. However, the final element is the most important. Unless harms can be identified that the status quo does not recognise – because of an ideological application of the harm principle – pornography cannot be viewed as a tool of a patriarchal dominant group.

3. The Harm Principle

In two different ways, this 'principle' allows for the subjugation of women by males. The first involves the benefits males gain at the cost of females by legislating against material that does fall within this principle. The second involves the interpretation of this principle by the courts.

When legislating, the dominant group does prohibit some material. This typically involves clearly heinous acts, e.g. 'a young woman […] and a dog.'[32] By outlawing such material, the dominant group seeks to consolidate its hold on power in two ways.

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what they really desire because they have never experienced a state of 'pure equality'.

[29] S M. Shaw 'Men's leisure and women's lives: the impact of pornography on women' (1999) *Leisure Studies* 18, 197-212.

[30] I Diamond 'Pornography and Repression: A Reconsideration' (1980) 5 *Signs* 4, pp. 45-77.

[31] Sunstein, above n 17.

[32] *R v Sinclair* unreported, CA, 258-03, October 22, 2003, Glazebrook, Baragwanath & Goddard JJ.

Firstly, they appear to be on the side of the oppressed group – females – by lieu of legislation outlawing some of this material. However, material that is obviously demeaning, e.g. rape, is not as ideologically effective as subtler material can be because the oppressed group will never accept it. In contrast, as Shaw points out, many females believe the consumption of 'mainstream' pornography to be acceptable for males and this is therefore the material that can have stronger ideological effects.

Therefore, the second way males use this principle to strengthen their dominance is to use it to successfully disguise the ideological operation of this 'freedom'.[33] The harm principle – by requiring a high threshold – means 'degrading or dehumanising' is defined narrowly, leaving much ideological material free to permeate society.

The courts also use this principle to consolidate male dominance. The words 'degrading or dehumanising'[34] are interpreted by the courts in a way that fails to take into account the many harms caused by pornography. Sunstein writes:

> Pornography acts as a filter through which men and women perceive gender roles and relationships between the sexes […] pornography undeniably reflects inequality, and through its reinforcing power, helps to perpetuate it.[35]

Pornography often depicts women in a (limited) variety of subservient poses and roles.[36] As McRae explains, 'pornography may be violent, or it may imply violence through its portrayal of women and their subordination of men.'[37]

Pornography also has a structural effect on the minds of those who view it. This is disregarded by the courts. Rhode states:

> Most males first learn about sex through pornography, and the

[33] Robin Morgan *Goodbye To All That* (Know, Inc, 1971), p. 10 described this tactic as '[T]he liberal co-operative masks on the face of sexist hate and fear'.

[34] Film, Videos and Publication Classification Act 1993, above n 2, s 3(2).

[35] Sunstein, above n 17.

[36] Ibid.

[37] McRae, above n 7.

> messages it sends are not exactly calculated to encourage relationships or mutual respect, caring and intimacy… [by] link[ing] sexual pleasure with female degradation.[38]

Studies have shown a strong correlation between pornography and later sexual deviance.[39] Furthermore, females' thinking is also structured by pornography. One typical belief is that 'if you figure men are comparing you to that type of body [in pornography], then you probably don't feel as good about yourself as you should […] I think it makes them look down on us.'[40]

In contrast, when adults are involved, the courts are much more reluctant to ban the material.[41]

The judiciary also uses this principle to argue that 'correlation' between (even accepted) harms is insufficient. One film, *Visitor Q*, was deemed acceptable for limited consumption in New Zealand – despite showing acts of rape and necrophilia – because it was filmed from a detached point of view and did not 'promote or support' the actions. The courts use the fiction that explicit material cannot encourage men to commit such acts unless it overtly encourages them.[42]

Lacey again provides an apt summary: 'the profusion of the pornographic regime of representation inevitably effects the social constitution of femininity […] and hence […] the status of all women.'[43] By ignoring much of the negative effects pornography causes and by requiring clear cause-and-effect between harms and

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[38] Deborah L. Rhode, *Speaking of Sex: the Denial of Gender Inequality* (Cambridge, MA: Harvard University Press, 1997), 60.

[39] Dr G Ratcliffe 'An integrated approach to the origins of sexually abusive behaviour' (1996) 2(1) *Feminist Law Journal*, 14.

[40] Shaw, above n 29. Such beliefs arise because females are blinded by the 'freedom of expression' to believe that pornographic material should be allow to exist in the private sphere. The fact that females accept the consumption of pornography on these grounds shows the power of the dominant ideology.

[41] See n 26 for examples of demeaning material that is legal in New Zealand.

[42] *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review* [2005] 3 NZLR 403; see also Sunstein, above n 17; Contra the Smoke-free Environments Amendment Act 2003 amending the Smoke-free Environments Act 1990 – in this, mere correlation is consider enough to protect citizens from the 'harms' of smoking.

[43] Lacey, above n 19.

pornography, the dominance of males is reinforced.

The final step in a CLS analysis is to ask whether such domination can be justified.

C. Are the existing power relationships undesirable?

Any conclusion supporting this dominance is indefensible. Women deserve real equality. It is ironic that one of the main elements supporting this patriarchy – freedom of expression – is considered a fundamental right and resides in the same document as a supposed 'right from discrimination'.[44]

Conclusion

What should those seeking change do from here? Many feminists have sought to have pornography recognised as discrimination. But this approach would alienate many females who do enjoy viewing pornography.[45] Many women find consuming pornography empowering.[46]

Also, restricting pornography risks further restricting women's freedoms.[47] Strossen believes restriction could 'jeopardise […] free speech precedents and principles'.[48] After a stringent censorship law was adopted in Canada[49], over half of the gay and feminist bookstores there had material seized.[50]

Thirdly, just as pornography is depicting a certain view of women (as subservient) the prohibition of pornography depicts another stereotype

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[44] Bill of Rights, s 19, above n 2.

[45] But see Dyzenhaus, above n 4 (explained above n 28).

[46] M Vadas 'A First Look at the Pornography/Civil Rights ordinance: Could Pornography by the Subordination of Women?' (1987) 84(9) *The Journal of Philosophy*, 487-511.

[47] Ibid.

[48] N Strossen *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New Ed Edition, NY University Press, 2000), 117.

[49] *R v Butler* [1992] 1. S.C.R. 452.

[50] L S. Chancer 'Feminist Offensives: 'Defending Pornography' and the Splitting of Sex from Sexism' (1996) 48(3) *Stanford Law Review*, 739-760.

(as frigid and un-sexual). The US Supreme Court described such a restriction as 'thought control,' since it 'establish[es] an approved view of women, of how they may react to sexual encounters, [and] of how the sexes may relate to each other.'[51]

The subjugation of females would not be stopped by restricting access to pornography. It is only one of many elements supporting male dominance.[52] Narrowing the focus will blunt further debate on these other elements. Instead, females should seize a tool being used by males – freedom of expression – and turn it back on them to amplify feminist concepts.

What is required is more freedom, not less.[53] Only through forcing real debate – in either sphere – can the ideological chains of male oppression be broken and true equality achieved.

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[51] *American Booksellers Ass'n v Hudnut* 771 F.2d 323, 328 (7th Cir. 1985).

[52] Ibid.

[53] Chancer, above n 50.

LIMITED EMPLOYMENT LOCATIONS: A CRITICAL ASSESSMENT OF AN UNNECESSARY POLICY

AMELIA EVANS*

Introduction

In August 2003 the Government released details of the 'Jobs Jolt', a package designed to "help people get off benefits and into employment".[1] One facet of this package was the Limited Employment Locations policy (the Policy). The Policy was designed to discourage unemployed persons from living in areas with few employment prospects. Instead, by living in areas with greater employment opportunities, "unemployed people [would be given] the maximum chance of securing a job".[2]

This paper begins in Part A by examining how the Policy operates. It is shown that it functions within sections 89 and 102 of the Social Security Act 1964 (the Act), and applies a fixed "blanket" rule to all beneficiaries. At Part B the consequences of operating as a blanket rule are assessed, concluding the Policy to be unlawful, arbitrary, unnecessary and ineffective. Finally, in Part C, the Policy is critiqued to assess if it produces fair results. Although the Policy has some redeeming features, its detrimental effects on designated areas and discriminatory effects on beneficiaries lead to the assessment that the Policy is unduly burdensome. Consequently, the paper concludes that the Policy should be abolished, especially given that any perceived benefits from the Policy can already be obtained through the existing framework of the Act.[3]

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1 Hon Steve Maharey, Minister of Social Development and Employment "Jobs Jolt will get more New Zealanders into work" (4 August 2003) Press Release.

2 Hon Rick Barker (4 March 2004) 615 NZPD 11586.

3 As explained in Part B (2).

A. The Policy and Legislative Scheme

The Policy derives from the Job Jolt package announced by the Ministry of Social Development (the Ministry) under the Labour Government and thus has no legislative framework of its own.[4] However, it is incorporated into the unemployment benefit (the Benefit) eligibility test through the statutory requirement that applicants must take "reasonable steps" to obtain employment.[5] The requirement to take reasonable steps to obtain employment is present in the "job search"[6] requirement in section 89(1)(a) of the Act.[7] Indeed, when assessing whether this criteria has been satisfied, caseworkers are advised to examine whether an applicant has, without a good reason "moved to an area where there is no work available".[8] However, in practice the Policy has been more regularly used under section 102(2)(a) of the Act, to help assess whether the duty to take reasonable steps to find employment, as required by the ongoing work test obligations,[9] has been fulfilled. It does not apply to other benefits under the Act.

Under the Policy, a "Limited Employment Locations Alert Sheet" is circulated by the Ministry, which lists areas deemed "limited employment locations" (LELs). Whether an area is designated as an LEL depends on a range of factors, including the availability of work,

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[4] Hon Steve Maharey, above n 1.

[5] Social Security Act 1964, s 89(1)(a)(iv) and s 102(2)(a).

[6] See Ministry of Social Development *Manuals and Procedures* "Job Search Requirements" <http://www.winz.govt.nz> (last accessed 8 April 2007), where this term is adopted by the Ministry to describe the statutory requirements of section 89(1) of the Social Security Act 1964.

[7] This sets out that to be eligible for the Benefit, an applicant must not be in full-time employment, but be seeking, available, willing and able to undertake it, and have taken reasonable steps to find it. Note this is not the only test for eligibility however, as section 89(2)-(4) of the Social Security Act 1964 sets out further requirements concerning thresholds of age, residency and income.

[8] Ministry of Social Development *Manuals and Procedures* "Meeting job search requirements" <http://www.winz.govt.nz> (last accessed 8 April 2007). Note however, this is in the context of the Unemployment Benefit Student Hardship.

[9] Mazengarb's Employment Law (looseleaf, LexisNexis NZ Limited, Wellington, Social Security Act 1964) para 6989.14 (last updated March 2007). See also Ministry of Social Development *Manuals and Procedures* "Limited Employment Locations" <http://www.winz.govt.nz> (last accessed 8 April 2007), which refers to the relevant legislation as being section 102(2)(a) of the Security Social Act 1964.

size of the local labour market, and public transport accessibility.[10] If an area is designated as an LEL, there are three categories of obligations and restrictions imposed on beneficiaries living, or intending to live, in that area.[11]

The first category requires that a person receiving the Benefit who consequently moves to an LEL "must have access to reliable transport and be willing and realistically able to commute to a nearby town or centre where there is employment available", or else they will not satisfy the work test obligations of section 102 and be unable to continue to receive the Benefit.[12] Secondly, where a person is already living in an LEL yet not receiving the Benefit, they too must satisfy the above criteria if at any time they apply for the Benefit, otherwise the section 89 eligibility requirement of taking reasonable steps may not be satisfied and therefore an applicant may not be entitled to the Benefit.[13] Thirdly, while persons already living in an LEL who receive a Benefit will not be expected to relocate nor automatically lose their Benefit, they will face increased attention from caseworkers.[14] This information is most easily summarised in a table:

[10] Ministry of Social Development *Job Jolts Factual Information: Limited Employment Locations Factsheet* <http://www.msd.govt.nz> (last accessed 6 April 2007).

[11] See also the discussion of the impacts of being designated an LEL in Part C (2).

[12] Ministry of Social Development, above n 9.

[13] Ministry of Social Development, above n 9. Note however, that this is only implied from the guidelines rather than an explicit directive as the other tiers are.

[14] Ministry of Social Development, above n 9.

	Receiving Benefit at time of policy announcement	Not receiving Benefit at time of policy announcement
Live in LEL when policy announced.	Do not automatically lose Benefit nor forced to relocate, but will experience increase attention from caseworkers.	If consequently apply for a Benefit, must have access to reliable transport and be willing and realistically able to commute to a nearby town or centre where there is employment available to satisfy section102(2)(a).
Move to LEL after policy announced.	Must have access to reliable transport and be willing and realistically able to commute to a nearby town or centre where there is employment available to satisfy section 89(1)(a)(iv).	No impact.

If analysed properly, it can be seen that the Policy applies as a fixed rule to all applicants. That is, if a person receiving the Benefit moves to an LEL or consequently applies for the Benefit when living in an LEL, they *must* meet the criteria imposed by the Policy in order to continue to receive the benefit, rather than merely providing guidance for caseworkers as they assess whether the reasonableness tests have been met on a case-by-case basis. This characteristic of the Policy poses several problems.

B. Effects of Blanket Application

1. Unlawful

First, the Policy may be unlawful. The courts have ruled that neither section 89 nor section 102 confers a general discretion on the Ministry.[15] Instead, the Ministry must simply assess whether the circumstances of the individual fit the specific criteria as set out in the sections.[16] Therefore, even without its blanket application, it could be argued the Policy is ultra vires, as the Act does not permit extraneous

[15] *Blackledge and Others v Social Security Commission* (17 February 1992) HC AK CP 81/87, adopting the analysis in *Green v Daniels* (1977) 13 ALR 1.

[16] *Blackledge and Others v Social Security Commission*, above n 15.

policies to be used when applying the sections, as the sections themselves are directive enough.

However, the wide wording of the operative terms of sections, such as "willing", "reasonable", and "seeking",[17] appear broad enough to imply that a limited discretion must be used to determine whether an applicant's efforts meet the criteria. Therefore it is arguable these sections are covered by what Tipping J described a second class of discretionary powers: that "the nature of the subject-matter [justifies] the establishment as a matter of discretion of a carefully formulated policy".[18]

Nonetheless, even if such discretions were considered permissible — which seems likely given that the courts have upheld the validity of some discretionary polices[19] — the Policy may still be unlawful. This is because, as Tipping J outlined, a discretion must not be blanket in its application.[20] Indeed, it has been held that cases must be individually considered to assess whether, on their facts, they warrant a departure from a general policy.[21] This reflects a long-established principle that the blanket application of guidelines without regard for individual circumstances is a fundamental violation of the exercise of discretionary powers.[22] Yet, as outlined above, the Policy provides no such individual outlook: if a beneficiary moves to an LEL or applies for the Benefit when living in an LEL, and does not have access to reliable transport, or is not able to commute to a centre where employment is available, he or she *must* have the Benefit terminated.[23] By imposing this fixed rule, which does not allow individual circumstances to be taken into account, the Policy may therefore be unlawful. Such an outcome would be consistent with the stance previously taken by the Social Security

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[17] Social Security Act 1964, s 89(1)(a).

[18] *Practical Shooting Institute (NZ) Ltd v Police* [1992] 1 NZLR 709, 718 Tipping J.

[19] See *SSAA Decision No 74/03*; *SSAA Decision No 124/2000* which impliedly accept policy guidelines regarding self-employment under section 89 of the Social Security Act 1964.

[20] "… no case is to be rejected automatically because it does not fit the policy": *Practical Shooting Institute (NZ) Ltd v Police* [1992] 1 NZLR 709, 718 Tipping J.

[21] *Practical Shooting Institute (NZ) Ltd v Police*, above n 18, 718 Tipping J.

[22] *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.

[23] Ministry of Social Development *Manuals and Procedures* "Clients moving to a limited employment location" <http://www.winz.govt.nz> (last accessed 8 April 2007).

Appeals Authority who, in the context of strike action, ruled there should be no blanket refusals of the Benefit, instead "inquiries should [be] made in each case to ensure that no person [is] penalised unjustly".[24]

2. Arbitrary, unnecessary, and ineffective

(a) Arbitrary

Related to this inflexibility, the blanket application creates a second, more patent, problem: by its very nature the Policy fails to allow for the consideration of individual circumstances. Accordingly, there may be persons who ordinarily would satisfy all the job search and work test requirements, and perhaps after a time find employment in an LEL; yet they will be unable to receive the Benefit during their period of unemployment. That a person, doing all he or she reasonably can do to seek employment, is denied the Benefit merely because of their decision to live in a specific location seems to run contrary to the clear words of the Act,[25] as well as being undesirably arbitrary. This is especially apparent concerning the class of people who may have always lived and worked in an LEL, however consequently losing their job: even if they do all that is possible to find employment in the area, they will be denied the Benefit. This is true even if the choice to remain in the area is due to, for example, family or historic ties, or because of an inability to fund a relocation.[26] Yet, the same person living in an area that is not an LEL, and exercising the same efforts to seek reemployment, would be eligible for the Benefit. That a person is denied the Benefit on the basis of their location is, in this respect, hugely arbitrary.[27] Indeed, the desire to eliminate such arbitrary outcomes is the rationale behind "blanket rules" being prohibited under discretions.[28]

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[24] SSSA Decision No 452.

[25] As the specific criteria are set out in Social Security Act 1964, s 89(1)(a) and s 102(2).

[26] In this regard, it is difficult to see the decision to remain as a "choice", as there may be no option but to remain.

[27] It is also unfair and discriminatory, as further developed in Part C (2)-(3).

[28] *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.

(b) Ineffective

Further, the "one-size-fits-all" nature of the Policy means it fails to achieve its stated purpose. That purpose was to move those people who receive the Benefit into employment.[29] Yet, it does not appear there is a rational connection between the Policy and its purpose. First, it cannot be assumed that such a policy will modify behaviour. Many factors affect a person's decision about where to live, which may not be influenced by economic reasons such as benefit entitlement.[30] As a result, while it is true such people will "move off" the Benefit, they may not find employment, thus creating a gap in the welfare net. Secondly, encouraging people to live in areas with greater employment opportunities does not necessarily lead to the conclusion that beneficiaries will have a greater likelihood of finding employment. There are often institutional factors which may contribute to a person's inability to find work, such as discrimination and skill shortages; or even individualistic factors, such as lack of experience, skills, motivation, or education.[31] Therefore, the rationale of the Policy is flawed: while it is likely to reduce the number of people receiving the Benefit, it is ineffective at ensuring those people actually find employment. This is because it does not allow for individual circumstances to be taken into account, instead it adopts a blanket approach to welfare.

(c) Unnecessary: utilising the existing framework

This author believes that the essence of the Policy, to not offer the Benefit to people who live in areas with minimal employment prospects, can be attained more effectively — by taking into account individual circumstances — within the existing framework of the Act, thus making the Policy itself redundant. This is because the widely worded requirements of the Act allow for caseworkers to individually take into account the effect location has on an applicant.[32] For example,

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[29] See Hon Steve Maharey,above n 1; Hon Rick Barker, above n 2, 11587.

[30] See, for example, the list of reasons given in Part B (2)(a).

[31] Andrea Cullen and Darrin Hodgetts "Unemployment as Illness: An Exploration of Accounts Voiced by the Unemployed in Aotearoa/New Zealand" (2001) 1 Analyses of Social Issues and Public Policy 33, 35.

[32] See the operative terms of sections 89(1) and 102 of the Social Security Act 1964,

a person who appears to be moving to an LEL with intent to avoid work could be neither construed as seeking nor taking reasonable steps to find employment.[33] Accordingly, that person would not be eligible for the Benefit. This would alleviate the operational problems outlined above and produce a result whereby those people who do not truly fulfil the legislative criteria be ineligible for the Benefit, whilst retaining eligibility for those who have a genuine reason for seeking work in an LEL.[34]

C. Fairness of the Policy

1. Theoretical Fairness

Conceptually it can be argued that the Policy is intrinsically fair. Under a reciprocal view of welfare, if the State is offering the unemployed financial assistance, the State has a right to set conditions which a beneficiary must fulfil.[35] Under such a view, any obligation — as long as it is not oppressive — must be inherently fair given the contractual nature of a benefit: a beneficiary receives money in return for fulfilling the obligations imposed by the State.

Furthermore, it is arguable that it is both fair and reasonable for the State to discourage beneficiaries from living in areas where it is unlikely they will find employment. This is because the purpose of the Benefit is to provide relief for those who are unable to find employment, not to fund a "lifestyle choice" of refusing to work;[36] if a person is living in an LEL, then they are unlikely to find employment, which is equivalent to making a "lifestyle choice" not to work.[37] Instead, the State should only

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where wide-meaning words such as "reasonable" and "seeking" are used.

[33] Social Security Act 1964, s 89(1)(a).

[34] This would allow for factors such as moving to an LEL because it has lower costs of living, familial ties or historic connections, to be taken into account.

[35] Jane Higgins "From Workfare to Welfare" in Jonathan Boston, Paul Dalziel and Susan St John (eds) *Redesigning the Welfare State in New Zealand – Problems, Policies, Prospects* (Oxford University Press, Auckland, 1999) 260, 261.

[36] This was recognised in *SSAA Decision No 29/2006*, where the Authority ruled that a decision to seek work from an LEL was a "lifestyle choice", which ran contrary to the Social Security Act 1964.

[37] Indeed this rationale was raised in parliamentary debate, that "if there are employment opportunities in a person's hometown, and they decide to move to a place where there

provide Benefits to those who are making an active effort to find employment, and those people who chose to move to an LEL by definition cannot be seeking or taking reasonable steps to find employment, as they are moving to an area with minimal employment opportunities.

Further, it can be argued that the policy has been designed to minimise unfairness, by excluding those already living in an LEL and receiving the Benefit. However, these arguments overlook the actual hardship and unfairness imposed on beneficiaries and LEL inhabitants, which this author believes are significant enough to deem the Policy unfair and unacceptable.

2. Unfair aspects of the policy

(a) Effects of LEL classification

To begin, the negative consequences of an area being designated as an LEL are extensive for its current and potential inhabitants. Not only does LEL status prevent the natural migration of people and the wealth they bring a community, but it tarnishes the public perception of a region by effectively declaring it economically stagnant.[38] Such a declaration is likely to adversely affect the existing population, both by demeaning the worth of their residence, and deterring future growth by preventing the accumulation of a labour force in the area.[39] Although the list of LELs is reviewed annually,[40] within such time an area may have suffered severe economic harm, and its reputation may take several years to restore. Further, the methodology adopted in assessing whether an area should be an LEL was undermined, as many local mayors were not consulted despite a promise from the Work and

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are not, then that is a lifestyle choice, and they should fund it, not the taxpayer" Hon Rick Barker, above n 2, 11586.

[38] See Hone Harawira (24 August 2006) 633 NZPD 4857 where it is stated that New Plymouth Mayor, Peter Tennent, claimed the Policy was unhelpful and undermined small communities.

[39] See Hone Harawira, above n 38, where it is stated that Marlborough District Mayor, Alistair Sowman "said the region was crying out for workers, and that the blacklist would put people off moving there".

[40] Ministry of Social Development, above n 10. Locations can also be reviewed at other times if employment opportunities change.

Income National Commissioner that they would be.[41] Without adequate consultation, it is likely that identification of some of the 259 LELs[42] will have been based on incorrect or incomplete information. For example, Kawhia was deemed an LEL despite strong demand for labour in the area given the widely held expectation that tourism and fishing initiatives are expected to develop rapidly in the future.[43] Such poorly informed decisions could be grounds for judicial review.[44]

(b) General discriminatory effects

The Policy also provides two prima facie breaches of the New Zealand Bill of Rights Act 1990 (the BORA).[45] The first is the right to freedom of movement.[46] By potentially preventing a person from being entitled to the Benefit if he or she moves to an LEL, it is arguable that this will inhibit a beneficiary's ability to move freely around the country. Although this not a direct barrier to movement, it could be argued that because of the level of welfare dependence, this nonetheless fits within the scope of the right,[47] thereby implying a breach of the BORA. Secondly, the right of freedom from discrimination may be breached, as the Policy specifically restricts the ability of the unemployed to choose where to live.[48] Indeed, even before the BORA was enacted the limitation on movement was criticised by the Royal Commission on

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[41] See, for example, Sue Bradford "No Truth in No-Go Consultation Claim" (3 March 2004) Press Release; "Blacklist Choices Puzzle Small Towns" (6-7 March 2004) *New Zealand Herald* Auckland; "Consultation Controversy" (11 March 2004) *The Jobs Letter* Taranaki; Ruth Berry "No Go Job Towns Jolt Councillors" (4 March 2004) *New Zealand Herald* Auckland. See also the commentary in John Huges "Jolt and Jive" (2003) 6 ELB 72.

[42] For a full list of the LELs, see Ministry of Social Development "Limited Employment Locations Alert Sheet" <http://www.msd.govt.nz> (last accessed 8 April 2007).

[43] "NKC No-Go Areas for Unemployed Draws Little Reaction" (11 March 2004) *Otorohanga District Council Newsletter* Otorohanga.

[44] *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL).

[45] The New Zealand Bill of Rights Act 1990 applies to the Policy as its implementation would be considered an act by the executive under section 3(a) of the Act.

[46] New Zealand Bill of Rights Act 1990, s 18(1).

[47] See *R v Allison* (9 April 2003) HC AK T002481 for a discussion of the extent of the right to freedom of movement.

[48] New Zealand Bill of Rights Act 1990, s 19(1), as being the recipient of the Benefit is a prohibited ground of discrimination under the Human Rights Act, s 21(1)(k)(ii).

Social Policy.[49] Alternatively, the Policy may be considered particularly discriminatory towards Māori, who could be prevented from returning to their papakāinga.[50] However, as the Policy is arguably designed to assist the unemployed as disadvantaged persons, by providing an incentive to remain in areas with greater employment, the BORA may not be breached.[51]

As the BORA is regarded as a basic protection of the rights that New Zealanders deem fundamental to a "free and democratic society",[52] if the Policy is in breach of either of these sections this would be strong evidence of its unfair application.[53] Further, even if the Policy does not breach NZBORA because of definitional technicalities, it seems to breach the spirit of these rights. This in itself illustrates the hardship it will cause beneficiaries, even if that hardship cannot be rectified through legal redress.

(c) Inconsistent Application

Finally, the application of relocation polices by the Social Security Appeal Authority (the Authority) has historically been inconsistent, leading to the unfair result that beneficiaries are uncertain as to the effect moving to an area with low employment opportunities will have on Benefit entitlement. The "remote areas policy", the predecessor to the Policy, was originally heavily criticised by the Authority who stated the policy was "difficult to sustain in times of high unemployment throughout New Zealand" and that the plain meaning of the work test obligations had been satisfied irrespective of where the appellant lived.[54] Later, however, the Authority accepted the policy fell within the

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[49] *Royal Commission on Social Policy* (Vol II, Government Printer, Wellington, 1998) 567. While this criticism was levelled at an earlier policy, not the LEL Policy, they are materially the same concerning discrimination on the unemployed.

[50] Land to which there is a direct tribal or ancestral connection. See John Huges "Jolt and Jive" [2003] ELB 72.

[51] New Zealand Bill of Rights Act 1990, s 19(2): if assisting disadvantaged groups, there will be no breach.

[52] New Zealand Bill of Rights Act 1990, s 5.

[53] Note that the discussion of the legal consequences of a breach of NZBORA is outside the scope of this paper.

[54] *SSAA Decision No 41/89*. Note that the statutory section referred to was s 58(1), the precursor to s 89(1), however the requirements are materially the same for this purpose.

discretion of the Benefit, and applied it almost unquestioningly.[55] Such reasoning fails to recognise that any such discretion must be properly exercised. Nonetheless, irrespective of which approach is adopted, the fact that inconsistent approaches have been applied leaves beneficiaries in a quagmire of uncertainty. Accordingly, there needs to be greater certainty as to the validity and operation of the Policy to ensure that it functions fairly.

Conclusion

These criticisms seem to outweigh any notion of theoretical fairness, as individual beneficiaries already face the hardship of unemployment (indeed the purpose of moving to an LEL may be to lower living costs) so when the consequences of limiting movement are added, as reflected in the BORA, the Policy becomes unacceptably unfair. Further, inhabitants of an LEL, even if they are not receiving the Benefit, suffer from the loss of dignity in their hometown and face future difficulties if they apply for the Benefit. The outcome of the law to be applied if an appeal is lodged for denied beneficiaries is uncertain, further contributing to the Policy's unfair application.

This unfairness, coupled with the operational problems of unlawfulness, arbitrariness and inefficiency that arise from the application of the Policy as a blanket rule, warrant the retraction of the Policy. Any perceived advantages of assessing the impact a person's location has on his or her ability to find work could be obtained through the wide words of sections 89 and 102 of the Act. In a free and democratic society, individuals should be entitled to welfare based on their individual need, rather than on an arbitrary rule. Accordingly, the Policy should be abolished.

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[55] *SSAA Decision No 26/97*.

COMMERCIAL SEXUAL SERVICE CONTRACTS AND PUBLIC POLICY: SECTION 7 OF THE PROSTITUTION REFORM ACT 2003

TAMINA CUNNINGHAM*

Introduction

Section 7 of the Prostitution Reform Act 2003 states: "No contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds."

In essence, the section facilitates "freedom of contract" in respect of sexual service contracts by abrogating the court's common law jurisdiction to refuse to enforce sexual service contracts on public policy ground. However, in enacting section 7, did Parliament intend to facilitate "freedom of contract" to such an extent that the courts will be required to enforce contracts in cases where the qualitative nature of the sexual service contracted for constitutes a sexually immoral act or one that borders criminal assault?

A. Contracts contrary to Public Policy

It is well established at common law that a court can hold a contract invalid or illegal because it is contrary to public policy.[1] The jurisdiction is embodied in the maxim: *ex turpi causa non oritur action* (from an immoral consideration an action does not arise).

In New Zealand, the Illegal Contracts Act 1970 augments the consequences of this doctrine.[2] In order to be triggered, the *ex turpi causa* rule does not require a contravention of law; it can be triggered by consideration that is immoral but not illegal.

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1 *Smith v White* (1866) L.R. 1 Eq. 626.

2 The common law is still relevant to determine whether a contract is illegal. However, the common law consequences have been replaced with broad discretion powers of the court to grant relief where appropriate under s 7 of the Illegal Contracts Act 1970.

For centuries, the act of prostitution has been held to be contrary to public policy and sufficient to justify the refusal of enforcement. The sheer weight of immorality justified holding the contract to be invalid without the need to contemplate other factors like the qualitative nature of the sexual service contracted for. Prostitution was so intensely immoral that it could taint a contract by association, even if the contract's consideration did not involve the act of prostitution.[3]

Today, the countervailing weight of public policy is less intense. Public policy is temporally dependent; it is not immutable.[4] Societal opinion of sexual immorality has changed over time[5] and this has been reflected in the courts. It appears that the act of prostitution is no longer sufficient to defeat a contract on public policy grounds. The Hong Kong High Court in *Chuang Yue Chieng Eugene v Ho Yau Kwong Kevin*[6] expressed doubt that the taint of prostitution could justify a strike-out application. Comparably, the Federal Court of Australia, in *Barac (t/as Exotic Studios) v Farrell*[7] has held that an employment contract's association with prostitution was insufficient to refuse a claim for worker's compensation.

These cases suggest that the current common law position regarding sexual service contracts is that the act of prostitution is insufficient to refuse to enforce a sexual service contract: other factors are necessary to 'tip the balance'. As the courts have not been required to consider the qualitative nature of the sexual act in their determination, it is possible that in certain cases the immoral nature of the sexual act contracted for would tip the balance. This would leave sexual service contracts that require the performance of a sexually deviant act open to defeat.

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3 *Pearce v Brooks* (1866) LR 1 Exch 213; *Smith v White* (1866) L.R. 1 Eq. 626.

4 See H. Guest (ed.), *Chitty on Contracts*, 28th ed (1999) Vol. I, Para. 17-004.

5 Examples of such changes in opinion include the reduction of social stigma attached to: adultery, homosexuality and some alternative sexual acts.

6 *ChuangYue Chieng Eugene v Ho Yau Kwong Kevin* [2002] 4 HKC 245.

7 *Barac (t/as Exotic Studios) v Farrell* (1994) 125 ALR 241.

B. Section 7 of the Prostitution Reform Act 2003

The Prostitution Reform Act 2003 was enacted for the purpose of decriminalizing prostitution and providing a framework to safeguard the human rights of sex workers and for the promotion of their safety and welfare.[8] However, notwithstanding this intention, section 7 does not apply to employment contracts for sex workers. Nor does it cover other ancillary contracts like lease agreements for brothel premises or contracts of insurance.

Section 7 contemplates two types of contract: commercial sexual service contracts[9] and contracts for the arrangement of a contract for commercial sexual service. It applies to contracts that are directly related to the provision of physical participation by a person in sexual acts with, and for the gratification of another person for which payment or other reward is provided.

As the ambit is restricted to contracts directly related to the act of prostitution, one could assume that section 7 is a statement that the provision of sexual services is not contrary to public policy to such a degree that contracts should be refused enforcement. However, if this is the case, the courts would be required to enforce contracts in cases where the qualitative nature of the sexual service contracted for constitutes a sexually immoral act or one that borders criminal assault.

Whether this is the true interpretation and effect of section 7 will turn on whether "public policy" should be interpreted as merely public policy against prostitution or whether it should be interpreted as public policy against commercial sexual service contracts in general. If the former is adopted, then section 7 precludes commercial sexual service contracts from being refused enforcement for the mere reason that they are contracts for prostitution, which leaves the option open in respect of contracts requiring the performance of a sexual act which is independently immoral and contrary to public policy. If the latter interpretation is adopted, then all sexual service contracts will be capable of enforcement, regardless of the qualitative nature of the sexual act contracted for, subject to the commission of illegal acts.

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[8] S 3 Prostitution Reform Act 2003.

[9] S 4(1) Prostitution Reform Act 2003.

C. Possible Interpretations of Parliament's intention

1. Affirmation of the Common Law Position

If public policy is interpreted as merely public policy against prostitution, section 7 will have the effect of affirming the common law position taken by the courts in recent years. As this position is not conclusive, an affirmation in the form of section 7 would provide a degree of certainty for New Zealand courts if asked to determine whether prostitution is a sufficient justification to refuse enforcement of a sexual service contract.

Two issues arise with this particular interpretation. Firstly, it requires a significant reading down of the term 'public policy' which is very restrictive in the light of the term's wide interpretative capability. It is also inconsistent with the addend 'other similar grounds' at the end of section 7, which suggests a wider ambit.

Secondly, the interpretative ambit of public policy only addresses policy against public policy and does not extend to public policy concerns flowing from the sexual acts contracted for. Therefore contracts involving "immoral sexual acts" would be open to defeat and sex workers who provide such services would be without contractual rights. This would be inconsistent with the aim of the Prostitution Reform Act 2003 being the promotion of safety and welfare of sex workers. It would also be an illusory interpretation that ignores the reality of the sex industry; being that alternative or deviant sexual practices are commonly demanded.[10] The reality of the industry extends well past the comfort zone of acts occurring within the marital bed or those appearing upon our television screens. Specialist acts like slave and master, group sex, human defecation, and sado masochism[11] are all commonly engaged in by consenting adults. No doubt there are numerous other acts in the light of the infinite ambit of human gratification and imagination.

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[10] J Jordan, *The Sex Industry in New Zealand* (2005) Wellington: Ministry of Justice.

[11] The legal issues surrounding sado masochism and criminal liability are discussed below.

2. Contracts for Sexually Deviant Acts that are not Illegal

The issues identified above could be addressed by taking a wider interpretation of public policy. This would require "public policy" to bear the meaning of countervailing public policy against sexual service contracts generally, meaning that all public policy considerations surrounding sexual service contracts would be insufficient to refuse the enforcement of a sexual service contract.

Although this interpretation is wider and more consistent with the aims of the Act and the reality of the context it is being applied to; it is not absolute. Obviously section 7 could not be used to protect sexual service contracts that require the performance of an illegal act. To allow such an interpretation would result in absurdity with an extreme example being that a person could enforce another to commit murder under a sexual service contract. But would all contraventions of law be considered outside the protection of section 7?

3. Mere Contraventions of Law

The phrase 'or similar grounds' at the end of section 7 suggests a category of circumstances that are similar or related to public policy, but are distinctive enough to be afforded a separate category. It may be that this separate category intends to cover circumstances where the execution of the contract contravenes a law that does not expressly or impliedly invalidate the contract. In substance, this refers to breaches of laws that are regulatory in nature. This is the circumstance envisaged by section 5 of the Illegal Contracts Act 1970, which states:

> A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

If this interpretation is adopted, mere contraventions of law resulting from the performance of a commercial sexual service contract would be shielded by section 7. For example, in the context of the Prostitution Reform Act 2003, if the performance of the sexual service or arrangement of the sexual service breached sections 8 or 10 of that

Act,[12] sections which are merely regulatory in nature, this would, with reference to section 5 of the Illegal Contracts Act 1970, be insufficient justification to refuse enforcement of the contract.

Conversely, a breach of section 23 of the Prostitution Reform Act 2003 would fall outside of this ambit. That section prohibits the use of persons under eighteen years in a commercial sexual service contract and imposes a term of imprisonment of up to seven years. In light of the proviso in section 5 of the Illegal Contracts Act 1970, the offence's 'object clearly so requires' that the contract be illegal.

D. Sexual Service Involving Bodily Harm

It is arguable whether Parliament intended for section 7 to apply to commercial sexual service contracts, the performance of which requires the intentional infliction of bodily harm with the consent of a 'victim' who is sui juris.[13]

In England, the House of Lords in *R v Brown*[14] held by a 3:2 majority, that a person cannot lawfully consent to criminal assault for the purpose of sexual gratification because there is no public interest justifying the commission of the harm.[15] The New Zealand Court of Appeal in *R v Lee*[16] considered *Brown* and identified numerous problems and exceptions to the application of the rule, ultimately favouring the minority position and judgment of Lord Mustill in *Brown*. The Court of Appeal held:[17]

> [T]here is an ability to consent to the intentional infliction of harm short of death unless there are good public policy reasons to forbid it and those policy reasons outweigh the social utility of the activity and

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[12] s 8 of the Prostitution Reform Act 2003 requires the taking of reasonable steps to adopt safe sex practices. s 10 requires compliance with the Health and Safety in Employment Act 1992.

[13] Obviously there would be no issue if the party was not sui juris or if the contract could be avoided due to lack of consent on general principles of contract law.

[14] *R v Brown* [1993] 2 All ER 75.

[15] Ibid 75; In *R v Wilson* [1997] QB 47 the English Courts held that activities involving bodily harm engaged upon within the confines of the marital bed were justifiable.

[16] *R v Lee* [2006] 3 NZLR 42.

[17] Ibid 116.

> the value placed by our legal system on personal autonomy. A high value should be placed on personal autonomy. Any constraints on human activity must be justified … In cases where grievous bodily harm is intended, however, there may be policy reasons for criminalising such conduct despite consent, even on the test we propose.

In the light of *Lee*, it follows that not all intentional inflictions of bodily harm for the purposes of sexual gratification will constitute criminal assault. Therefore, the validity of a commercial sexual service contract, the performance of which constitutes intentional infliction of bodily harm, will turn on the degree of harm intended and relevant policy considerations.

If "public policy" is given the meaning of public policy against commercial sexual service contracts in general then it is possible that section 7 would protect sexual service contracts involving the intentional infliction of bodily harm provided the harm does not constitute criminal assault. It is likely that this would represent the interpretative high water mark of section 7.

Conclusion

The operation of section 7 of the Prostitution Reform Act 2003 lies dormant awaiting its use as a defence against claims that a commercial sexual service contract should be suppressed or struck down on public policy grounds. The conservative interpretation of Parliament's intention is that the provision merely affirms the common law. Given the issues of this approach, a pragmatist would suggest a wider interpretation to include contracts that involve sexually deviant conduct that may 'tip the balance'. The pragmatic approach is the preferred interpretation in the light of the purpose of the Prostitution Reform Act 2003 and the context to which section 7 is to be applied.

THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION: POLICY, ISSUES AND FUTURE REFORMS

REBECCA MOCKETT*

Introduction

The aim of this paper is to examine the policy problem of international child abduction. International child abduction involves the abduction of a child by a parent from their home country (place of habitual residence) to another state. Prior to the establishment of the Hague Convention, the legal position regarding international child abduction was unsatisfactory.[1] An overseas custody order was unlikely to be recognised and enforced in another state and the only real remedy available was for the parent left behind to attempt to gain a custody order in the country where the child had been abducted to. This provided a very unjust situation, as the legal proceedings were normally lengthy and at a high cost and placed the left behind parent at a disadvantage of having to fight a court case in unfamiliar surroundings. Furthermore, there were potentially embarrassing situations for courts in which two jurisdictions would reach different decisions on the custody of a child and would appear to be questioning the law in the other jurisdiction. The response from the international community saw the Hague Conference on Private International Law propose the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) in 1980.

The Hague Convention was essentially a compromise as it was not possible for all states to agree to the harmonisation of the rules of jurisdiction or criteria for the recognition and enforcement of existing custody orders.[2] Instead of using traditional private law remedies, the

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1 David McClean, *The Hague Convention on the Civil Aspects of International Child Abduction Explanatory Document* (Commonwealth Secretariat, Britain, 1997), 2.

2 Paul R. Beaumont and Peter E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, New York, 1999), 21.

Hague Convention provides a procedural framework that operates through Central Authorities in each state, and is based on the summary return mechanism. This mechanism automatically returns an abducted child to their place of habitual residence.[3] The basis for the summary return mechanism is the assumption that automatic return is in the best interests of the child.[4] At the time of the drafting of the Convention, international child abduction cases were based on the paradigm abduction case that involved the non-resident and non-custodial parent (usually the father) abducting his child in order to gain a more favourable custody order in another jurisdiction.[5] In the situation of the paradigm abduction case, automatic return is in the child's best interests as the child is returned to their primary carer, to an environment that they are familiar with and allows the custody dispute to be heard in the place of habitual residence.[6] The compromise evident in the Convention was between states' original reluctance to cede their ability to look into the merits of individual cases and the simplicity that the summary return mechanism provides.[7]

Since 1980, socio-legal and technical developments have led to change in the profile of the child abductor. It is now more common for the abductor to be female, the primary caregiver, and to be returning to their country of origin to escape domestic violence.[8] The change in the paradigm abduction case has led to inevitable difficulties in the assumption that summary return is in the child's best interests. There is a tension between the summary return mechanism that does not consider the individual welfare of the child, the fundamental principles of New Zealand family law, and the United Nations Convention on the Rights of the Child (UNCRC) which holds the welfare of the child as of paramount importance. This tension was recognised with the passage of the Guardianship Amendment Bill 1991, which incorporated

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[3] Beaumont and McEleavy, above n 2, 21.

[4] Margaret Casey and Lex de Jong, 'Hague Convention on Civil Aspects of Child Abduction' Seminar presented to the New Zealand Law Society, New Zealand, March 1995.

[5] Beaumont and McEleavy, above n 2, 3.

[6] Elisa Pérez- Vera *Explanatory Report* (1982) Hague Conference on Private International Law <http://hcch.e-vision.nl/upload/expl28.pdf> (at 20 May 2006).

[7] Beaumont and McEleavy, above n 2, 20-21.

[8] Mary O'Dwyer, "Current Issues in Hague Convention Cases: A New Zealand Perspective" (2002) 4 BFLJ 5.

the Convention into New Zealand law, yet little was understood as to its implications. The policy process regarding the Convention seems to have been driven by public perception of the need for the government to act after highly publicised international child abduction cases. The context of domestic violence also poses conceptual difficulties for the summary return mechanism. In light of these tensions, New Zealand has remained steadfast in its application of the Convention. However, New Zealand has been prepared to extend the scope of the Convention to allow not just parents with rights of custody to seek an order for return, but also those with rights of access. It is evident that the Convention needs to adapt to the changing context of child abduction. The difficulty is to attain reforms that do not undermine the entire functioning of the Convention. The focus of this paper is on the tensions between the Convention, the best interests of the child, domestic violence and the New Zealand interpretation of rights of custody.

A. The Hague Convention

1. Provisions of the Convention

The preamble of the Hague Convention states that the purpose of the Convention is "to protect children internationally from the harmful effects of their wrongful removal or retention…"[9] This purpose is principally met through the objectives of the Hague Convention as set out in Article 1. They include the prompt return of children wrongfully removed or retained in any Contracting State and to ensure that rights of custody under the law of one Contracting State are respected in the other Contracting State.[10] In order to invoke the Hague Convention and obtain the return of an abducted child there are four requirements. Firstly, that the child was removed from the child's place of habitual residence to a Contracting State. Secondly, that the removal of the child breached the parent in the home country's rights of custody. Thirdly, at the time of the removal, those rights of custody must have actually

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[9] Hague Convention on the Civil Aspects of International Child Abduction, opened for signature 1980, 19 ILM 1501, preamble, (entered into force November 1980) ("Hague Convention").

[10] Nigel Lowe, Mark Everall and Michael Nicholls, *International Movement of Children* (Jordan Publishing Limited, England, 2005) ch 12, 198.

been exercised by the parent in the home country. Lastly, that the child was habitually resident in the home country immediately before the removal.[11]

The Convention provides five defences that may defeat an order for return. Firstly, the application was made more than one year after the removal of the child and that the child is now settled in the new environment.[12] Secondly, that the applicant was not exercising custody rights at the time of the removal or that the applicant consented to the removal.[13] Thirdly, that there is a grave risk that the return would expose the child to physical or psychological harm or would place them in an intolerable situation.[14] Fourthly, that the child objects to being returned (often called the "child objects" defence), if at an age and degree of maturity that it is appropriate to give weight to their view.[15] Lastly, that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.[16]

2. Underlying Assumptions

The Convention is designed to minimise the effects of abduction upon the child and provide a deterrent to parents contemplating abduction.[17] These goals are met through the summary return mechanism.[18] These goals and the summary return mechanism reflect two underlying assumptions. The first assumption is that summary return is in the best interests of the child. This assumption is only true in the context of the paradigm abduction case as envisaged in 1980. The difficulty with this assumption is that developments in society since the time of drafting have led to a change in the prototype abductor. The second assumption

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[11] Care of Children Act 2004, s 102. The Care of Children Act 2004 replaced the Guardianship Amendment Act 1991.

[12] Care of Children Act 2004, s 106(1)(a).

[13] Care of Children Act 2004, s 106(1)(b)(i)-(ii).

[14] Care of Children Act 2004, s 106(1)(c)(i)-(ii).

[15] Care of Children Act 200, s 106(1)(d).

[16] Care of Children Act 2004, s 106(e).

[17] Anne- Marie Hutchinson, Rachel Roberts and Henry Setright, *International Parental Child Abduction* (Family Law, United Kingdom, 1998), 4.

[18] Ibid.

is that child abduction is harmful. The change in the profile of the child abductor has revealed the high incidence of child abduction in order to escape domestic violence.[19] In the context of domestic violence, the abduction may actually remove the child from harmful circumstances. Therefore, the assumption that summary return is in the best interests of the child and that the abduction is harmful are questionable in the context of the changed prototype abduction and domestic violence.

2. Compromise and Tensions

At the drafting of the Convention, the summary return mechanism was decided upon as a compromise.[20] This mechanism provided a simple alternative to harmonising rules and received a great deal of political support.[21] It also resolved the problem of conflicting custody orders being made by different jurisdictions and the subsequent disregard for the principle of comity that requires respect for the laws of other states. The main debate between states centred on the exceptions to summary return.[22] There was significant support by some states for only allowing narrow exceptions to summary return to prevent the Convention being weakened.[23] The summary return mechanism was a novel idea and represented a major change, as the courts would no longer be able to determine abduction cases on the basis of the best interests of the individual child.[24] Therefore, some states were hesitant to accept the summary return mechanism and successfully advocated for the inclusion of a public policy clause. This clause allowed states to refuse an order for return if it was incompatible with its fundamental principles of the law relating to the family and children.[25] This clause would have resolved the tension between the summary return mechanism and the fundamental principle of New Zealand family law. However, there was fierce opposition to this clause, as it was seen as

[19] O'Dwyer, above n 8, 9.

[20] Beaumont and McEleavy, above n 2, 21.

[21] Ibid 21.

[22] Ibid 22.

[23] Ibid.

[24] Ibid.

[25] Ibid 23.

weakening the Convention, and it was eventually replaced with a more restrictive clause.[26]

The political momentum that followed the Hague Convention facilitated the making of concessions in order to reach a solution.[27] The concessions made were that courts would no longer be able to inquire into the individual merits of child abduction cases and that the exceptions to summary return were very narrow. Accordingly, states gave up the right to refuse an order for return on the basis that it was not in the best interests of the child. Consequently, the operation of the Convention has led to tensions between the assumption that summary return is in the best interests of the child and an individualistic approach that determines the best interests of the child on a case by case basis. It has been noted that the Convention emphasises the good of children generally by seeking to deter parents from unlawfully abducting a child and, as a result, the "Convention is a step removed from an individualistic child-centred approach inherent in the best interests of the child philosophy prevalent in family law."[28] This tension is highlighted by the paramountcy of the best interests of the child in the UNCRC and New Zealand family law and the subordination of the best interests of the individual child in the Convention. As noted above, particular focus will be placed on the tension between summary return and the best interests of the child and the context of domestic violence. In addition, this paper will discuss the tension between New Zealand's rigid application of the Convention generally, and the liberal approach New Zealand has adopted towards rights of custody.

B. Incorporation of the Hague Convention into New Zealand Law

The Hague Convention was incorporated into New Zealand law through the Guardianship Amendment Act 1991 that implemented the particulars of the Convention through legislative provisions rather than incorporating the Convention directly. At the time the Guardianship Amendment Bill 1990 (the Bill) was introduced, politicians were aware of the unsatisfactory legal situation regarding child abduction as there

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[26] Ibid.

[27] Beaumont and McEleavy, above n 2, 21.

[28] Ibid. 13.

had been highly publicised international child abduction cases in New Zealand.[29] In the Morgan/Foretich case, an American woman claimed her husband had abused her child and abducted the child to New Zealand.[30] Despite an American court finding that there was inconclusive evidence of abuse, the mother was able to gain a custody order in her favour in New Zealand.[31] This case was seen as epitomising the fact that New Zealand had become a safe haven for child abductors and highlighted the need for New Zealand to ratify the Hague Convention.[32]

As is common in the policy process, often a highly publicised event forces the government to legislate to rectify a situation. In the case of child abduction, it is probable that the heightened publicity of the Morgan/Foretich case meant that the Government needed to be seen to be doing something and was a strong motivation behind the incorporation of the Convention. Therefore, it is questionable as to whether the ratification of the Convention by the Government was driven by the impact of the problem of child abduction on public consciousness, rather than the desire to resolve the problem of child abduction itself.

1. Policy Considerations

The arguments for and against the Hague Convention were evident during the Parliamentary Debates. The general focus of the debates was over the adequacy of the exceptions to summary return. Paul East was concerned that the discretion to refuse to return a child was not wide enough to prevent a court from having to return a child to a detrimental situation.[33] He recognised that the discretion is very limited and not as wide as the basic and fundamental principle of New Zealand family law that the welfare of the child is always paramount.[34] This highlighted that there was recognition during the policy process of the

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[29] (1990) 507 New Zealand Parliamentary Debates 1544 (Warren Kyd).

[30] *Re the M Children* (2002) 21 FRNZ 67.

[31] *Re the M Children* , above n 30, 67.

[32] Sarah Prestwood, 'Child abduction: hide and seek' *The Dominion* (Wellington, New Zealand, 3 November 2001) 1, 4.

[33] (1990) 507 New Zealand Parliamentary Debates 1541 (Paul East).

[34] Ibid.

tension between the Convention and New Zealand family law. However, this is contradicted by Lianne Dalziel's comment that New Zealand family law is very much focused on the interests of the child and "that, of course, is the priority being adopted in the Bill tonight".[35] The Convention does not prioritise the interests of the child, as is done so in New Zealand family law. The initial concern expressed by members of the opposition and Paul East, were resolved through acceptance that the exceptions to summary return must be narrow in order to prevent a full custody hearing after every application for a child to be returned.[36]

In submissions to the Justice and Law Reform Select Committee, the New Zealand Law Society and Professor Angelo of Victoria University both noted concern over section 23 of the Guardianship Act which required courts to "regard the welfare of the child as the first and paramount consideration" and the possibility that this section could defeat the Convention.[37] This shows that the tension between the Convention and the best interests of the child that are fundamental to New Zealand family law is again recognised. The Select Committee clarified, that, although the Hague Convention is based on the premise that the best interests of the child are of paramount importance, this is qualified by the fact that in international child abduction cases the interests of the child are best met through summary return.[38] The assumption that summary return is in the best interests of the child continued to be a major justification for the procedures within the Hague Convention and has later proven to be problematic in some situations. At the time the Bill was introduced, there did not appear to be any international obligations that the Convention needed to be reconciled with. Although there are inconsistencies between the UNCRC and the Convention, New Zealand did not ratify the UNCRC until 1993.[39]

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[35] (1991) 513 New Zealand Parliamentary Debates 1201 (Lianne Dalziel).

[36] (1991) 513 New Zealand Parliamentary Debates 1202 (Paul East).

[37] Carolyn Pritchett, *Summary of Issues Raised During the Hearing of Evidence and in Written Submissions to the Justice and Law Reform Select Committee on the Guardianship Amendment Bill 1990* (24 July 1990), 4.

[38] Secretary for Justice to Justice and Law Reform Committee, 24 July 1990.

[39] Peter Boshier, 'Care and Protection of Children: New Zealand and Australian Experience of Cross-Border Cooperation' (2005) 5 NZFLJ 63.

The incorporation of the Hague Convention into New Zealand domestic law was characterised by acceptance of the assumptions within the Convention. Particularly, the assumption that summary return was in the best interests of the child and that the prototype abductor was true for New Zealand.[40] Although there was no national interest analysis done for this time period, a memorandum for the Cabinet Legislation Committee shows that, firstly it was accepted that the Convention was aimed at the prototype abductor and that this was not questioned. Secondly, that the Convention met the best interests of the child through summary return.[41] Furthermore, this memorandum states that the Bill provides no areas of contention or policy implications that require further analysis.[42] During the policy process, there was no discussion over whether these assumptions and the framework the Hague Convention operates within are relevant for New Zealand. The underlying tension between the paramountcy of the best interests of the child and the operation of the summary return mechanism in the Convention has been recognised in the Select Committee stage and specifically legislated to prevent any confusion. However, during the parliamentary debates, it is clear that some of the politicians did not understand that the Convention is not in line with New Zealand family law. It was concluded that summary return with limited exceptions was necessary to prevent a full custody hearing from occurring after every application for a child to be returned.[43]

2. Subsequent Developments

Since the implementation of the Bill, the legislation has not significantly changed. It was necessary to amend the Act in 1994, as the definition of "rights of custody" in the Guardianship Amendment Act 1991 was narrower than the definition in the Convention. There has been a wide range of case law involving the Convention and common issues that the courts have dealt with include questions regarding habitual residence, rights of custody and the established defences to an order for return. It appears that the driving force behind the development of the

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[40] New Zealand Parliamentary Debates, above n 33, 1540.

[41] Minister of Justice *Memorandum for Cabinet Legislation Committee* (1989), 1.

[42] Ibid.

[43] (1991) 513 New Zealand Parliamentary Debates 1202 (Paul East).

law in this area is a strong desire to continue to uphold the spirit of the Convention and the summary return mechanism. In addition, the principle of comity continues to restrain judges from making decisions that appear to criticise another state's legal system. For example, judges are reluctant to allow the establishment of the grave risk defence in the situation of domestic violence as it is seen to be saying that the legal system of the place of habitual residence is unable to protect the victim and child upon return.

C. International Child Abduction and the Best Interests of the Child

The Convention assumes that the best interests of the child are met through the summary return mechanism. As the Convention is based on the prototype abductor, it is presumed that the child will be returned to their primary carer, their home and that that the custody dispute will be heard in an environment that is familiar. However, this approach to child abduction allows the individual child's best interests to be subordinated to the interests of children collectively.[44] The Court in *S v S* summarised this position by saying:

> The provisions of the Act and the Convention also make it clear that the issue before the Court is not the best interests of the children as such, but rather the choice of forum where those best interests are to be determined.[45]

Essentially, the Convention is about determining the forum for the custody dispute to be heard rather than ascertaining the best interests of the child on a case by case basis. A strong criticism of the Convention is that this approach will at times lead to the return of a child when it is not in their best interests and may cause harm. The difficulty with the approach in the Convention was evidenced in *KS v LS*[46] and *A v A,*[47] which are discussed below. As has been discussed, the Convention's approach to the best interests of the child is inconsistent with New Zealand family law in general and the UNCRC.

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[44] Beaumont and McEleavy, above n 2, 29.

[45] *S v S* [1999] 3 NZLR 528, 530 (CA).

[46] [2003] NZFLR 817.

[47] (1996) 14 FRNZ 348.

In *KS v LS*, [48] a mother abducted her daughter to New Zealand from Australia. The Family Court in New Zealand found that in the circumstances a return order would expose the child to grave risk of psychological harm and place the child in an intolerable situation, as the mother had been diagnosed with breast cancer and was unable to return to Australia with the child.[49] The Family Court held that it was in the best interests of the child that the mother and child were not separated.[50] The High Court overturned this decision on the basis that the judge in the Family Court had erred in the emphasis placed on the mother's illness and had not displaced the presumption of summary return, nor met the high threshold for the defence.[51] The High Court continued with the approach that the best interests of the child are met through summary return and determination of the custody dispute in the place of habitual residence.

Another controversial case was that of *A v A*[52], in which the mother abducted her child from Denmark to New Zealand. The mother claimed that the father had sexually abused the child. Despite evidence that the child had a real fear of returning to Denmark because the abuse may continue, an order for return was still made. The mother then took the child into hiding, as she was so concerned for the welfare of the child if an order for return was made.[53] These cases highlight the tension between the summary return mechanism and the best interests of the child, which may not warrant an order for return.

1. New Zealand Family Law

In New Zealand, the consideration of the welfare and best interests of the child is a fundamental basis and guiding principle in family law.[54] In section 4(1)(a)-(b) of the Care of Children Act 2004, it states that the welfare and best interests of the child should be the first and

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[48] *KS v LS*, above n 46, 817.

[49] Ibid.

[50] *KS v LS*, above n 46, 818.

[51] Ibid.

[52] *A v A*, above n 47, 348.

[53] Ibid.

[54] Boshier, above n 39, 64.

paramount consideration in the administration and application of this Act and in any other proceeding involving the guardianship of the child.[55] Similarly, the Child, Young Persons and Families Act (CYPF Act) states that one of the guiding principles it applies to achieve its objectives is that the welfare and best interests of the child is the primary consideration and that young people must be protected from harm, their rights upheld and welfare promoted.[56] However, the Care of Children Act 2004, in section 4(7), expressly prevents the paramountcy principles in section 4 from overriding the provisions relating to child abduction. It is clear that there is an inconsistency between the paramountcy of the best interests and welfare of the child that is fundamental to New Zealand family law and the operation of the Convention, as was recognised by legislators in section 4(7).

During the incorporation of the Convention into New Zealand law, this tension between the Convention and New Zealand family law was partly recognised. At the Select Committee stage, a specific clause was inserted into the Bill to prevent the fundamental principles of family law from overriding the Convention. However, the Parliamentary Debates show that some of the politicians did not understand the tension between the Convention and New Zealand family law. During the drafting of the Convention, states were concerned that they would no longer be able to refuse to return a child if it was not in the child's best interests. This tension was not resolved, as a wide discretion to refuse an order for return was problematic as it would defeat the Convention. It would have been difficult to agree to harmonise family law rules, and the procedural framework in the Convention was a pragmatic compromise that required concessions in order to reach a workable solution. Within New Zealand, there was no discussion on how the Convention was a compromise and the implications that resulted.

The situations that have arisen in *KS v LS* and *A v A* highlight that the policy process in New Zealand did not contemplate that the application of the Convention would lead to the return of children in extremely detrimental situations. There was a general acceptance that the Convention was a step forward in the area of child abduction and it

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[55] Care of Children Act 2004, s 4(1 (a)-(b).

[56] Boshier, above n 39, 66.

could not be rendered unworkable by allowing substantive hearings every time an application for return was made. There is increasing criticism towards the Convention for placing the interests of children as a class above the interests of the individual child through the summary return mechanism.[57] In light of the emphasis on the welfare and best interests of the child in both New Zealand family law generally and the CYPF Act, the Convention places the interests of the child in a contrary position.

2. United Nations Convention on the Rights of the Child

Since the drafting of the Convention, there have been significant developments in the law relating to children's rights.[58] The Convention is based on traditional notions of parental rights and the welfare of the child rather than specific children's rights.[59] The Convention sought to balance the welfare of the individual child with the welfare of children generally by adopting the summary return mechanism.[60] In recent times, there has been increasing criticism that the summary return mechanism is inconsistent with the UNCRC. The UNCRC details the rights of children as being entitled to the same basic human rights as adults and additional rights as a result of being a child.[61] Article 3 of the UNCRC states that the best interests of the child shall be a primary consideration in all actions concerning children. It is apparent that there is a tension between the approach to the best interests of the child in the Convention and article 3 of the UNCRC.

The main judicial attempt to reconcile the Convention and the UNCRC is that the best interests of the child are only relevant to substantive custody disputes and not Hague Convention applications, as they are only concerned with establishing the best forum for the custody dispute to be heard and not the individual merits of the case.[62] Accordingly, it is said that the jurisdiction to determine the child's best interests is simply

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[57] O'Dwyer, above n 8, 9.

[58] Rhona Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12 Transnat'l L. & Contemp. Probs. 393, 397.

[59] Ibid.

[60] Ibid.

[61] Ibid 401.

[62] Ibid 436.

transferred to the state where the child was abducted from.[63] This is not a compelling argument as it does not accord with Article 3 where the best interests of the child must be the *primary* consideration. There are two further criticisms to this argument. Firstly, the actual return of the child itself can impact on a child's welfare as it may expose the child to harm. Secondly, after the return of a child, the courts are reluctant to allow a child to be moved again. The child's need for stability is likely to override a decision that it is in the best interests of the child to be permitted to leave the country.

Furthermore, this argument requires that the courts in the home country apply the principle that the best interests of the child are paramount in determining the custody dispute. During the drafting of the Convention, it was noted that the summary return mechanism may not be appropriate as states have different levels of social and legal development.[64] However, the state hearing the application for return is unlikely to refuse the return if the legal system in the state the child is to be returned to does not determine custody disputes on the basis of the best interests of the child. This is because judges are reluctant to make decisions that appear to be criticising the legal system of another jurisdiction as this is highly offensive. The argument that the summary return mechanism is consistent with the best interests of the child is very weak. It cannot be guaranteed that return is in the best interests of the child and that the subsequent custody dispute will be determined in accordance with the best interests of the child.

There is also increasing awareness that the policy of expediency in the Convention which requires the child to be returned as quickly as possible and which does not allow expert reports, oral evidence, cross examination or counsel for the child is inconsistent with the UNCRC. Article 12 of the UNCRC states that parties must ensure that a child who is capable of formulating his or her own view, is given the right to express those views freely in all matters affecting the child, and have their views given due weight according to their age and maturity.[65] There is a tension between the perception of the child as dependent under the Hague Convention (as was the general perception of the

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[63] Ibid.

[64] Beaumont and McEleavy, above n 2, 19.

[65] O'Dwyer, above n 8, 10.

child at the time of drafting the Convention), and the notion that the child is a unique individual, who is entitled to participate in matters that affect them.[66] Article 12 of the UNCRC requires proceedings under the Hague Convention to adopt a procedure that allows a child the information and support required to form and express their view and have it understood properly.[67] Accordingly, in *VP v A*, [68] Judge Doogue accepted that legal and social changes since 1980 required the courts to take a more child-focused interpretation of the Hague Convention. He ordered that in the situation of the "child objects" defence being raised, the child has the right to counsel.[69] Accordingly, the development of children's rights as evidenced in the UNCRC is beginning to affect the interpretation and application of the Convention.

3. Policy Recommendations

The summary return mechanism was a compromise between protecting the interests of the individual child, and protecting the interests of children generally.[70] The result was that an inevitable tension arose between the summary return mechanism, and the best interests of the individual child which is prevalent in New Zealand family law, and the UNCRC. Prior to the Convention, abduction cases could be decided upon the best interests of the child in the state the child had been abducted to. The problem was that the concept of "best interests" is indeterminate, with a wide range of factors being considered. Therefore, judges had a wide discretionary power in custody dispute cases.[71] This wide discretionary power led to great uncertainty and varied decisions, meaning that abductors may have gained a more favourable outcome in another jurisdiction.[72] Part of the function of the summary return mechanism is to protect children generally by

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[66] Emma Parsons and Pauline Tapp, 'Case Note: The Hague Convention in the 21st Century -An Issue of Process: *VP v A*' (2005) 5 NZFLJ 23, 25.

[67] Ibid.

[68] [2004] FRNZ 141.

[69] *V v A*, above n 69, 141.

[70] Beaumont and McEleavy, above n 2, 21.

[71] Jude Reddaway and Heather Keating, 'Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four through the Principles of the Hague Convention' (1997) Int'l J. Children's Rts. 77, 79.

[72] Ibid 84-85.

deterring parents from abducting their child to another state in an attempt to gain a more favourable custody order. The summary return mechanism avoids an embarrassing situation, where a court decides a custody dispute differently from another jurisdiction.[73]

The use of the summary return mechanism in the Convention has led to a tension between the fundamental principles of New Zealand family law and the UNCRC. Both New Zealand family law and the UNCRC place the welfare of the child as the paramount consideration in determining custody disputes. The assumptions within the Convention focus on the best interests of the child being met through the summary return mechanism. In this approach, the best interests of the child are often subordinated in order to ensure the Convention is not undermined. The implications of this tension were seen in *KS v LS* and *A v A*. In these cases, the New Zealand courts were forced to return a child when it is not in their best interests. As has been shown, the actual return may cause harm to the child and it cannot be guaranteed that other states will determine custody disputes on the basis of the best interests of the child.

In order to conform to the UNCRC and general family law principles, the courts should move towards an approach that would allow for situations in which an order for return can be refused where it is clearly not in the best interests of the child. This more child focused approach would allow the courts greater scope to refuse an order for return when it could result in harm to the child. This child-focused approach is criticised because it may marginalise the deterrent effect of the Convention and defeat the purpose of the Convention.[74] However, this is a weak argument as the courts would only utilise this approach in limited situations. Furthermore, this approach would not require the courts to look into the merits of each individual case as this would defeat the purpose of the Convention.[75]

In reality, there is little political will to bring about significant changes to the application of the Convention. New Zealand has often stated the need to uphold the Convention when faced with the tension between

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[73] Ibid 86.

[74] Schuz, above n 58, 397-398.

[75] Ibid 451.

the best interests of the child and the summary return mechanism. In order to remain effective in protecting children and combating the practice of child abduction, there is a need for the application of the Convention to continue to adapt to developments within society.

D. International Child Abduction and Domestic Violence

Increasingly, child abduction situations involve a mother who has custody, returning to her country of origin in order to escape domestic violence.[76] Domestic violence poses conceptual difficulties for the Hague Convention, as the summary return mechanism may return a child to a situation of domestic violence. This was seen in *M v M*[77] and *H v C*,[78] where an order for return was upheld despite serious domestic violence. Originally, it was thought the summary return mechanism adequately protected domestic violence victims. This was based on the assumption that the batterer would be the father and the abductor and therefore, the return of the child would be the safest option.[79] The Hague Convention does provide for the "grave risk" defence,[80] which prevents the return of a child. However this defence has been narrowly interpreted by the courts.[81]

The "grave risk" defence is often unsuccessful, because courts prefer to continue to opt in favour of summary return where the Contracting State that the child is to be returned to can adequately protect the child.[82] This dilemma raises questions over whether New Zealand should continue to apply the summary return mechanism in the context of domestic violence, especially given the inadequacy of the "grave risk" defence. Undertakings and mirror orders are policy instruments

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[76] Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2001) 69 Fordham L. Rev. 593, 595- 596.

[77] [2001] NZFLR 769.

[78] [15 February 2001] Family Court, Wellington.

[79] Roxanne Hoegger, 'What if She Leaves? Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy'(2003) 18 Berkeley Women's L.J. 181, 187.

[80] Care of Children Act 2004, s 106(1)(c)(i)-(ii).

[81] Ibid.

[82] Merle H Weiner, 'The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad' (2003) 11 Am. U.J. Gender Soc. Pol'y & L. 749, 755.

that are frequently used to protect the child upon return.

In *M v M*, [83] the mother abducted her four children from the United States to New Zealand. The mother objected to returning to the United States on the basis that the return would expose the children to grave risk of psychological harm and would place them in an intolerable situation as the father had been convicted of sexual assault against two of the children, and of assaulting the mother.[84] Despite Bisphan FCJ concluding that there was evidence that returning to the United States would expose the children to psychological harm, the decision was made that the harm would be of a limited nature and extent and, therefore the children were ordered to be returned to the United States.[85] Similarly, in *H v C* [86], an order was made for return of the children to Australia despite evidence of very serious domestic abuse including wounding with a knife. The mother was also suffering from depression as a result of the violence and there was evidence that if she was returned to Australia the depression and further drug abuse would be likely to occur.[87] The Court held that the defence of grave risk was not established and that there was adequate protection available in Australia. The driving force behind these decisions would appear to be the desire to uphold the Convention and not allow the high threshold for establishing the "grave risk" defence to be lowered. There has consistently been a genuine concern that allowing more discretion when making orders for return will render the Convention unworkable.

1. Best Interests of the Child

Within the Convention, the emphasis on the mechanism of summary return being in the best interests of the child is based on the assumption that the effects of child abduction are always harmful to the child. However, with domestic violence, the abduction by the fleeing parent may have removed the child from a dangerous situation. Merle Weiner, states that most research relating to the effects of domestic violence is based on negative effects upon the child as a result of living

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[83] *M v M*, above n 78, 769.

[84] Ibid.

[85] *M v M*, above n 78, 779-780.

[86] *H v C*, above n 79.

[87] Ibid.

in secrecy after being abducted.[88] It has been said that a true representation of the effects of child abduction is more like a continuum, with the effects being dependent on the particular circumstances.[89] For example, a child being abducted and removed from a harmful environment is unlikely to be as negatively affected as a child who is abducted by a batterer and forced to live in hiding.

Given the nature of domestic violence, the summary return mechanism is inconsistent with the best interests of the child. Children are affected by domestic violence in numerous ways and the effects of domestic violence cannot be separated from custody issues.[90] It has been found that if a parent abuses the other parent, there is a high likelihood that they will also abuse the child.[91] There is often an incorrect assumption in domestic violence cases that parental separation will stop a child from being detrimentally affected by domestic violence. Domestic violence still affects children if they no longer see it happening, as the victim's emotional distress is evident. There are also concerns that a batterer may continue to harass the other parent once the child and abductor have returned and use the child as a means to facilitate violence. It is evident that the summary return mechanism is inconsistent with the best interests of the child and does not fit with the nature of domestic violence.

2. "Grave Risk" Defence

The "grave risk" defence allows an application for the return of a child to be refused where there is a grave risk that his or her return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. This defence was drafted to accommodate situations in which summary return would be detrimental to the child, yet the drafters were careful to avoid a general public policy or welfare defence that would defeat the overall purpose of the Convention to deter abductions and provide a fast return mechanism.[92]

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[88] Weiner, 'International Child Abduction and the Escape from Domestic Violence', above n 77, 619.

[89] Ibid 620.

[90] Hoegger, above n 80, 184.

[91] Ibid 185.

[92] Schuz, above n 55, 441.

The onus is on the person trying to claim the defence. This was intended to put the dispossessed person in the same position as the abductor.[93] However, in the situation of domestic violence, the victim who has abducted their child to escape violence will be at a disadvantage and the batterer will be given the upper hand.

The courts have been faced with the dilemma of a Convention that is aimed at abductions by non-custodial parents and the changed profile of the typical abductor. They, have thus tended to protect the integrity of the Convention and allow summary return even in questionable circumstances.[94] In order to establish the defence, the abductor must show that the place of habitual residence is unable to provide for the protection of the child upon return.[95] The courts are hesitant to say that another state cannot provide for the protection of a victim of domestic violence, as this is seen as offensive and indicative that the other legal system is inadequate. In *El Sayed v Secretary for Justice*[96], the defence of grave risk was established in the situation of serious domestic violence. The High Court held that the grave risk defence did not require a narrow interpretation and that the harm did not have to relate to the return to the country of habitual residence.[97] Although the High Court in *KS v LS*[98] agreed that the defence was established in *El Sayed,* it was clarified that the correct approach to the defence of grave risk is still to focus on the ability of the place of habitual residence to protect the child upon return.[99] In addition, the defence is still intended to be given a narrow interpretation.[100]

Recently, the Court of Appeal in *HJ v Secretary for Justice* [101] quashed an order for return and held that the defence of grave risk was established in the situation of serious domestic violence. This decision signalled a

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[93] Pérez, above n 6, 460.

[94] Schuz, above n 55, 443.

[95] John Caldwell, 'The Hague Convention and a grave risk to children: recent developments' (2003) 4 BFLJ, 191.

[96] [2003] 1 NZLR 349.

[97] Ibid.

[98] [2004] NZFLR 817.

[99] Ibid 193.

[100] Ibid.

[101] [2007] 2 NZLR 289.

major change to the approach taken by the courts to Convention cases and domestic violence. Remarkably, this decision does not appear to have been criticised for its potential to weaken the Convention. This decision showed that domestic violence is being taken seriously and is authority for the presumption that return is not to replace an evaluative analysis of the facts when the defence is raised. The approach in *HJ* and approval of the use of the defence in *El Sayed* by the High Court in *KS v LS* shows that there are some circumstances of domestic violence in which the courts will be prepared to reject the presumption of automatic return. This is because the potential harm to the child is so serious that an inquiry into whether the home country can protect the child is almost irrelevant.[102] The interesting question is whether New Zealand will be criticised for weakening the approach under the Convention.

3. Undertakings and Mirror Orders

Given the high threshold required to meet the "grave risk" defence, undertakings provide a means for the court to protect the child upon return. Undertakings include actions such as restraining orders, temporary custody arrangements, provision of costs for the return and possible assurances to go straight to the Family Court upon return.[103] The use of undertakings is designed to provide protection for the child until the receiving jurisdiction takes over responsibility for the child.[104] The difficulty with undertakings is the inability of the state issuing them to ensure that they are enforced in the state the child is returning to. In an attempt to deal with this difficulty, courts have begun to use mirror orders. Mirror orders provide that measures such as protection orders are granted in both the state hearing the Hague Convention application and the state in which the child is to be returned to.[105] In addition to this, Hague Convention liaison judges are used to facilitate communication between the two jurisdictions and ensure that protection measures are adequate pending the return of the child. The

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[102] *KS v LS*, above n 99, 193.

[103] Joseph Kay, 'The Hague Convention - Order or Chaos?' (2005) 19 AJFL 245, 279-282.

[104] Danny Sandor, 'Review of the Hague Child Abduction Convention: protecting both children and adults until and upon return?' (2001) 15 AJFL 80, 82.

[105] Ibid 83.

Special Commission Report of the Permanent Bureau in 1997 recommended that Article 7(h) of the Hague Convention place an obligation on Central Authorities to protect the welfare of the child upon his or her return.[106]

A strong criticism is that often the perpetrator of domestic violence will not obey measures such as restraining orders and no matter what protection is ordered the child will still be in danger upon return. In a study done by 'reunite' (a child abduction charity) it was found that in 66.6 percent of the cases studied, undertakings were not honoured by the left behind parent upon the return of the child.[107] It has been said by some commentators that undertakings and mirror orders represent an effective compromise between the need to maintain the principle of summary return that is fundamental to the philosophy of the Convention, and finding a means to protect victims of domestic violence.[108] This is questionable, as the courts seem to be forfeiting the need to guarantee the safety of the child in order to uphold the Convention. It is clear that undertakings and mirror orders are a dubious compromise that allows the summary return principle to continue and seemingly still provide protection to domestic violence victims. This is an area that needs reform in order to address the nature of domestic violence in relation to child abduction situations.

4. Policy Recommendations

In 1997, the Special Commission, which reviews the Convention, first recognised the connection between domestic violence and the changed profile of the abductor. Despite this finding, little reform has been made to the Convention to deal with this issue.[109] The difficulty is that the recognition of domestic violence in situations of child abduction seems to warrant a different remedy. This is because the abduction is less morally reprehensible. However, there is a tension between the philosophy of the Convention that assumes that the best interests of

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[106] Ibid 87.

[107] Marilyn Freeman, 'Outcomes for Abducted Children' [2004] IFL 171, 174.

[108] Hoegger, above n 80, 196.

[109] Permanent Bureau *Report of the third Special Commission meeting* (1997) Hague Conference on International Private Law < http://hcch.e-vision.nl/index_en.php?act=publications.details&pid=2271&dtid=2> (at 3 August 2006).

the child warrants automatic return, and the recognition that in situations of domestic violence, summary return may expose the child to harm. The current situation requires rectification, as the Convention works in favour of the abuser.[110] The victim is at a disadvantage because in most situations, the child will have to be returned, and the child is likely to be placed in close proximity to the abuser.[111] The recent decision in *HJ v Secretary for Justice,* to allow serious domestic violence to defeat an order for return, may initially resolve this tension between summary return and domestic violence. However, this decision is likely to eventually attract criticism, as it undermines the Convention. It is still necessary to resolve the tension within the operation of the Convention towards domestic violence. Possible policy options to address the problem of domestic violence include a specific domestic violence defence and the extension or codification of undertakings and mirror orders.

A specific domestic violence defence would allow an order for return to be defeated, upon the establishment of domestic violence, and a substantive hearing on the custody dispute to occur. This is advantageous because the victim is not subjected to having the child removed from them, and the child is likely to remain with the primary carer.[112] A specific domestic violence defence is the most straightforward method of addressing this issue, and would send a strong message concerning potential harm to children from domestic violence.[113] The use of a domestic violence defence is criticised in two ways. Firstly, it is seen as contradicting the deterrence aim of the Convention. This is because it would potentially make it possible for abductors to gain a better custody order, than before they abducted the child.[114] Secondly, such a defence may diminish the effectiveness of the Convention. This is because application procedures would be lengthened, and courts would be able to delve further into substantive

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[110] Weiner "International Child Abduction and the Escape from Domestic Violence", above n 77, 634.
[111] Ibid.
[112] Barbara Lubin, 'International Parental Child Abduction: Conceptualising new remedies through application of the Hague Convention' (2005) 4 WUGSLR 415, 444.
[113] Weiner, 'International Child Abduction and the Escape from Domestic Violence', above n 77, 694.
[114] Sandor, above n 105, 87.

hearings instead of automatic return. However, the defence would require clear evidence of domestic violence, and is not likely to be able to be used by opportunistic parents wanting to gain a better custody order. Despite the logic behind a specific defence, there is little political will to interfere into what is regarded as a successful instrument.[115]

Another policy option is the codification of undertakings or the extension of mirror orders. In order for undertakings to be a widespread solution to domestic violence there needs to be authorisation of undertakings in the Convention to allow them to be enforceable in all contracting states.[116] As undertakings are not enforceable, states have preferred to use mirror orders. Mirror orders are enforceable in both the state hearing the application for return, and the state the child is being returned to. There is also a need for further education regarding domestic violence, to ensure that the use of undertakings and mirror orders is effective, and most relevant to the behaviour that jeopardises the victim and child's safety. It is also important to note that undertakings and mirror orders will only be valid if a state has effective measures to combat domestic violence. As noted during the drafting of the Convention, not all states have the same level of social and legal development.[117] It has also been established that there are situations of domestic violence, in which no matter what undertakings are given or mirror orders made, the victim and the child will still not be safe upon return. As it is very difficult to change the Convention, mirror orders are a preferred policy instrument. However, both mirror orders and undertakings do not guarantee the safety of the abductor and child.

E. Rights of Access and Rights of Custody

The Convention uses the distinction between rights of custody and rights of access as a basis for quantifying what constitutes a wrongful removal or retention of a child.[118] Again, this was a compromise, as in

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[115] Marilyn Freeman, 'Primary Carers and the Hague Child Abduction Convention' [2001] IFL 140, 145.

[116] Freeman, 'Primary Carers and the Hague Child Abduction Convention', above n 115, 678.

[117] Beaumont and McEleavy, above n 2, 19.

[118] Ibid 45.

custody disputes there can be many competing claims. For example, there is the claim of the abductor, the left behind parent, the child and other relatives. In order to deal with each of these claims, a substantive hearing into the merits of each claim would be required and the summary return mechanism would be impractical. The decision to focus on protecting the rights of the custodial parent was seen as the most simple and practical formula.[119] Under the Convention, rights of custody give rise to a right to apply for the return of an abducted child, and rights of access only give rise to access arrangements. At the time of the drafting of the Convention, it was presumed that the abductor would be the non-custodial parent, and that the left behind parent would have rights of custody. At this time, it was common for one parent to have primary responsibility for the child, and the other parent to have defined access arrangements.[120] Therefore, protecting the parent with rights of custody would be in the best interests of the child, as the abducted child would be returned to their primary carer and home country.

In recent times, an increase in the breakdown of marriages and relationships has led the Courts to use less traditional means of allocating responsibility for children.[121] As the prototype abduction situation is no longer true, it has become more difficult to maintain the distinction between the custodial and the non-custodial parent. The New Zealand courts have taken a liberal approach to the definition of rights of custody, and allowed a parent with rights of access to obtain an order for return. This was evidenced in the cases of *Gross v Boda*[122] and *Dellabarca v Christie.*[123] This approach is contrary to the wording of the Convention and international jurisprudence on the matter. New Zealand has been criticised by other jurisdictions for the unilateral extension of the scope of the Convention. This criticism of the New Zealand approach was seen in the English decision of *Hunter v Murrow.*[124] The consequence is that New Zealand courts may allow a child to be returned to a parent that has not had substantial contact

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[119] Ibid.

[120] Ibid 210.

[121] Lowe, Everall and Nicholls, above n 10, 257.

[122] [1995] NZFLR 49 (CA).

[123] [1996] NZFLR 829.

[124] [2005] EWCA Civ 976.

with their child. There has been little reaction to this development within New Zealand and it is unlikely that the Government realises there is a problem.

1. The New Zealand Approach

Instead of incorporating the Hague Convention as a whole directly into domestic law, New Zealand chose to implement it through legislative provisions. In doing so, the Guardianship Amendment Act 1991 initially defined rights of custody as the right to the possession, and care of the child, and the right to determine where the child lived.[125] This definition was actually narrower than the definition in the Convention and consequently required amending by the Guardianship Amendment Act 1994.[126] The 1994 amendment changed the definition of rights of custody to include rights relating to the care of the child, and the right to determine the child's place of residence.[127] Rights of access are defined as the right to take a child for a limited period of time to a place other than the child's habitual residence.

In *Gross v Boda*, [128] the Court of Appeal held that the father's visitation rights that included every other weekend and alternating holidays gave him intermittent possession, and was sufficient to qualify as rights of custody. Cooke P disagreed with the distinction between rights of custody and rights of access, and stated that "no convincing reason has been given in argument for postulating a sharp dichotomy between the two concepts".[129] Therefore a parent with substantial intermittent rights to the possession and care of the child could be said to have rights of custody.[130] Similarly, in *Dellabarca v Christie*, [131] the father was held to have rights of custody arising from his entitlement to daytime access every Wednesday and one weekend day every third week, as this was considered to be a right relating to the care of the person of the

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[125] Guardianship Amendment Act, s 4.

[126] Paul Geraghty (ed.), *Family Law in New Zealand* (11th ed, LexisNexis New Zealand Limited, New Zealand, 2003) vol 1, ch 6, 592.

[127] Ibid.

[128] *Gross*, above n 123, 49.

[129] Ibid.

[130] Ibid 55-56.

[131] *Dellabarca*, above n 124, 829.

child. These cases highlight that extending the definition of rights of custody, can allow a parent with only rights of access to successfully obtain the return of the child.

In the introduction of the Guardianship Amendment Bill 1991, Hon. William Jefferies, Minister of Justice, stated that ratifying the Convention, demonstrated New Zealand's commitment to international cooperation.[132] This is an interesting statement, as New Zealand has taken a contradictory stance towards the application of the Convention. In the face of changing trends in child abduction situations, New Zealand has relentlessly upheld the Convention. New Zealand has allowed children to be returned in the context of circumstances such as domestic violence. However, New Zealand has been willing to unilaterally extend the scope of the Convention, and allow the return of a child to a parent who only exercises rights of access that are not protected by the Convention. There has been such disapproval of the New Zealand approach, that the principle of comity that usually restrains courts from criticising the legal system of another state has not prevented the resulting condemnation.

2. Criticisms

The difficulty with the New Zealand approach to rights of custody is that it allows a parent who never had actual care of the child to apply for the return of the abducted child.[133] Consequently, an order for return may send a child to a parent and situation that is totally unfamiliar. The Convention, through the summary return mechanism, intends to return a child to their primary carer and a familiar environment. Although summary return does not always bring this result, there is still no justification for the New Zealand approach. The extension of rights of custody does not further the intentions of the Convention. Furthermore, upon return of the child, a substantive hearing is unlikely to grant custody to a parent with only access rights, and what is known as an 'empty shuttle' occurs. An empty shuttle occurs when an abducted child is returned to their home country and the abducting parent is then given permission to leave the country with the child. This is a pointless procedure, as the parent with rights of

[132] (1990) 507 New Zealand Parliamentary Debates 1540 (W.P. Jefferies).

[133] *A v A [Child Abduction]* (2001) 21 FRNZ 540.

access is unlikely to be granted custody, and as a result there is a considerable waste of time, resources and cost by all parties involved.

This criticism towards the New Zealand approach was evident in *Hunter v Murrow*[134]. In this case, the mother abducted the child from New Zealand to London.[135] The High Court in New Zealand held that the father's contact, which was limited to two or three times a week was sufficient to establish rights of custody. This was unusual, as the child had never lived with the father, and he would have been unlikely to be granted custody in a full hearing. The English court disagreed with the New Zealand decision, and refused the order for return. The basis for this decision was that the father only had contact arrangements not rights of custody.[136] Thorpe LJ stated that New Zealand had wrongly interpreted simple contact arrangements as custody rights, and that this impedes the uniform construction of the Convention.[137] In *S v H*, [138] Hale J considered that it would be 'Draconian' to grant an order for return where a parent only exercised rights of access. The English approach to determining whether rights of custody exist is to view the expression broadly, but maintain the essential distinction between rights of custody and rights of access.[139] The result is that the New Zealand position is at odds with other jurisdictions, and the primary carer and the secondary parent are treated as being equal.

3. Policy Recommendations

Thorpe LJ in *Hunter v Morrow* discusses how there is a general movement away from the distinction between rights of custody and rights of access.[140] Accordingly, it is suggested by counsel that the determinative factor should be parental responsibility. If the parent holds parental responsibility by virtue of marriage, agreement or operation of law, then they would also have rights of custody.[141] The

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[134] *Hunter*, above n 125, 976.

[135] *Hunter*, above n 125, 976.

[136] Ibid [22].

[137] Ibid.

[138] [1998] Fam 49, 57.

[139] *Re: V- B (Abduction: Custody Rights)* [1999] 2 FLR 192.

[140] *Hunter*, above n 125, [35].

[141] Ibid.

New Zealand approach seems to be in line with changing social and legal developments regarding child custody. The simple distinction between the primary carer and the secondary parent is no longer realistic. In New Zealand, as of 1 July 2005, section 18 of the Care of Children Act 2004 states that unmarried fathers whose particulars are registered on the child's birth certificate have parental responsibility.[142] Therefore, the distinction between rights of custody and rights of access may have less significance in the future.

In *Hunter*, Thorpe LJ expresses regret in refusing the order for return as it prevents the father from playing an active role in the child's life which had occurred prior to the removal of the child.[143] The New Zealand approach seems to prioritise the involvement of both parents in the child's life. In *Hunter*, the only real remedy available for the father is to relocate in order to continue contact with his child. There seems to be something inherently unjust in the arbitrary removal of the child by the mother. The mother did not claim domestic violence or any specific reason for her departure with the child. The situation in *Hunter* warrants a close examination of the distinction between rights of custody and rights of access. New Zealand would be wise to advocate for further investigation into these issues through the Hague Conference Special Commission.

On the other hand, the New Zealand approach undermines and weakens the Convention. The New Zealand position is very unusual as it seems to even contradict the traditional approach New Zealand has taken to the application of the Convention. As discussed above, New Zealand has tended to uphold the Convention, and summary return even in the face of evidence of domestic violence. However, the decision in *HJ v Secretary for Justice* to refuse an order for return in the context of domestic violence may have signalled a new direction for New Zealand. It is possible that New Zealand is now willing to step outside the framework of the Convention in determining Convention applications. This is a dangerous approach as it leads to uncertainty and criticism from other states. There is strong support for only allowing significant changes to the Convention to be made by legislators and not

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[142] Ibid, [36].

[143] Ibid [34].

done through the discretion of judges.[144] New Zealand must seek change to the Convention through legitimate channels and ensure that its decisions are in line with international jurisprudence on the rights of custody.

F. Future Reform

Throughout this paper, I have highlighted the inadequacies of the Convention in meeting the changing needs of society today. The philosophy of the Convention is based on the assumption that the best interests of the child are met through summary return. As has been highlighted, this assumption is only correct in the context of the prototype abduction. However, as the prototype abductor is no longer true of most abduction situations the philosophy of the Convention is questionable. The tension between the assumptions in the Convention and developments within society has proven to be problematic. In particular, there is need for reform in order to ensure the best interests of the child are always met and that the needs of domestic violence victims are met. In addition, there is a need to address New Zealand's liberal approach to the definition of rights of custody.

1. Best Interests of the Child

The summary return mechanism reflects a compromise between ensuring the best interests of the individual child are met, and protecting children generally by deterring future abductions. Given developments within society, the assumption that the summary return mechanism is in the best interests of the child is no longer correct. The case law has shown that the approach in the Convention can lead to the return of child when it is not in their best interests. This was evident in the cases of *KS v LS* and *A v A*. There is a further need to reconcile the approach in the Convention with the fundamental principles of New Zealand family law, and article 3 of the UNCRC, which holds the best interests of the child as of paramount importance.

There is no simple solution to this inconsistency. On one side of the argument is the notion that the Convention needs to be amended so

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[144] Beaumont and McEleavy, above n 2, 83.

that an order for return can be refused, when it is clearly not in the best interests of the child. The other side of the argument is that the determination of custody disputes on the basis of the best interests of the child is indeterminate, and varies immensely between jurisdictions. Prior to the Convention, the difficulty of using the "best interests" of the child as the determinative factor in custody disputes produced a great number of inconsistencies between jurisdictions. The inconsistency between jurisdictions provides an incentive for an abduction, as the parent may gain a more favourable custody decision in another jurisdiction.

This amendment is not meant to defeat the operation of the Convention, and allow substantive hearings in all Convention applications. This is a difficult point to agree with. In practice this amendment is likely to allow courts to delve further into substantive hearings. In addition, there is a general perception that the summary return mechanism is a strength of the Convention, as it provides certainty. Therefore, qualifications to the summary return mechanism are likely to produce uncertainty and weaken the application of the Convention. It seems apparent that it is not possible to retain the Convention in its current state, and allow greater scope for the refusal of an order for return on the basis of the best interests of the child.

2. Domestic Violence

The drafters of the Convention originally thought that they had provided adequately for the protection of domestic violence victims. This was based on the assumption that the abductor would be the abuser, and that the summary return mechanism would return the child to safety. Again, the change in the profile of the abductor has challenged the assumptions in the Convention. The idea that the abductor would be the victim of domestic violence was not contemplated during the drafting of the Convention. It has become increasingly common for the victim to abduct their child in order to escape domestic violence. In both *M v M* and *H v C*, the mother abducted her child in order to escape horrendous domestic violence and the courts still ordered the return of the child.

This new situation poses a serious difficulty for the Convention in two ways. Firstly, the Convention assumes that the abduction produces

harmful effects to the child. In the context of domestic violence this is questionable, as the abduction removes the child from the harmful situation. In *M v M*, the abduction had clearly removed the child from a harmful situation, yet this was not enough to prevent an order for return. There is little research available on whether this situation is still harmful to the child, yet common sense would say it is not. Secondly, the presumption in favour of summary return in the situation of domestic violence can lead to an order for return exposing the child to harm either from experiencing or witnessing domestic violence. Two policy options suggested are the inclusion of a specific domestic violence defence and the strengthening of the use of undertakings and mirror orders.

The high incidence of domestic violence seems to warrant the inclusion in the Convention of a specific domestic violence defence. A domestic violence defence is a simple method of addressing this trend within society and protecting the child. The difficulty with this defence is that there are questions raised over the threshold level of violence that would be required to establish the defence. The defence is also criticised because it is again seen as weakening the Convention by allowing substantive hearings in applications for return. At this stage, there is little political will to make such a major reform to the Convention. However, as the policy process seems to react to specific events, I would predict that further situations such as those in *M v M* and *H v C* will eventually force the international community to address this issue. The plight of victims of domestic violence has become an increasingly important domestic issue in the last decade, and may eventually extend to the context of child abduction.

At present, the issue of domestic violence and child abduction has been dealt with through the use of undertakings and mirror orders. As undertakings are technically not enforceable in other states, there is a preference for courts to use mirror orders. There is little incentive to make undertakings enforceable through their codification in the Convention. This is because it is difficult to make changes to the Convention, and mirror orders are viewed as a satisfactory alternative. Mirror orders provide a dubious compromise to the use of a specific domestic violence defence. Mirror orders do not guarantee that the perpetrator will obey the protection measures and therefore, do not ensure the safety of the child or victim upon return. The real issue here

is that the summary return mechanism in the Convention is not appropriate in relation to the situation of domestic violence. Neither undertakings nor mirror orders deal with this tension. Until the policy process is forced to react to the situation of domestic violence and abductions, the use of mirror orders is the only option available.

3. Rights of Custody and Rights of Access

As there are often many competing claims in a custody dispute, it was necessary to reach a pragmatic solution during the drafting of the Convention and focus solely on protecting rights of custody. Accordingly, the Convention makes a distinction between rights of custody and rights of access. The New Zealand courts have interpreted rights of custody liberally, and allowed the return of a child to a parent exercising only rights of access. This approach is problematic, as it may lead to the return of a child to a parent that the child has never lived with, this was seen in *Gross v Boda* and *Dellabarca v Christie*. This approach also contradicts the intention of the Convention to return a child to their primary carer and a familiar environment. Therefore, the New Zealand approach is inconsistent with the wording in the Convention and was criticised by the English courts in *Hunter v Murrow*.

This issue is further complicated by developments within society that have led to less traditional means of allocating responsibility for a child. The distinction between rights of custody and rights of access has become more difficult to maintain. In accordance with these developments, it was suggested by counsel in *Hunter v Murrow* that parental responsibility should be the determinative factor and not rights of custody. The advantage of this position is that it would allow the child to have contact with both parents. The disadvantage is that allowing parental responsibility to be the determinative factor in abduction cases, may still allow the return of a child to a parent they have never lived with and an unfamiliar environment. This situation is unlikely to be in line with the best interests of the child.

The solution to New Zealand's unilateral approach is difficult to ascertain. On the one hand this approach is justified by developments within society. On the other hand, this approach is inconsistent with the essential distinction between rights of custody and rights of access in the Convention. The solution may lie in Thorpe LJ's comments in

Hunter. Firstly, he notes that it is impractical to revise the Convention, as any changes have to be agreed by all Contracting States.[145] Secondly, he notes that article 31(3)(b) of the Vienna Convention on the Law of Treaties (the Vienna Convention), allows a construction that reflects subsequent practice in the application of the treaty, and establishes the agreement of the parties regarding its interpretation.[146] This section could be used to allow the application of the Convention to develop in accordance with social and legal changes since the drafting of the Convention. In the situation of rights of custody, New Zealand would need to prove that other states agreed with the liberal interpretation of rights of custody. In *Hunter*, counsel was unable to prove that this was the case.[147]

In consequence, the New Zealand approach is still out of step with international norms regarding the application of the Convention. This unilateral approach is also criticised for weakening the Convention, by extending its scope beyond what was ever intended. There are two options for New Zealand in light of the above discussion. Firstly, New Zealand could rectify the situation and not allow the return of a child to a parent with only rights of access. Therefore, New Zealand would avoid further criticism from other states and uphold the provisions of the Convention. Alternatively, New Zealand could continue with the liberal approach and hope that other jurisdictions will eventually follow. This would then allow the application of article 31(3) (b) of the Vienna Convention. Despite the criticism that New Zealand has received for its liberal approach, there does not seem to have been a realisation of this problem within New Zealand. There has been little scholarly attention on this issue and it is not an issue that is highly visible to the public. Therefore, New Zealand is likely to continue with its liberal interpretation of rights of custody.

4. Observations

The above issues pose significant challenges to the operation of the Convention. Since the drafting of the Convention, social and legal developments within society have led to difficulties in implementing the

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145 *Hunter*, above n 124, [30].

146 Ibid.

147 Ibid [32].

Convention. Article 31(3)(b) of the Vienna Convention provides the opportunity to adapt the application of the Convention to meet the changing context of child abduction. The inherent difficulty is that to deal with the challenges of the above issues, it is necessary to use methods that ultimately undermine the framework the Convention is based upon. For example, in order to ensure that a child is not returned to a situation of domestic violence, a specific domestic violence defence is appropriate. However, this defence would weaken the summary return mechanism in the Convention and allow courts to hold substantive hearings. The summary return mechanism is an essential component of the Convention and as stated previously is often viewed as a strength of the Convention.

The policy process seems to require a highly publicised event to force the government to rectify a particular policy problem. The incorporation of the Convention into domestic law in New Zealand followed the highly publicised Morgan/Foreitch case. This case resulted in public outcry at the inadequate legal situation regarding child abduction in New Zealand and forced the Government to react. The difficulty with this approach to solving a policy problem is that the response is often hurried and lacks a substantial analysis of all the issues involved. It is apparent that the government is unaware of the major tensions between the assumptions in the Convention and changes that have occurred in society since the drafting of the Convention. Therefore, one may question whether it will take further highly publicised cases for the government to recognise the inherent tensions within the Convention and rectify the situation.

Conclusion

It is clear that there is a tension between the assumptions in the Convention and changing social trends. It is impractical to attempt to revise the Convention, as this requires the agreement of a large number of states. The most realistic option for reform is the use of the Vienna Convention to allow the interpretation of the Convention to adapt to the changing context of child abduction. However, the difficulty is that the changes required undermine the functioning of the Convention. The balance must be struck between allowing the Convention to respond to changes in society and ensuring the essential elements of the Convention remain functional.

THE CONTEMPORARY SOCIAL RAMIFICATIONS OF THE LANDS CASE AND THEIR IMPACT ON THE FORESHORE AND SEABED DEBATE

ABBY SUSZKO*

Introduction

The Court of Appeal's historic judgment in *New Zealand Maori Council v Attorney-General*[1] (the Lands Case) has had widespread ramifications for New Zealand society.

This case raised the profile of the Treaty of Waitangi (the Treaty) in legal, political and constitutional fields, so much so that the Treaty has within the space of a generation evolved constitutionally "…from a colonial footnote to a solemn pact between founding partners".[2] The Court articulated a set of principles that have developed over the last twenty years and have become incorporated in Government agencies' practices,[3] entrenched in the charters of institutions,[4] and even incorporated into the operations of charitible organisations.[5] The Lands Case described the Treaty in terms of a contract, enabling a clear definition of Crown breaches and acknowledging a Māori right of

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1 [1987] 1 NZLR 641.

2 Augie Fleras and Paul Spoonley, *Recalling Aotearoa: Indigenous Politics and Ethnic Relations in New Zealand* (Auckland, 1999) p. 14. For many Māori the Treaty has always had this constitutional importance. (See discussion later in this article and generally Ranginui Walker, *Ka Whawhai Tonu Matou: Struggle Without End,* (2nd edn.) (Auckland, 2004) p. 265).

3 Such as the Department of Conservation, the Department of the Controller and Auditor General and the Department of the Prime Minister and Cabinet.

4 Including schools and universities. (Maureen Molloy, 'Imaging (the) Difference: Gender, Ethnicity, and Metaphors of Nation' (1995) *Feminist Review* 94, pp. 94-105).

5 Such as the Auckland War Memorial Museum, the Anglican Church, the Methodist Church and Rape Crisis, despite not being agencies of the Crown and therefore not a Treaty partner. (Merata Kawharu, 'Rangatiratanga and Social Policy' in Michael Belgrave, Merata Kawharu and David Williams (eds.) *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, (Auckland, 2005) p. 106).

reparation.[6] The case was at the forefront of Treaty jurisprudence and helped establish the Treaty dialogue which facilitated negotiations with iwi and helped established a process through which Treaty settlements could take place.[7] In addition, the Lands Case established the meaning of the principles of the Treaty as a way to measure contemporary Crown conduct towards Māori.[8]

The focus of this article will be on the social ramifications of the Lands Case, those that are perhaps not as widely publicised, but have just as real a consequence in today's society. This article is intended to highlight the different understandings of what the Lands Case articulated, and how these different understandings play out in the practical implementation of the Treaty partnership. Lastly, this article will showcase the consequences of these ramifications in the foreshore and seabed debate which arose following the Court of Appeal's decision in *Ngati Apa v Attorney-General*[9] (*Ngati Apa*). To achieve this, this article will compare the Lands Case and what it stood for against what happened post *Ngati Apa*, in particular late 2003 and 2004.[10]

This article is structured in three layers: the different understandings of partnership; the outcome of the Court settling the issue of sovereignty; and the consequences of finding in favour of Māori.

A. The ramifications of the different understandings of the Principle of Partnership

The Court of Appeal was unanimous in its view that the central Treaty principle was one of partnership,[11] with each partner, Māori and the Crown, having to act towards each other in the spirit of reasonableness

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[6] See generally Paul McHugh, 'Constitutional Voices' (1996) 26 VUWLR 499.

[7] See generally ibid.

[8] McHugh, 'A History of Crown Sovereignty in New Zealand' in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past-A New Zealand Commentary* (Wellington, 2001) p. 205.

[9] [2003] 3 NZLR 643.

[10] This article is not intended to be a close critique of *Ngati Apa*. Instead it will focus on the fall out from *Ngati Apa* as a indicator of race relations in New Zealand today, and to measure this against the Lands case and what it potentially stood for in 1987.

[11] The Lands Case, supra n. 1, p. 664 per Cooke P.

and good faith.[12] This partnership created fiduciary duties, which for the Crown extend to active protection of Māori in the use of their lands.[13] Subsequently, Māori owe duties of loyalty to the Queen, full acceptance of the Government and to reasonably co-operate with its policies.[14]

A major ramification of the Lands Case is that the term 'partnership' has been accepted as the definitive model of the Crown/Māori relationship. The concept of a 'partnership' has been adopted in copious government publications and policies,[15] followed in numerous Waitangi Tribunal Reports,[16] entrenched in institutional charters ,[17] and spoken about in Parliament, on marae and on the streets of New Zealand. Interestingly, so ingrained is the term 'partnership' in Treaty discourse that some Māori even use it to describe what their ancestors were striving for in signing the Treaty, and what Māori have aimed to maintain in their interaction with the Crown since 1840.[18]

In mainstream New Zealand, the term 'partner' invokes the well-established progressive, or politically correct, reference to the two people in an intimate relationship. Metaphorically, the Treaty partnership has come to signal a caring partnership reflective of New Zealand's bicultural beginnings.[19] At the same time the term

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Eddie Durie, 'The New Zealand Maori and the Waitangi Tribunal' in William Renwick (ed) (Wellington, 1991) p. 4. See for example Cabinet Office, Department of the Prime Minister and Cabinet, *Cabinet Manual 2001,* (Wellington, 2001) p. 69; Ministry of Fisheries, *Statement of Intent: for the period July 2007 to June 2012,* (Wellington, 2007) p. 23.

[16] See for example Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, (Wellington, 1987) p. 255; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, (Wellington, 2004) p. 130

[17] See for example *University of Otago Charter*, p. 13 <http://www.otago.ac.nz/about/offical_documents.html>. Also see generally Kawharu 'Rangatiratanga and Social Policy' supra n. 5; Fleras and Spoonley *Recalling Aotearoa: Indigenous Politics and Ethnic Relations in New Zealand*, supra n. 2, pp. 13-14; Molloy 'Imagining (the) Difference: Gender, Ethnicity, and Metaphors of Nation' supra n. 4.

[18] See for example Apirana Mahuika, 'Whakapapa is the Heart' in Ken Coates, and Paul McHugh, *Living Relationships, kākiri ngatai: the Treaty of Waitangi in the New Millennium* (Wellington, 1998) p. 216 (Commentary), who argues that since 1840 Māori have been dominant in their pursuit of equal partnership and rangatiratanga.

[19] Nan Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation*

'partnership' invokes legal and business partnerships. The common assumption is that such partnerships are 'equal'. In the Crown/Māori partnership, this assumption operates to mask the sedimentation of inequality between the Crown and Māori as the result of colonisation.[20]

Over the last twenty years this partnership has been played out in a number of forums. For example, Gerald Lanning argues that the basic elements of a fiduciary relationship appear to exist in Crown interaction with Māori.[21] However, this fiduciary relationship is on a tenuous footing and difficulties arise when defining obligations.[22]

Often Māori feel that the Crown should be doing more to fulfil its fiduciary duties. Thus the last two decades have been beset with several court cases and Waitangi Tribunal claims regarding Māori concerns about the Crown's action towards them and the Crown's failure to adequately meet their obligations.[23] As Sir Tipene O'Regan claims, what is actually happening is the antithesis to partnership as described by the Court of Appeal.[24]

O'Regan's observation clearly shows that Māori expectations of partnership are not being meet. Māori follow an 'equal partner' approach. For many Māori the term signalled parity with non-Māori,[25]

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from Aotearoa New Zealand (Aldershot, Hants, England, 2006) pp. 81-82.

[20] Ibid.

[21] Gerald Lanning, 'The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship' (1997) 8 Auckland U. L. Rev. 445, p. 471. For more information on the current fiduciary duty in New Zealand and how it compares to Canada see Alex Frame 'The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?' (2005) 13 Waikato L. Rev. 70.

[22] Ibid.

[23] For example the State-Owned Enterprises cases, such as *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) (the Broadcasting Assets Case) and the Fisheries cases, such as *Ngāi Tahu Maori Trust Board v Attorney-General* CP614/87 (HC).

[24] Sir Tipene O'Regan, 'A Ngai Tahu Perspective on Some Treaty Questions' (1995) *25 VUWLR* 178, p. 185. O'Regan is explaining how he sees the Crown/Māori relationship. To him, the partnership envisioned by the Court of Appeal cannot exist while Māori are forced to negotiate for percentages of state funding and are unable to exercise tino rangatiratanga. He metaphorically describes the resulting partnership as a marriage, where one spouse, the Māori Partner, is reduced to a mere chattel, and the marriage can only function at the dictate of one party.

[25] Walker, 'Immigration Policy and the Political Economy of New Zealand', in Greif and Stewart (eds), *Controlling Interests: Business, the State and Society in New Zealand,* (Palmerston

or a version of a bicultural society that could encompass law and policy developments such as parallel legal systems.[26] As Chief Judge Eddie Durie (as he then was) saw it, the Court characterised partnership as denoting the joining of distinct persons in a common enterprise for mutual benefit.[27] This idea of partnership is "…closer to the Maori view of the Treaty as an alliance".[28]

However, Gerald Lanning contends that the fiduciary relationship defined by the Court of Appeal is, and will necessarily be, an unequal one.[29] Paul McHugh supports this contention, stating that a partnership with fiduciary duties is incompatible, contradictory and unequal; the common law principle of partnership supposes equality, yet fiduciary duties do not.[30]

In the Lands Case, the Justices emphasised that nothing can fetter the right of a duly elected parliament to govern.[31] Accordingly, when the Crown subsequently issued its own statement of Treaty principles, it adopted the principle of kāwanatanga as its primary principle.[32] In this principle the Crown clearly states that the government's right to govern surpasses any rights of Māori. Consequently, any partnership established with Māori must be unequal, as Māori can never achieve equality with the Crown.

In numerous interactions with Māori since the Lands Case the Crown has indicated that the concept of partnership it alludes to is this unequal one.[33] This interpretation has been supported through later decisions of

North, 1995) pp. 282-302.

26 Seuffert, *Jurisprudence of National Identity: Kaleidoscopes of Imperialism and Globalisation from Aotearoa New Zealand*, supra n. 19, p. 81.

27 Durie, 'The New Zealand Maori and the Waitangi Tribunal' supra n. 15, p. 3.

28 Ibid. Walker goes one step further, explaining that in describing the Crown/Māori relationship as one of partnership the Court of Appeal helped New Zealand on the path of decolonisation in the sense of dismantling the hegemonic domination of Māori. (Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, supra n. 2, p. 265).

29 Ibid.

30 McHugh, 'A History of Crown Sovereignty in New Zealand' supra n. 8.

31 The Lands Case, supra n. 1, p. 665 per Cooke P.

32 Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (Wellington, 1989).

33 For example, it is this article's contention that, in the foreshore and seabed debate, the limit of time placed on oral submissions before the Fisheries and other Sea-Related

the Court of Appeal[34] which, although refraining from detailing the precise partnership, has commented that the relationship between Māori and the Crown remains unequal.[35]

These differing understandings of the partnership expressed by the Court of Appeal had major ramifications in the foreshore and seabed debate. It is obvious that the Government felt that the Crown had exhausted all its obligations of partnership through its consultation hui.[36] Conversely, Māori felt that the Crown was acting unreasonably in dismissing the alternative solutions Māori proposed.[37] To many Māori, in legislating for Crown ownership of the foreshore and seabed and denying Māori the right to go to court to have their rights defined, the Crown was not acting in good faith towards its Treaty partner.[38] In fact, many Māori saw the Government's actions as discriminatory.[39]

Another serious ramification of the Lands Case discourse on partnership for the foreshore and seabed debate flows from the fact that the Court of Appeal recognised fiduciary-like duties arising out of the Treaty partnership as incumbent on the Crown in its dealings with Māori, but gave no indication of the aboriginal fiduciary doctrine in its own right.[40] The Court of Appeal's silence allows for the Crown to

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Legislation Select Committee and the restriction on who could present shows the Crown's unwillingness to consider the cultural importance of these oral submissions, and thus they are not treating their Māori partner as equals.

[34] See for example *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, p. 152 per Cooke P, where the Court of Appeal stated that "Partnership certainly does not mean that every asset in which Maori have some justifiable claim to share must be divided equally". This was followed later in *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, p. 528.

[35] See generally Te Puni Kōkiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of Waitangi as expressed by the Waitangi Tribunal and the Courts*, (Wellington, 2001) p. 77.

[36] See for example The New Zealand Government, *The Foreshore and Seabed of New Zealand, Government Proposals for Consultation,* (Policy Document, 17 December 2003), Appendix C where the Government outlines their consultation process.

[37] See generally Abby Suszko 'Māori Perspectives on the Foreshore and Seabed Debate: A Dunedin Case Study' Honours Dissertation, (University of Otago, 2005) p. 26.

[38] See generally ibid.

[39] See generally ibid, p. 29

[40] McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, (Auckland, 1991) p. 250.

bypass its potential fiduciary duties in situations where the Treaty is not directly in issue.

The outcome of the foreshore and seabed debate is a dramatic example of this. Under urgency the Government enacted the Foreshore and Seabed Act 2004 despite Māori protest and the Waitangi Tribunal's finding that the Government's policy breached the principles of partnership and active protection.[41] As former Prime Minister Sir Geoffrey Palmer strenuously pointed out in 2005, the Crown was justified in its actions towards Māori because the foreshore and seabed debate was about the doctrine of aboriginal title and not the Treaty.[42] Thus, it appears that the Crown can be selective as to when it adheres to the Court's principle of partnership, and the duties arising from it, while interacting with Māori in aboriginal and customary title and rights issues.[43]

B. Ramifications of settling the issue of sovereignty

A major ramification of the Lands Case, one that was missed in the media[44] during the hype and excitement surrounding the case, and consequently has never really been articulated publicly, is that the Court of Appeal essentially settled the question of sovereignty.

Prior to the Court of Appeal's ruling, Māori had grown vocal in their objection to government practices concerning things Māori. During

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[41] Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy,* supra n. 16, pp. 128, 131, 132. The Foreshore and Sebed Act removed the Māori Land Court's jurisdiction to grant customary title in the foreshore and seabed to Māori. (Foreshore and Seabed Act s 46) Thus, the Act removed the right of Māori to go to court to prove the nature and extent of their property rights in the foreshore and seabed.

[42] Sir Geoffrey Palmer, 'The New Zealand Constitution in 2005' in Jack Hodder, Geoffrey Palmer, and Ivor Richardson, *New Zealand's Constitutional Arrangements: where are we heading?* (New Zealand Law Society Seminar, May 2005) p. 15

[43] As McHugh concludes, the Treaty is an acknowledgement of Māori and their prior land occupation. It is more than an affirmation of existing rights; and is not intended to merely fossilise the status quo but to provide a direction for further growth and development. (McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, supra n. 40 pp. 4-5).

[44] For example, Claudia Orange explains that the media coverage at the time stressed the liberal nature of the Land Case judgment, but what was not so evident was that at the time Māori were accepting that sovereignty was held indisputably by the Crown. (Claudia Orange, *An Illustrated History of the Treaty of Waitangi*, (2nd edn.) (Wellington, 2004) p. 166)

this time, Māori began to question the government's right to rule and the Crown's claim that Māori had ceded sovereignty.[45] These questions were put to one side as it became clear that Māori had won a historic 'victory',[46] gaining judicial recognition and legitimisation of the Treaty and Māori claims of redress for Treaty breaches.[47] As Ranginui Walker explains, the Lands Case vindicated Māori faith in the Treaty after more than a century of recourse to it as their Magna Carta.[48]

However, the Court also stressed that the principles do not act as a limit on the power of a duly elected parliament, [49] and that Māori have undertaken a duty of loyalty,[50] reinforcing the orthodox legal view. This highlights that New Zealand has inherited a constitution from Britain, and along with that comes parliamentary sovereignty.[51]

Therefore, the Court left the doctrine of incorporation expressed in *Hoani Te Heuheu Tukino v Aotea Maori Trust Board* firmly in place,[52] and the status of the Treaty remains the same at law today as it did in 1941. The Treaty is still not a fetter on parliamentary sovereignty or a direct source of rights and obligations and does not have supremacy over

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[45] See generally McHugh, 'A History of Crown Sovereignty in New Zealand' supra n. 8, p. 200.

[46] The Lands Case, supra n. 1, p. 661 per Cooke P.

[47] Ibid, pp. 664-665. See generally Thomas Geuther, *Public Law,* (Butterworths questions and answers series, Wellington, 2002) p. 141; Te Puni Kōkiri, *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of Waitangi as expressed by the Waitangi Tribunal and the Courts*, supra n. 35, p. 100.

[48] Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, supra n. 2, p. 265.

[49] The Lands Case, supra n. 1, p. 665 per Cooke P.

[50] Ibid, p. 664.

[51] Andrew Sharp, *Justice and the Māori: The Philosophy and Practice Māori Claims in New Zealand since the 1970s*, (2nd edn.) (Auckland, 1997) p. 303.

[52] *Hoani Te Heuheu Tukino v Aotea Maori Trust Board* [1941] AC 308 (PC). (*Te Heuheu*) Cooke P followed the doctrine in his judgment, stating that it was only because the legislature had incorporated the phrase 'principles of the Treaty' into section 9 of the State Owned Enterprises Act 1986 that the Court was able to come to its decision. (The Lands Case, supra n.1, p. 668). Richardson J went one step further, stating that he is of the opinion that *Te Heuheu* correctly sets out the law. (The Lands Case, supra n. 1, p. 691) For more information on the doctrine articulated in *Te Heuheu*, its contemporary status and its possible future see Alex Frame 'Hoani Te Heuheu's case in London 1940-1941: An Explosive Story' (2006) 22 NZULR 148.

legislation. It remains reliant on the will of parliament to incorporate its principles in legislation to influence legal proceedings.[53]

Thus, in one judicial sweep the Court dismissed Māori claims in the courts that they maintained a localised form of sovereignty, tino rangatiratanga, and that this rangatiratanga acted as a fetter on parliamentary sovereignty.[54] Instead tino rangatiratanga was brought under kāwanatanga, and subsequently defined as 'self-development'[55] or 'self-management'.[56] As Claudia Orange notes, the struggle for tino rangatiratanga was to be abandoned on a constitutional level and was to be played out in other forums.[57]

Parliament's decision to insert section 9 into the State-Owned Enterprises Act 1986, and the Court of Appeal's subsequent interpretation of the principles of the Treaty, further negated the standing of the two texts of the Treaty, and in particular the standing of rangatiratanga. As Michael Belgrave explains, "The principles of the Treaty of Waitangi had walked into the modern treaty."[58] Mereata Kawharu agrees, stating the "…principles have become the dominant way of considering Treaty issues."[59]

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[53] As McHugh contends, "…if Māori rights are to be protected from legislative curtailment and given overriding status, some entrenchment by Parliament will be necessary". (McHugh, *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi*, supra n. 40).

[54] In the *Motunui-Waitara Report*, the Waitangi Tribunal defined tino rangatiratanga as sovereignty. (Waitangi Tribunal, *Motunui-Waitara Report*, (Wellington, 1983) pp. 50-51). Interestingly, following the Lands Case, the Waitangi Tribunal has refrained from using this definition, instead opting for 'self-development'. (See Waitangi Tribunal, *Taranaki Report, Kaupapa Tuatahi*, (Wellington, 1996) p. 5).

[55] See ibid., p. 5.

[56] See generally F. M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law & Legitimation*, Auckland, 1999) p. 171.

[57] See generally Orange, *An Illustrated History of the Treaty of Waitangi*, supra n. 44. Other forums include post-settlement Iwi Governance Structures and Corporations such as Te Runanga o Ngāi Tahu, and also in the educational field through Kōhanga Reo and Kura Kaupapa Māori.

[58] Michael Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories*, (Auckland, 2005) p. 81.

[59] Kawharu, 'Rangatiratanga and Social Policy' supra n. 5.

This definition shift has had a range of ramifications. In many instances, the principles have assumed a higher position than rangatiratanga.[60] As a result, government policies have been free to operate in denial of tino rangatiratanga.[61] Many Māori are dissatisfied with this.[62]

This has created a situation in some instances where Māori and the Crown tend to have different understandings of rangatiratanga. These different understandings impact on the application of partnership, as "…some Māori still find the meaningful application of partnership hampered by a limited appreciation of the various dimensions of rangatiratanga".[63]

Consequently these outcomes became particularly prominent in the foreshore and seabed debate where Māori talked in terms of rangatiratanga as well as the principles of the Treaty. For Manawhenua,[64] the foreshore and seabed had always been under the jurisdiction of iwi and hapu, and decision-making over it rested with hapu and whānau. They were, and still are, adamant that the foreshore and seabed belonged to them and that they were guaranteed rights over it under the tino rangatiratanga in Article Two.[65]

Thus, Māori and the Crown continued to talk past each other. This is especially evident when some Māori chose to express tino rangatiratanga as sovereignty.[66] It also highlights that almost twenty years after the Court of Appeal articulated the orthodox doctrine that

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[60] See generally ibid, pp. 105-122.

[61] Jane Kelsey, *A Question of Honour: Labour and the Treaty, 1984-1989*, (Wellington, 1990) pp. 236-7.

[62] Kawharu, 'Rangatiratanga and Social Policy' supra n. 5, p. 107.

[63] Ibid, p. 105.

[64] The people who exercise kaitiakitanga (stewardship, guardianship) and possess mana (power, prestiege) over land in a geo-political area.

[65] The Paeroa Declaration, resolution one; see also Richard Ogden, 'The foreshore and seabed issue' [2004] NZLJ 14, p. 15.

[66] See generally Paul Cavanagh, 'The Foreshore and Seabed Controversy' [2003] NZLJ 428, p. 429. It should be noted here that in following the precedent set down in the Lands Case, the Court of Appeal in *Ngati Apa*, explicitly stated that sovereignty rested with the Crown. However, the Court found that with this Crown sovereignty goes radical title, but not beneficial title. Thus a court could legally grant beneficial title to others before customary rights are extinguished. (*Ngati Apa*, supra n. 9, p. 653, per Elias CJ).

sovereignty sat with the Crown, many Māori still do not realise, or choose not to acknowledge, that in law the issue of sovereignty has been settled.[67]

Additionally, throughout the foreshore and seabed debate many Māori felt the Government was redefining tino rangatiratanga as a minority interest.[68] This is an acute illustration of a ramification of Parliament's emphasis on, and the Court's subsequent application of, the principles ahead of the terms of the Treaty; one which creates tension and misunderstandings between Treaty partners.

C. Ramifications of ruling in favour of the Māori claimants

The Lands Case brought Māori claims into the justiciable realm of the courts. As McHugh notes, "The *Wi Parata* consignment of those relations to a non-justiciable zone of the prerogative no-longer held".[69]

One major outcome is that subsequent courts have applied President Sir Robin Cooke's "…broad, unquibbling and practical interpretation…"[70] to the Treaty. Consequently, over the last twenty years, the courts have tended to interpret statutes pertaining to Māori rights in the way most favourable to the Māori claimants.[71]

Another ramification is that the Lands Case decision enhanced Māori expectations and increased their confidence in the courts.[72] Accordingly, over the decade following the Lands Case, the courts

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[67] Interestingly, despite the status of rangatiratanga being reduced in law, for Māori the legal status of the Treaty and tino rangatiratanga is secondary to how they view it. (Noel Cox, 'The Treaty of Waitangi and the Relationship between the Crown and Maori in New Zealand' (2002-2003) 28 Brook. J. Int'l L. 123, p. 149).

[68] See Moana Jackson, 'Like a Beached Whale': A Consideration of Proposed Crown Actions over Maori Foreshore' in International Research Institute for Maori and Indigenous Education (IRI), *Te Takutai Moana*, Economics, Politics and Colonisation, Series 2003. vol. 5, 2nd edn, (New Zealand, 2003) p. 14; Annette Sykes, personal comment in Hikoi: Inside out [Video Recording] (New Zealand, 21 July 2004) at 5mins, 40secs.

[69] McHugh, 'A History of Crown Sovereignty in New Zealand' supra n. 8, p. 205.

[70] The Lands Case, supra n. 1, p. 655 per Cooke P.

[71] Carrie Wainwright, 'The Legal Status of the Treaty' in *Treaty of Waitangi*, (New Zealand Law Society Seminar, August 2002) p. 1.

[72] Jane Kelsey, *Rolling Back the State: Privatisation of Power in Aotearoa/New Zealand* (Wellington, 1993) p. 255.

became the first stop for Māori seeking to restrain the government breaches of the Treaty of Waitangi. Māori won most of these cases, prompting conservative Māori to herald the coming of a new constitutional order.[73]

This confidence in the courts was carried through to 1997, where Te Tau Ihu[74] began legal proceedings in the Māori Land Court, seeking a declaration of their customary rights to the seabed around the Marlborough Sounds.[75] The legal proceedings eventually lead to the Court of Appeal's ruling in *Ngati Apa*.

However, one dramatic outcome of finding favourably for Māori is the public backlash against Māori claims. As Judge Carrie Wainwright acknowledges:

> The prominence of the SOE cases, and their political impact, lead to the widespread (but incorrect) view that Maori have only to turn up to court with the Treaty in hand to extract from a judge the decision which will prevent the Government from proceeding with policies that adversely affect Maori.[76]

Widespread adverse public reaction has followed every major Crown/Māori interaction over the last two decades, especially the later State-Owned Enterprises and Fisheries cases.[77] Fuelled by media hype and politicians pushing their own agendas, these reactions served to create an atmosphere of separatism; the exact opposite of the partnership that the Court of Appeal envisioned.

During the 1990s some major settlements with Māori were made,[78] and it seemed that New Zealand was progressing into post-colonialism.

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[73] Ibid, p. 281.

[74] The collective name for the top of the South Island iwi: Ngāti Apa, Ngāi Kōata, Ngāti Kuia, Ngāi Rārua, Ngāti Tama, Ngāti Toa and Rāngitāne.

[75] Re Marlborough Sounds (1997) 22A Nelson Minute Book 2 (MLC).

[76] Carrie Wainwright, 'The SOE Cases' in *Treaty of Waitangi*, (New Zealand Law Society Seminar, August 2002) p. 3.

[77] See generally Sir Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (Dunedin, 1992) pp. 91-92.

[78] For example the Ngāi Tahu and Tainui settlements, and the allocation of fisheries quota.

However, as mentioned above, there was continued adverse reactions to these settlements. These reactions encapsulated a build up of tension that was set to explode, and did so in the public backlash against Māori in the foreshore and seabed debate.

So it was on the back of this growing resentment that the Court of Appeal delivered its *Ngati Apa* decision. Within two weeks non-Māori were marching in Nelson[79], carrying slogans proclaiming 'Whites have rights too' and asserting Māori privilege. Just as Judge Wainwright stated happened with the State-Owned Enterprises cases, many people believed because Māori turned up to court, they would receive a judgment in their favour. Just as with the Lands Case, little was published in the media about the legal substance of the judgment.[80] Instead the media widely perpetuated the belief that Māori would restrict access and veto development.[81]

This clearly illustrates a dramatic social ramification of the Lands Case. Due to the many emotions associated with court cases surrounding Māori rights, the legal significance of the cases will be lost in the public debate and consequently history is set to repeat itself through the maintenance of the misrepresentation of Māori claims.

Conclusion

The social ramifications of the Lands case are far reaching. They highlight the differences in understandings between Māori and the Crown as to what the Court of Appeal established, as well as the public's misunderstandings of the legal significance of the case.

As shown in this article, these differing understandings have a serious effect on the practical application of partnership. Consequently both Māori and the Crown have different perspectives as to what

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[79] On 28 June 2003, 500 people rallied in Nelson against Māori having ownership of the foreshore and seabed.

[80] It has to be noted that the court did not find that Māori had ownership in the foreshore and seabed. The Court of Appeal in *Ngati Apa* simply found that the Māori Land Court had the jurisdiction to investigate Māori claims to customary title in the foreshore and seabed. (*Ngati Apa*, supra n 9, p. 670 per Elias CJ).

[81] See Tom Bennion, Malcolm Birdling and Rebecca Paton, *Making Sense of the Foreshore and Seabed*, (Wellington, 2004) p. 4.

partnership entails, and what the fiduciary obligations encompassed in partnership require. Māori tend to see the Treaty partnership as between equals, whereas the Crown views it as an unequal partnership. The court cases that pepper the last two decades underscore these different perceptions, with Māori often claiming the Crown should be doing more to fulfil their fiduciary obligations.

These differing views of partnership had major ramifications for the foreshore and seabed debate, where Māori felt the Crown failed to act reasonably and in good faith and should have done more to fulfil its fiduciary obligations.

A second, and far-reaching ramification, is that because the foreshore and seabed debate centred on the doctrine of aboriginal title, the Crown was able to bypass its fiduciary obligations by distinguishing this situation from Treaty situations where its fiduciary duties to actively protect Māori interests applies.

Another ramification exposed in this article is that the Lands Case settled sovereignty with the Crown. Essentially the Court of Appeal adopted the orthodox legal doctrine of parliamentary sovereignty, stating unequivocally that none of the principles can act as a fetter on the power of a duly elected parliament. Thus, even though the Court raised the profile of the Treaty, the Treaty itself remains dependant on the will of Parliament to incorporate its principles into legislation to have any effect.

Consequently the Court located tino rangatiratanga below kāwanatanga, and it has come to mean 'self-development'. Additionally, Parliament's emphasis on the principles, and their subsequent interpretation through the courts, has resulted in a situation where the principles have assumed a higher position than rangatiratanga. This has had an adverse affect on the practical application of partnership as many Māori feel true partnership is limited by little appreciation of the different dimensions of tino rangatiratanga.

These different perceptions of rangatiratanga had a major effect on the outcome of the foreshore and seabed debate, and served to increase tensions and misunderstandings between the Treaty partners. Māori felt the Crown was acting to reduce and define rangatiratanga as a minority

interest, whereas the Crown was alarmed at Māori representations of rangatiratanga as sovereignty. Consequently, these different understandings meant that Māori and the Crown continued to talk past each other.

Lastly, this article revealed perhaps the most regrettable ramification of the Lands Case: the adverse public backlash towards Māori claims. The Lands Case positively increased Māori expectations and confidence in the legal system. Consequently, Māori followed up the Lands Case with a number of court cases. Unfortunately, these court cases prompted public outcry.

Thus this article has revealed another social ramification of the Lands Case: the misrepresentation of Māori claims. It became a widespread belief that Māori only had to show up to court to get a judgment in their favour. Calls of Māori privilege are commonplace, and Māori are wrongly represented as obstructing government policies and New Zealand's progress.

This ramification was never more evident than during the foreshore and seabed debate. The public backlash against Māori witnessed in the debate will have a lasting effect on New Zealand society and creates race relations in stark contrast to that envisioned in the Lands Case.

A COMPARATIVE ANALYSIS: THE CONSEQUENCES OF FRAUD IN THE ENGLISH AND NEW ZEALAND LAND TITLE REGISTRATION SYSTEMS

ROWAN ARMSTRONG*

Introduction

There is a striking contrast, between the New Zealand and English[1] land registration systems, to the approach taken and often the outcome to fraudulent transactions. To illustrate this, take the situation in the well known New Zealand case, *Frazer v Walker*.[2] The Privy Council held that a bona fide mortgagee and then subsequent purchaser, whom had acquired title to the farm property by virtue of a previous fraudulent transaction, were both to be protected by the indefeasibility provisions in the Land Transfer Act (LTA) 1952. Mr Frazer, the defrauded previous registered proprietor, was entitled to compensation for his loss. Conversely, the application of this factual situation to the English Land Registration Act (LRA) 2002 is likely to result in a different outcome. As Mr Frazer was still in actual occupation of the farm, an English Court would probably find for him by rectifying the land title. The subsequent purchaser who had been deprived of their interest would be entitled to compensation.

The legal justification to these divergent consequences and further comparisons between the two title registration systems will be expanded on in this paper. More specifically three fundamental questions will be analysed: firstly, does a registered proprietor who makes a fraudulent[3] transfer remain protected as the registered proprietor over the property? Secondly, is a bona fide purchaser for value protected where there is a previous fraudulent transfer? And

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1 Although this paper refers solely to England, the term encompasses England and Wales.

2 *Frazer v Walker* [1967] 1 AC 569.

3 Fraudulent transfers are absolutely void (forgery is included).

thirdly, in what circumstances is a registered proprietor of property required to recognise an unregistered interest which exists over that property? These questions involve the subsequent transfer of registered property. The effect of first registration in England will not be evaluated.[4] Due to the complexity, especially in England, in answering these three primary questions it was not possible, to also consider whether these outcomes would differ if the fraudulent transfer was to a volunteer transferee.

A. Registration of Title

Security of land ownership is essential. As Hammond J stated, 'if there is any area of the law in which the absolute security is required, without equivocation, it must be in the area of security of title to real property.'[5] The tool for providing this security in England is no longer, as may be perceived by many, predominantly prescribed by a common law 'deeds system.' Legislation[6] has dramatically changed the nature and consequences of conveyancing to *compulsory registration of title*. New Zealand is no stranger to this concept with the 'Torrens system'[7] of title registration being at the forefront of our land law.[8] It is therefore not necessary to look at the principles specific to deeds conveyancing in this paper, as these will play only a limited role in the future of both jurisdictions.

Legislation is absolutely paramount, especially when considering land title registration principles. Advocates of title registration in England began laying claim to the concept in 1862, shortly after it was implemented in South Australia. However, the 1862 Act proved to be a

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[4] Land Registration Act 2002, s 3 - 22 and schedule 1.

[5] *Register-General of Land v Marshall* [1995] 2 NZLR 189 at 198-199.

[6] Currently compulsory title registration is governed by the LRA 2002; previously LRA 1925.

[7] Named after the founder, Sir Robert Torrens, who sought to improve security and cure the defects common with unregistered deeds title transactions.

[8] Although the 'deeds system' is still in existence (Deeds Registration Act 1908) it is of virtually no application today due to title registration proclaimed by the Land Transfer Acts: Land Transfer Act 1870; Land Transfer Act 1885; Land Transfer (Compulsory Registration of Titles) Act 1924; and currently the Land Transfer Act 1952. This current Act has undergone many amendments, including the notable Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

failure.[9] The later statutes were not much better in declaring that indefeasibility was impossible.[10] The LRA 1925[11] was the breakthrough influence in creating sweeping changes to the law of title registration in England. This statute remained virtually unaltered for the rest of the century slowly extending compulsory title registration over England and Wales. Complete coverage was achieved in 1990.[12] The recently enacted LRA 2002 has been heralded as a 'conveyancing revolution,'[13] most significantly introducing electronic computer registration. Whilst the LRA 2002 is revolutionary, it depends on the LRA 1925 for much of it conceptual foundation. The LRA 2002 is to bring about not a system of registration of title, but a system of title by registration.[14] This has signified a momentous shift of ideology in England from the concept of possession to that of qualified title ownership.

In order to understand the legal justification of the three fundamental questions posed in this paper, the legislative concepts at the foundation of registration in each jurisdiction need to be explained. This is essential in determining the conclusiveness that registration confers on transferees for consideration. The statutory approaches in providing security of title are conceptually very different. England has not followed in the footsteps of New Zealand and other Commonwealth nations by implementing a Torrens registration system. Instead England opted for its own unique scheme. While the general aim of all title registration schemes is that the register should reflect, to a degree,

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[9] Title registration was not compulsory and there was no indemnity fund for errors and fraud in the title. The system was also extremely expensive due to obtaining detailed enquiries as to boundaries. E Cooke, 'E-Conveyancing in England: Enthusiasms and Reluctance,' in D Grinlinton (ed), *Torrens in the 21st Century* (2003) at 278.

[10] Land Transfer Act 1875; Land Transfer Act 1897 introduced limited compulsion and an indemnity fund. However the status of the indemnity fund was of virtually no use following the decision in: *Attorney-General v Odell* [1906] 2 Ch 47.

[11] Amendments to the LRA 1925 were made in 1936, 1986, 1988 and 1997.

[12] C Harpum, *Megarry & Wade - The Law of Real Property* (6th ed, 2000). On December 1st 1990 the whole of England and Wales was subject to compulsory registration. In March 2003 around 90% of titles were registered.

[13] L Chamberlain, 'The Land Registration Act 2002: A Conveyancing Revolution'– Pt 1 [2002] 152 NLJ 1093.

[14] Per Barwick CJ, *Breskvar v Wall* (1971) 125 CLR 376 at 385 in Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001).

three fundamental principles:[15] a mirror,[16] insurance,[17] and the curtain,[18] these are not absolute and in England[19] especially there has been some deviation from aspects of these.

1. Land Registration in New Zealand: Land Transfer Act 1952

The foundation of New Zealand's LTA is that a registered proprietor is deemed to have a conclusive indefeasible title to land on registration.[20] As Lord Wilberforce stated, 'indefeasibility of title is a convenient description of the immunity from attack by an adverse claim to the land or interest in respect of which he is registered.'[21] The paramount statutory provisions from which this concept is derived are sections 62,[22] 63,[23] 182,[24] and 183[25] LTA 1952. However, as these sections

[15] T Ruoff, *An Englishman looks at the Torrens System* (1957).

[16] The register should be an accurate and conclusive reflection of the relevant interests affecting the land. As Lord Oliver in *Abby National Building Society v Cann* [1991] 1 AC 56 at 78C stated, the governing principle of land registration is that land should be regulated by and ascertainable from the register alone.

[17] The accuracy of the register should be guaranteed if the register is found to be inaccurate. There should be state compensation available.

[18] A purchaser of land is not concerned with interests which lie behind the register.

[19] See generally: A Pottage, 'The Originality of Registration' (1995) 15 OJLS 371.

[20] *Bahr v Nicolay* (No. 2) (1988) 164 CLR 604 at 613. This protection does not pass until registration: LTA 1952, s 41. As illustrated in *Sutton v O'Kane* [1973] 2 NZLR 304 and *NZ Meat Nominees v Sim* (1990) 1 NZ ConvC 190.

[21] *Frazer v Walker* [1967] NZLR 1069 at 1075-1076.

[22] LTA 1952, s 62: This essence of this section is that a registered proprietor of land shall, except in the case of fraud, hold the land subject to that notified on the register of title but absolutely free from all other interests whatsoever. There are three exceptions to this in s 62.

[23] LTA 1952, s 63: The essence of this section is that no action for the recovery of land can be brought against a registered proprietor: … (c) except where the registration was obtained by the fraud of the registered proprietor. There are also 4 other statutory exceptions.

[24] LTA 1952, s 182: The essence of this section is that 'a person who without fraud, deals with the registered proprietor is not obliged to inquire into the circumstances in which registration was obtained and is not affected by notice of any trust or unregistered interest. Knowledge of the existence of a trust or unregistered interest is not of itself to be imputed as fraud.

[25] LTA 1952, s 183: No action for recovery of land, or for damages, can be brought against a person who became registered, bona fide, and for value on the ground that his or her predecessor became registered through fraud or error of any kind or under any void or voidable instrument.

proclaim, the concept of indefeasibility is not absolute. There are numerous exceptions, with the most notable of these being fraud.

2. Land Registration in England: Land Registration Act 2002

In England the conclusiveness of registration is determined by section 58 LRA 2002.[26] Although, section 29[27] is equally significant and could broadly be translated as the English equivalent to New Zealand's indefeasibility sections. This states verbatim:

> (1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.
> (2) For the purposes of subsection (1) the priority of an *interest is protected* –
> (a) in any case if the interest –
> (i) is a registered charge or subject of a notice in the register,
> (ii) *falls within any of the paragraphs of Schedule 3*, or
> (iii) appears from the register to be excepted from the effect of registration.

This section, at first glance, appears to indicate that land title is conclusive to a purchaser, even when there is forgery. This would support the New Zealand approach of immediate indefeasibility.[28] However on closer examination it is clear that this section substantially differs.

(a) Overriding Interests

Elaborating on section 29(2)(a)(ii), the paragraphs listed in schedule 3[29]

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[26] LRA 2002, s 58 (1): If, on the entry of a person in the register as the proprietor of the legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration. (2) Subsection (1) does not apply… in which some other registration requirement remains to be met (these requirements are specified in schedule 2, it is not necessary to examine these at all in this paper).

[27] Previously LRA 1925, s 20. LRA 2002, s 30 is identical to the provisions in s 29 and relates to charges (mortgages).

[28] Immediate indefeasibility will be explained below.

[29] LRA 2002, schedule 3, these overriding interests include: (1) leasehold estates in land

are unregistered interests which override registered dispositions. The special protection given to these is the most controversial and fundamental difference that emerges between the paramount statutory provisions of New Zealand and England. Gray and Gray describe overriding interests as, 'a crack in the mirror from which the Land Register is meant to reflect'[30] as this is a total exception to the normal registration principles. The effect of overriding interests is that they are binding and enforceable against the registered proprietor or a subsequent registered proprietor,[31] regardless of whether they are registered on the title, and even if there is no knowledge of their existence. This means that purchasers may be in for a 'nasty shock' if they fail to inspect the property and make appropriate enquiries.[32]

Two conditions must be established before any overriding interests are to take effect. First, the interest must subsist 'immediately before the disposition' and affect the estate subject to the disposition.[33] Secondly, priority must be protected at the time of registration as an unregistered interest falling within one of the categories in schedule 3. The most significant of the overriding interests in schedule 3, which can directly impact on how priorities are determined when there is a fraudulent transfer or when recognising an unregistered third party's interest, is the protection given to a person in actual occupation of property. The other overriding interests are of less significance to this paper so will not be examined in detail.

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not exceeding seven years; (2) interests of persons in actual occupation; (3) easements and profits a prendre; (4) customary and (5) public rights; (6) local land charges; (7)-(9) mines and mineral interests; (10)-(14) five miscellaneous provisions (franchise, manorial right, right to rent which was reserved to the Crown, non-statutory right in respect of an embankment or sea or river wall and a right to payment in lieu of tithe). Guidance on the operation of overriding principles in the LRA 2002 can be derived from case law relating to the LRA 1925.

[30] K Gray & S F Gray, *Elements of Land Law* (4th ed, 2005).

[31] LRA 2002, schedule 3(2). Previously, LRA 1925 s 70(1)(g); Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001) para 8.55.

[32] S Cretney & G Dworkin, 'Rectification and Indemnity: Illusion and Reality' [1968] 84 LQR 528.

[33] LRA 2002, schedule 3.

(b) A Proprietor in 'Actual Occupation'

An essential preliminary question to consider is in what circumstances can a proprietor in England claim the protection of being in actual occupation of property? It is worth examining this issue separately as this will significantly impact on the three fundamental questions which will be subsequently discussed. To be in 'actual occupation' two elements must be established: that the claimant has an interest in the land; and that they are in actual occupation at the date of the disposition.[34] A useful 'mathematical' formula is provided by Gray and Gray:[35]

'Interest' + 'Actual Occupation' – 'Inquiry'
= 'Interest which overrides'

An 'interest' is restricted to a normal *proprietary* interest in the land (not personal rights). These are rights capable of enduring through different ownerships, according to nominal conceptions of title to real property.[36] The specific interests that are capable of binding a registered proprietor will be listed below, mainly when considering the third question.

It is important to note though, that it is the *rights* of the occupier that are protected by the status of being an overriding disposition, not the occupation itself.[37] Occupation without an interest does not create an overriding interest.[38] Occupancy has thus been described as a 'trigger' which activates the statutory protection of the occupier's rights.[39] A successful claim does not automatically mean the claimant is entitled to a right of occupation in the property either. In some situations there may be this right while in others, the interest which overrides is completely unrelated to actual occupation.

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[34] LRA 2002, schedule 3(2). The issue of priority is decided at the time of the completion of the purchase, not registration.

[35] K Gray & S F Gray, *Elements of Land Law* (4th ed, 2005).

[36] *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 655 at 696 per Russell LJ.

[37] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

[38] *City of London BS v Flegg* [1988] AC 54 at 74 per Lord Oliver.

[39] K Gray & S F Gray, *Elements of Land Law* (4th ed, 2005).

The second element to establish is whether a person is in *actual occupation* of the land. This is defined in the statute: 'if he, or his agent or employee, is physically present there.'[40] While this definition seems to be self-explanatory much litigation has occurred to determine where the line of 'physical presence' should be drawn. As this is a question of fact[41] the courts have been unwilling to lay down a code or catalogue of situations when occupation is established.[42] A consideration which will be taken into account though, is not only the length of time one may be absent from a property, but also the reason for it.[43] As Lord Oliver stated,[44] there must be 'some degree of performance and continuity which would rule out a mere fleeting presence.' Actual occupation has been held to include such situations as: the presence of the owner's builders on partly derelict property;[45] a separated wife who visited the property everyday to look after the children;[46] and where an occupier had gone elsewhere to give birth to her child but while away her husband had transferred the house, for consideration, to a friend who changed the locks and prevented her from returning.[47] However in *Strand Securities Ltd v Caswell* [48] the Court of Appeal held that leaving one's furniture in a flat, having a key to the flat or making occasional use of it[49] was not enough to constitute actual occupation.

Occupation of premises rather than houses has not been considered as frequently. In *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [50] fencing a derelict property and other typical ownership activities such as storing items was held to represent actual occupation. However in *Epps v Esso*

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[40] LRA 2002, schedule 3(2)(2).

[41] *William & Glyn's Bank Ltd v Boland* [1981] A.C. 487, applying the LRA 1925, s 71(g).

[42] *Hodgson v Marks* [1971] Ch. 892 at 932 per Russell LJ.

[43] *Stockholm Finance Ltd v Garden Holdings Inc* [1995] NPC 162. A lady who had not set foot in her London home for over a year was held to no longer be in actual occupation of it.

[44] *Abbey National Building Society v Cann* [1991] 1 AC 56 at 93.

[45] *Lloyds Bank Plc v Rosset* [1965] Ch 958.

[46] *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783.

[47] *Chhokar v Chhokar* [1984] FLR 313, note - this issue did not arise in the Court of Appeal.

[48] *Strand Securities Ltd v Caswell* [1965] Ch 958 at 981.

[49] Affirmed in *Epps v Esso Petroleum Ltd* [1973] 1 WLR 1071.

[50] *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EMCA Civ 151.

Petroleum Co Ltd [51] Templeton J held that parking cars on vacant land would not suffice, as occupation was not obvious. Conversely though, parking a car in a garage did amount to actual occupation.[52]

These cases demonstrate that in reality, physical presence is not always easy to determine. English land law has opted to grapple with this factual issue instead of having confidence in the conclusiveness of the register as is preferred in New Zealand.

A sub-issue which has also arisen is whether it is necessary to occupy the entirety of the premise over which the overriding interest is claimed. In *Ashburn Anstalt v Arnold* [53] Fox LJ commented that 'the overriding interest will relate to the land occupied but *not* anything further.' Conversely the Court of Appeal, in the recent case, *Ferrishurst Ltd v Wallcite Ltd* [54] declined to follow the earlier precedent which has placed a far more onerous burden on the purchaser.[55] The Court of Appeal held that a purchaser was bound by an option to purchase agreement regarding the whole title, not just that which was occupied. This extension is an additional step in the wrong direction from the conclusiveness of a title and even further annunciates the difference between the New Zealand and English land title registration systems. If this case was decided in England presently, a different outcome would probably eventuate due to the statutory provision that 'the overriding interest must relate to land for which there is actual occupation.'[56] This does not rule out the possibility of a person being held to have actual occupation if they do not have physical occupation of every little part of it though. The question to be asked is whether the conduct of the occupier suffices as actual occupation of the entire area claimed.[57] This interpretation would be consistent with the statute.

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[51] *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071.

[52] *Kling v Ketson Properties Ltd* (1984) P & CR 212.

[53] *Ashburn Anstalt v Arnold* [1989] Ch 1 28, applying the LRA 1925, s 71(g).

[54] *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355, applying the LRA 1925, s 71(g).

[55] Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001) para 8.57.

[56] LRA 2002, schedule 3(2)(1).

[57] R Smith, *Property Law* (4th ed, 2004) at 153.

(c) Limitations to a Proprietor in Actual Occupation

However, the LRA 2002 contains two main statutory limitations where a purchaser may take free of an overriding interest where there is an unregistered proprietor who is in actual occupation.[58] The first of which is if an inquiry was made before the disposition and this had not been disclosed when it could have reasonably been expected.[59] The burden of enquiry is on the purchaser who must therefore discover those in actual occupation and ask what their interest in the property is. Asking the seller is not sufficient.[60] The second limitation is if there is an interest belonging to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition *and* which the person to whom the disposition is made had no actual knowledge at the time.[61] It is not the interest which has to be apparent, but the occupation of the person having the interest.[62] The test of occupation, as stated, is whether it was *obvious* on a reasonably careful inspection of the land. This test is suggested to be less demanding than constructive notice.[63] The purpose of this section is to protect a purchaser where occupation is neither known nor readily ascertainable.[64] The onus therefore rests on the occupier.

3. Comparison

Contrasted with New Zealand's land transfer system, the status accorded to a proprietor in actual occupation of land is an alien

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[58] LRA 2002, schedule 3(2)(1). There are two other statutory limitations: (a) which relate to the Settlement Land Act 1925; (d) future leases, postponed for 3 months. A non-statutory limitation is that a spouses statutory possession rights are not capable of being overriding interests - Family Law Act 1996, s 31(10). Otherwise purchasers would need to make enquires in a large number of cases.

[59] LRA 2002, schedule 3(2)(1)(b), this is a reformulation of LRA 1925, s 70(1)(g).

[60] *Hodgson v Marks* [1971] Ch 892.

[61] LRA 2002, schedule 3(2)(1)(c).

[62] Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001) para 8.62.

[63] C Harpum, *Megarry & Wade - Law of Real Property* (6th ed, 2000) at 12-068. This limitation to actual occupation could be argued if this factual situation was to occur now in cases such as: *Abbey National Building Society v Cann* [1991] 1 AC 56 and *Lloyds Bank Plc v Rosset* [1965] Ch 958.

[64] Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001) para 8.62.

concept, out of kilter with the purpose of title registration envisaged by Sir Robert Torrens. Therefore, it could be held that Torrens registration protects static (rights of parties as registered on the title) rather than dynamic security (purchasers taking free of any overriding interests which are not registered on the title).[65] In that respect an overriding interest is the 'stumbling block' on registration of title.[66]

As the legislative foundations of registration and conclusiveness of title in England and New Zealand have been explained, it is now appropriate to investigate and compare the consequences of fraudulent transactions. There has been very little mention in England of fraud.[67] The main reason suggested for this, is that where a void (forged) transaction has been registered, the English land registration statutes have used the concepts of actual occupation and of mistake (relating to rectification)[68] as a mode of inquiry.

B. The First Fundamental Question

The first fundamental question to be addressed is whether a registered proprietor who previously made a fraudulent (void) transfer of property to themself remains protected as the registered proprietor? This is an undemanding issue. The void transfer has to be of no effect. The fraudulent registered proprietor obviously must lose possession and title to the property in question as it would be unthinkable to allow otherwise. In New Zealand the LTA 1952 specifically states fraud as an exception to indefeasibility.[69] Section 85 also enables the High Court to cancel or correct the computer register against the fraudulent registered proprietor.[70] The position in England, while not as visibly clear in the statute, is the same. While registration vests legal title in a fraudulent

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[65] E Cooke and P O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.

[66] Sir John Stewart-Wallace, 'Principles of Land Registration', at 32 in R Smith, *Property Law*, (4th ed, 2004).

[67] R Smith, *Property Law*, (4th ed, 2004).

[68] LRA 1925; LRA 2002 states that the register may be rectified where there is a mistake. This is intended, according to the Law Commission's Report (No. 271, para 8.15), to include fraud.

[69] LTA 1952, s 62 and s 63.

[70] LTA 1952, s 85 was applied in *Efastration v Glantsching* [1972] NZLR. 594. The registrar also has the power to correct the register, applying LTA 1952, s 81.

proprietor, like New Zealand, the defrauded true proprietor can undertake proceedings in court to establish that the title is void and seek rectification of the register. Rectification will reverse the transaction on the grounds that registration was a mistake even if this prejudices the fraudulent proprietor in possession of the land.[71] Obviously no indemnity will be payable as the transfer was wholly a result of their own fraud.[72]

C. The Second Fundamental Question

This question is more difficult. Should a bona fide purchaser for value be protected where there is a fraudulent transfer? Therefore fraud is against a previous registered proprietor. An example of this scenario is where: land was initially fraudulently transferred from (P) to (A), who obtained registration and then on-sold the land for valuable consideration to a bona fide purchaser, (B). The issue is whether (P) can claim the registered title to the property from (B). This is a complex issue, which poses a problem for any land registration system. There are two innocent parties and one must lose. Should an innocent bona fide purchaser for value be deprived of their interest in the property or should the innocent transferor who has been defrauded of their interest lose the claim to recover the property? The approach and conceptual basis taken, when analysing the conflicting interests in this scenario, illustrates an essential difference between the two title registration systems. The answer in New Zealand is rather more simplistic than the myriad of possible outcomes under the English LRA 2002.

1. New Zealand's Answer

In New Zealand this question has experienced considerable litigation and academic discussion. The degree of legitimacy the court assigns to the principle of registration, by a bona fide purchaser under a void transfer, is central in determining which innocent party has priority. There was originally uncertainty as to whether the doctrine of deferred indefeasibility[73] or immediate indefeasibility[74] would prevail.[75] The Privy

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[71] LRA 2002, schedule 4(3)(2)(a).

[72] LRA 2002, schedule 8(5)(1)(a).

[73] T Bennion & D Brown & R Thomas & E Toomey, *New Zealand Land Law* (2005). A title obtained fraudulently can be defeated only if it is 'perfected' by a subsequent bona

Council in the landmark decision, *Frazer v Walker,*[76] held in favour of the doctrine of immediate indefeasibly, conferred by sections 62, 63 and 183 LTA 1952. Thus, registration of title by a bona fide purchaser for value was conclusive even via a previously fraudulent transfer. However this decision is likely to cause harsh results in some situations.[77] It is possible that a person still in occupation of property would be ejected. Nevertheless, this position is preferred and has subsequently been affirmed on numerous occasions both in New Zealand[78] and Australia.[79] Applying the scenario above, if the registered proprietor (B) is a bona fide purchaser for value[80] they will be protected by the immediate indefeasibility provisions in the LTA 1952. This will also clearly apply to a subsequent bona fide purchaser. The defrauded transferor (P) would be entitled to receive compensation from the state.[81] If for instance, (B) is a registered bona fide mortgagee under a forged transfer, then similarly no claim will be successful as (B) is protected by immediate indefeasibility.[82] (P) would be restored as the registered proprietor but subject to (B)'s mortgage[83] and (P) could then claim compensation to remove the interest.

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fide purchaser for value.

[74] A bona fide purchaser for value, in the absence of fraud, will obtain an indefeasible title to the property on registration.

[75] This question was left open in *Gibbs v Messer* [1891] AC 248 (transfer to a fictitious person). In *Assets Co Ltd v Mere Roihi* [1905] AC 176 (three consolidated appeals) it was considered that registration of a void instrument does not confer an indefeasible title; *Boyd v Mayor of Wellington* [1924] NZLR 1174 held that registration of a void instrument under the LTA, conferred an immediately indefeasible title.

[76] *Frazer v Walker* [1967] 1 AC 569.

[77] NZ Property Law and Equity Reform Committee, 'The decision in *Frazer v Walker*,' June 1977, 9.

[78] Most notably in *Housing Corp of NZ v Maori Trustee* [1988] 2 NZLR 662; *Morrison v BNZ* [1991] 3 NZLR 291.

[79] Applying similar 'Torrens legislation' to New Zealand's: *Mayer v Cole* [1968] 2 NSWLR 747 (Aus); *Breskvar v Wall* (1971) 126 CLR 376 (Aus).

[80] The position of volunteers has not yet been determined in New Zealand.

[81] LTA 1952, s 172(b). Compensation will probably not be available for a forged transfer to a fictitious person as was held in *Gibbs v Messer.*

[82] LTA 1952, s 183.

[83] The analogous Australian case to this example is *Heron v Broadbent* (1919) 20 SR (NSW) 101.

2. England's Answer

The concept of 'indefeasibility' is foreign to English land registration statutes, cases, Law Commission Reports and textbooks. It has provoked very little litigation at all as there is a completely different ideology to registration. While registration in England similarly applies a 'statutory magic'[84] that confers immediate legal title[85] on the newly registered proprietor, this is subject to the possibility that the register is 'altered.'[86] Both an overriding interest and grounds for rectification can result in derogation of title from a registered proprietor.

New terminology under the LRA 2002 refers to alteration, with rectification being a subset of this.[87] Alteration is where any change is made to a register of title. It does not affect rights. It has the effect of ensuring the register accurately reflects the legal position of the title.[88] Alternatively, rectification is correcting a *mistake*[89] where a registered proprietor of the property is prejudiced.[90] This affects rights. While there is no guarantee of title itself in England, an indemnity provided by schedule 8(1) LRA is available where any person suffers loss by reason of *rectification* of the register. This indemnity provision can therefore be viewed as similar in nature to that offered in New Zealand to a defrauded party. Rectification and an indemnity are complementary remedies. Rectification will first be determined and then compensation will be available to the party who loses their claim. An alteration however is deemed to cause no loss under the Act and therefore no indemnity is available.

While the outcome when applying the English approach to land title

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[84] *Argyle Building Society v Hammond* (1984) 49 P & CR 148 per Slade LJ at 153. Under s 29(1) LRA 2002 as long as the registered proprietor is unaware of the forgery and provides valuable consideration they will obtain good title on becoming registered.

[85] LRA 2002, s 58 and Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution* (London, 2001) para 1.10.

[86] Slade LJ used the word 'rectified.' The terminology is substantially different under the LRA 2002. The correct word to now use is 'altered.' This is explained below.

[87] LRA 2002, s 65 and schedule 4.

[88] N P Gravells, *Land Law* (3rd ed, 2004).

[89] Correcting a mistake includes a registered forged transfer, though neither the LRA 2002 nor the Law Commission's Report (No. 271) expressly state this.

[90] LRA 2002, schedule 4(1).

registration will occasionally render the same result as would be seen in New Zealand, the theoretical basis for doing so is entirely different. For simplicity, analysis of a fraudulent transfer against a previous registered proprietor in England has been divided into three situations. Firstly, where there is an overriding interest by a defrauded proprietor still in actual occupation of the property. Secondly, (in the absence of an overriding interest) where title is transferred into the name of the fraudulent party and then transferred on for consideration to a bona fide purchaser or a mortgagee. And thirdly, (in the absence of any overriding interest) where a title is forged and transferred directly to an innocent bona fide purchaser for value.

(a) A Defrauded Proprietor who is in Actual Occupation of the Property

The first factual situation involves the determination of whether a defrauded registered proprietor is entitled to have title to the property returned to them by virtue of being in actual occupation and thus having an overriding interest. A claim to an equitable remedy, such as alteration of the register, is considered a proprietary *interest* and can bind innocent transferees.[91] However as explained above, it is critical that the person claiming alteration is deemed to be in actual occupation of the property (is physically present there).[92] If a defrauded proprietor (P) is in actual occupation of land then the register would be altered to reflect this. Normally as the new registered proprietor (B) is already bound by the interest prior to the alteration, no compensation is available, for there is considered to be no loss.[93] However a special exemption to this principle appears to exist under schedule 8(1)(2)(b) LRA 2002 where there has been a forgery.[94] A victim, (B), deprived of title to property by a person in actual occupation, (P), may be deemed

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[91] LRA 2002, s 116. Cases which illustrated this under the LRA 1925 are: *Chowood Ltd v Lyall* (No. 2) [1930] 2 Ch. 156; *Blacklocks v JB Developments (Goldaming) Ltd* [1982] Ch 183; *DB Ramsden & Co Ltd v Nurdin & Peacock plc* [1999] 1 EGLR; *Collins v Lee* [2001] 2 All ER 332 at p 338 (where doubts were raised as to fraudulent misrepresentation); *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P & CR 404 at 69; *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EMCA Civ 151 at 81.

[92] This is subject to the provisions, as explained, in the LRA 2002, schedule 3(2)(1)(b).

[93] The loss is caused by the overriding interest not alteration of the register.

[94] D J Hayton, *Registered Land* (3rd ed, 1981); R J Smith, *Property Law* (4th ed, 2003). This point has not been argued in court and will only rarely occur.

to have suffered loss and therefore be entitled to an indemnity on the register being altered. This should be the correct interpretation to take in England for compliance with the 'insurance principle.' If for instance (B) happened to be a registered bona fide mortgagee[95] or (B) was a bona fide purchaser and (C) was a bona fide mortgagee, then similarly alteration would occur and the mortgagee would be entitled to an indemnity.[96] As was already explained, actual occupation by a proprietor in New Zealand (LTA) is irrelevant and plays no part in determining priority to land.

(b) Title is Transferred to the Fraudulent Party and then onto a Bona Fide Purchaser (or Mortgagee) for Value

The second factual situation concerns if, or in what situations, rectification of land title will be ordered (in the absence of an overriding interest) to deprive a registered proprietor of their legal title. There is no immediate indefeasibility provision(s) in the LRA 2002. Rather than the registered title of a bona fide purchaser for value under a void transfer being absolutely paramount,[97] the purchaser will *usually*[98] be protected provided they are in possession of the property.[99] This is if land is 'physically in their possession.'[100] In *Kingsalton v Thames Water Developments*[101] the Court elaborated on this concept to state that 'a proprietor will normally be in possession, unless dispossessed.' As already seen, the Act also uses the expression 'actual occupation' when referring to an overriding interest. It is suggested that this is a narrower

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[95] Protected under LRA 2002, s 30.

[96] *Collins v Lee* [2001] 2 All ER 332, applying LRA 1925. The Court of Appeal allowed rectification against both the registered proprietor and the mortgagee. If the LRA 2002 was applied alteration would similarly be ordered to cancel both the transfer and interest with an indemnity available.

[97] See *Frazer v Walker* [1967] 1 AC 569.

[98] LRA 2002, schedule 4 (3)(2) and 6(2).

[99] *Re Haigh's Case* [Eng] – unreported.

[100] LRA 2002, s 131(1) & (2) defines certain relationships which give rise to possession without physical occupation. Occupation can be transferred to another and can include: a landlord is protected if a tenant is in occupation (*Freer v Unwins* [1976] Ch 288), a mortgagor is protected if a mortgagee is in occupation, licensor is protected if a licensee is in occupation and trustee is protected if a beneficiary is in occupation.'

[101] *Kingsalton v Thames Water Developments* [2002] 1 P & CR 184 at 21, applying the LRA 1925.

concept than the term 'possession.'[102] Although there is often an overlap where both terms will be satisfied, possession is of separate application than actual occupation. The focus here is on the present registered proprietor, not the previous one.

There are two presumptions in the LRA 2002. While in light of *Nouri v Marvi,*[103] these presumptions *may* be seen as only fettering the 'discretion of the registrar to rectify,' they will nevertheless still be *highly persuasive* for a court when exercising its discretion.[104] The first presumption is if a registered proprietor is deemed not in possession of the land, the existence of grounds for rectification must lead to the rectification unless there are exceptional circumstances which justify a refusal to rectify.[105] If rectification succeeds here the registered proprietor will be compensated by the indemnity fund.[106] Depriving a registered proprietor in possession of property from losing their interest is still one of the central aims of the LRA 2002. This is the second presumption. At the point when rectification of the register is demanded if the registered proprietor is in possession, then rectification will not take place without their consent and an indemnity will be paid to the claimant with the defrauded interest.

However this is not without exception. There are two situations when the protection of a proprietor in possession can be overturned and rectification allowed: where the registered proprietor has caused or contributed to the mistake by fraud or carelessness,[107] or unless it

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[102] *Strand Securities Limited v Caswell* [1965] 1 All E.R. 820 at 826 & 829-830. While leaving furniture in a flat will not satisfy as being in actual occupation, this may be sufficient to establish possession. However the ambit of how much wider possession is than actual occupation is not clear.

[103] *Nouri v Marvi* [2006] 1 EGLR 71 per Judge Rich QC – interpreting Peter Gibson LJ's judgment in *Kingsalton v Thames Water Developments* [2002] 1 P & CR 184 was of the opinion (*obiter dicta*) that the courts discretion to rectify was 'unfettered.'

[104] Ibid – the court will look at the 'policy of the statute.'

[105] LRA 2002, schedule 4(3)(3) and 6(3); Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001) para 10.18 and 10.22.

[106] LRA 2002, schedule 8(1)(2)(b) relates to schedule 8(1)(1)(a). These provisions also existed under the LRA 1925.

[107] LRA 2002, schedule 4(3)(2)(a). An issue which has not been determined yet is what behavior would amount to carelessness. Examples under the LRA 1925, s 82(3)(1), are found in: *Re 139 High Street Deptford* [1951] Ch 884 at 890-892 and *Claridge v Tingey* [1967]

would be unjust for the alteration not to be made.[108] The use of the double negative 'unjust' and 'not to be made' seems to indicate that the person seeking rectification must have a strong case.[109] Factors that the court may take into account include the length of undisturbed possession, the need for the land, expenditure on it, and the indemnity position.[110] The burden here is reversed onto the claimant.

Rectification therefore allows for an element of discretion. There is also discretion under the indemnity provision of the Act. It is unlikely in this situation that an indemnity would be paid. Schedule 8(5)(1) and (2) LRA 2002 states that an indemnity will not be payable where the claimant's loss is suffered wholly or partly as a result of their own fraud, or may be reduced where the loss that is suffered is partly as a result of their own lack of care.[111] Applying the hypothetical example above: if (A) fraudulently transfers (P)'s title to themselves, becomes registered, and later sells the land to (B), so as long as (B) is deemed to be in possession and is unaware of the forgery it is likely that (B)'s title will not be rectified. B will have 'good title' under sections 29(1) and 58 LRA 2002, with (P) entitled to receive an indemnity.[112]

A variation on this factual situation is instead of the void transfer being to a bona fide purchaser for value, the transfer is to a bona fide mortgagee. If (A) fraudulently transfers (P)'s property (who is not in actual occupation) to themselves and then obtains a registered mortgage over the property from (B), the title would initially be rectified in (P)'s favour.[113] However the issue remains what should happen to (B)'s (the mortgagee's) registered interest, created before the rectification? Should the interest remain protected on the title or should there be a secondary rectification? The case, *Norwich and Peterborough BS*

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1 WLR 134 at 140-141.

[108] LRA 2002, schedule 4(3)(2)(b) and 6(2)(b).

[109] R Smith, *Property Law* (4th ed, 2003).

[110] Examples under the LRA 1925 [s 82(3)(c)]: *Johnson v Shaw* [2004] 1 P & CR 123, rectification was ordered; *Horrill v Cooper* (1998) 78 P & CR 336 at 345-347, rectification was ordered; *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071 at 1080-1083 grounds for rectification were not satisfied.

[111] See *Dean v Dean* 80 P & CR 457.

[112] LRA 2002, schedule 8(1)(1)(b).

[113] LRA 2002, schedule 4(3)(2)(a).

v Steed [114] established that rectification against a subsequent mortgagee requires independent grounds. Therefore it is logical in England, that where there is fraud, the title will be rectified on these independent grounds to remove the mortgagee's interest. The basis for doing so is that the mortgagee can not claim that they are in 'possession' of the property; it is the fraudulent mortgagors who are in possession.[115] The rectified title will thus reflect its true position before the fraudulent transfers occurred.[116] All is not lost for the mortgagee though. Due to the nature of title registration they will be entitled to an indemnity from the state.[117] In comparison with the New Zealand LTA the register will remain unaltered. However the registered proprietor will receive compensation to pay the mortgage off.

(c) Title is Fraudulently Transferred Directly to a Bona Fide Purchaser for Value

The third factual situation is subtly different than the previous and although it would not be thought that the consequences would be any different, the English courts have managed to distinguish it. This is where (A) forges (P)'s signature (who is not in actual occupation) and directly transfers the title to a new bona fide registered purchaser for value (X). The issue is whether (X)'s title is protected. Applying section 58 LRA 2002 it would *prima facie* seem that (X) is protected. Even a person who is registered as proprietor (transferee) of a legal estate, on the strength of a forged transfer, should nonetheless obtain the legal estate.[118] Thus the statutory processes as described above should be applied. However application of the corresponding previous statutory

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[114] *Norwich & Peterborough BS v Steed* [1993] Ch 116.

[115] LRA 2002, schedule 4(3)(3) and 4(8), the court has the power to change the priority of interests. The title was not rectified in *Re Leighton's Conveyance* [1936] 1 All ER 667 applying LRA 1925 (however this case was based on undue influence and not fraud).

[116] See cases applying the LRA 1925, s 82: *Argyle Building Society v Hammond* (1984) 49 P & CR 148 and subsequently: *Norwich & Peterborough BS v Steed* [1993] Ch 116. Secondary rectification was precluded against the charge of the innocent mortgagee as the transaction was voidable not void (this was a question of construction applying LRA 1925). If there was a forgery though (thus a void transfer, LRA 1925 s 82(g)) rectification would have been permitted and an indemnity to the mortgagee available.

[117] LRA 2002, schedule 8(1)(2)(b).

[118] Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution*, No. 271 (London, 2001) para 9.4.

provision[119] suggested otherwise, even if the registered proprietor is in possession. It therefore seems that section 58 does not protect a claim by (P).

The initial case, *Attorney-General v Odell* [120] involved a forged transfer by the chargee's solicitor to Odell who was wholly innocent. The Court rectified against Odell on grounds that he never had 'good title' and was therefore not even entitled to an indemnity. This position remained, applying the LRA 1925, on different grounds. In *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*[121] the Court of Appeal held that there was no disposition[122] giving absolute title on the strength of a forged transfer. The new registered proprietor (legal owner) was subject to the rights of the defrauded party as the beneficial ("true") owner holding the property on trust for them. Therefore, surprisingly, the purchaser will *not* receive good title.

The issue of compensation under the LRA depends on whether 'good title' is obtained by a transferee. Presently the answer to this question is not clear. If the transferee does not obtain good title, there cannot be any mistake under the legislation, and therefore rectification is not available. The indemnity cannot be claimed as this is dependent on rectification.[123] The favourable view is that legal, 'good title,' should be found under a directly forged transfer. A contrary conclusion seems to be bizarre, unjust and lacks logic. It is unwise to have a further distinction to these principles of land registration solely on the premise that the fraudster imitated the registered proprietor and transferred the property to an unaware bona fide purchaser. These precedents should be overruled on the grounds that there was a misunderstanding as to the effect of registration (in light of sections 58 and 29 LRA 2002). The decision in *Malory* undermines the conclusiveness of the register and is

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[119] LRA 1925, s 69.

[120] *Attorney-General v Odell* [1906] 2 Ch 47 applying the LTA 1875; R J Smith, 'Forgeries and Land Registration' (1985) 101 LQR 79, this is effectively supporting a deferred indefeasibility doctrine.

[121] *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EMCA Civ 151 applying the LRA 1925. The reasoning is equally applicable to the LRA 2002.

[122] A *disposition* is essential under s 29 LRA 2002. If there is no disposition then this section cannot apply.

[123] LRA 2002, schedule 8 (1)(2)(b).

also inconsistent with the earlier precedent of *Argyle BS v Hammond*.[124] For the sake of simplicity and confidence in the register it is hard to see the precedent in *Malory* progressing any further.

3. Comparison

The three situations that have been described illustrate the complexity, lack of conclusiveness in the register and the completely different conceptual basis for land title registration in England. Having the status of being in possession and/or an overriding interest is pivotal. New Zealand, sensibly, does not recognise any such concept. It must be commended though that the statutory priority system in England is destined to be acceptable *most* of the time as the proprietor in possession or in actual occupation usually wishes to keep the property and not receive compensation. There is generally far greater reluctance in New Zealand to alter the position of the register. Immediate indefeasibility dictates that the bona fide purchaser for valuable consideration or mortgagee would receive title to the property, and the defrauded previous registered proprietor would be compensated. The advantage of this approach is its simplicity which may in turn bolster public confidence.[125]

D. The Third Fundamental Question

The third fundamental question to be analysed is one of the most difficult issues faced by any registration scheme:[126] if or in what circumstances is a registered proprietor of property required to recognise an unregistered interest which exists over the property? The purchaser's wrongdoing here affects not the vendor's interest, but unregistered third parties. For instance if (X) holds an unregistered interest in the land, of which (Z) has become the registered proprietor, the issue is whether (X) is able to have their interest recognised.

1. New Zealand's Answer

The approach adopted in New Zealand is to determine whether the

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[124] *Argyle BS v Hammond* (1984) 49 P & CR 148.

[125] R J Smith, 'Forgeries and Land Registration' [1985] 101 LQR 79 at 88.

[126] R J Smith, *Property Law* (4th ed, 2003).

registered proprietor's conduct amounts to fraud. If so, then the registered proprietor takes title subject to the unregistered interest claimed, as the indefeasibility protection under the LTA 1952 is no longer available. Section 182 LTA states that a registered proprietor is not affected by notice of any trust or unregistered interest and that knowledge of any trust or interest shall not be imputed as fraud.[127] The LTA does not define fraud though; this is left to judicial interpretation. Therefore something more than mere knowledge is required. The courts, in a series of early cases, used *obiter dicta* to assist in drawing a perimeter around the sphere of behaviour that would be considered fraudulent. This is still applied in cases today.

In *Assets Co Ltd v Mere Roihi* [128] the Privy Council held that fraud is confined to 'actual'[129] personal 'dishonesty' of some kind, not what is called 'constructive' or 'equitable' fraud.[130] Then in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [131] Salmond J elaborated on the concept of 'dishonesty'[132] to adopt a 'duty of an honest man' test.[133] The Privy Council in *Waimiha*[134] also expressed that it is fraudulent 'if the designed object of a transfer is to 'cheat a man of a known existing right.' While this *obiter dictum* is of some help, it is essentially a question of fact, at the date of registration, in determining whether conduct is considered fraudulent. This can often be a thin line, as the cases have suggested.[135]

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[127] Pre LTA 1952, in *Locher v Howlett* (1894) 13 NZLR 584 at 595-596, Richmond J held that notice of a trust or unregistered interest is not fraud.

[128] *Assets Co Ltd v Mere Roihi* [1905] AC 176 at 210 (PC).

[129] This is a conscious, subjective knowledge which may also include wilful blindness.

[130] TBF Ruoff, 'Protection of the Purchaser of Land (1969) 32 MLJ 121. A person may not benefit from avoiding information which he or she would have discovered had the enquiries usually made by a prudent purchaser been made.

[131] *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137 at 1175 (CA).

[132] Ibid at 1173. Dishonesty is a wilful and honest disregard and violation of the rights of other persons.

[133] Ibid. This is whether the purchaser knew enough to make it his duty as an honest man, to hold his hand, and either make further inquiries, abstain from the purchase, or purchase subject to the rights.

[134] *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106 per Lord Buckmaster.

[135] Cases where a registered proprietors conduct was considered fraudulent: *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491; *Efstratiou v Glantschnig* [1972] NZLR 594; *New Zealand Meat Nominees v Sim* (1990) 1 NZ ConvC 190, 498; *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138; *Swann v Secureland Mortgagee Investments Nominees Ltd* (in

If it is a proprietor's purpose on registration to defeat an unregistered interest, then obviously this conduct would not attract the protection of indefeasibility.

2. England's Answer

(a) Overriding Interest

The approach taken in England is not surprisingly, entirely different. The protection conferred to an unregistered third party is not based on any issue of fraud but whether the unregistered party has an *overriding interest*.[136] If so, then regardless of notice the purchaser will be bound to honour that interest. The most common situations where there is an overriding interest is if the claimant has an unregistered leasehold estate in land not exceeding seven years,[137] or the interest holder is in actual occupation of the premises. An unregistered lease in the property is relatively straightforward according to the statutory provisions in the LRA 2002.[138] However the protection of a proprietor in actual occupation of property is less so. Although the LRA 2002 now requires most interests capable of being classified as overriding to be noted in the register,[139] there are several that will still be protected so long as the holder of the interest is in actual occupation of the property. These include: a legal[140] or equitable lease or tenancy;[141] beneficial interest

licq) [1992] 2 NZLR 144; *Ward v Keane* 21/8/92, CA 11/91; *Hopman v Peka* 4/11/98 CP132/94; *Tuscany v Gill* (2001) 4 NZ Conv 193 at 446.
Cases where a registered proprietor's conduct was not considered fraudulent: *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101; *Harris v Fitzmaurice* [1956] NZLR 975; *Bunt v Hallinan* [1985] 1 NZLR 450; *NZ Guardian Trust Co Ltd v Ashby* 16/7/86 CP 727/86; *Talyanicich v Index Developments Ltd* 28/3/91 CP 1330/90; *Crinklewood Holdings Ltd v C V Quigley & Sons Nominees Ltd* [1992] 1 NZLR 463; *Laing v Lanron Shelf Co No 56 Ltd* [1994] 1 NZLR 562; *Auckland CC v Man O'War Station Ltd* 19/8/97 CP 1355/83; *CN & NA Davies Ltd v Laughton* [1997] 3 NZLR 705; *Duncan v McDonald* [1997] 3 NZLRE 669; *Town & Country Marketing Ltd v McCallum* (1998) 3 NZ ConvC 192 at 698.

136 LRA 2002, schedule 3, above n 29.

137 Leases of 7 years or more are registrable dispositions and thus have no effect in law until registered.

138 LRA 2002, schedule 3(1).

139 R J Smith, *Property Law* (4th ed, 2003).

140 *Ashburn Anstalt v Arnold* [1989] Ch 1 at 27D.

141 *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* (1973) 228 EG 725 at 729.

under an implied (bare) trust[142] or some other trust of land;[143] estate contract;[144] unpaid vendors lien;[145] protected or statutory tenant;[146] and a tenants right to recoup repair costs from the future rent owed to the landlord.[147] One overriding interest of particular importance was determined by the House of Lords in *William & Glyn's Bank Ltd v Boland.*[148] It was held that interests of beneficiaries (a wife) of trusts for sale[149] was an interest in the land and thus protected as 'overriding.'[150] This decision represented a large expansion to the negative of registration.[151] If an overriding interest exists then alteration of the title will occur. However as the registered proprietor takes subject to any overriding interests prior to alteration, no indemnity can be claimed as they have suffered no loss. This decision merely reflects the existing entitlement. If such a provision, giving priority to certain overriding interests of proprietors in actual occupation existed in New Zealand, then in several situations a registered proprietor would be bound by the interest prior to registration. Obvious examples in New Zealand where the courts have held the registered proprietor to be innocent of fraud and thus take free of the interest, when they are likely to be bound by the interest in England, include the factual situations found in *Harris v Fitzmaurice*[152] and *Bunt v Hallinan.*[153]

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142 *Collins v Lee* [2001] 2 All ER 332 at 336.

143 *William & Glyn's Bank Ltd v Boland* [1981] AC 487; *City of London BS v Flegg* [1988] AC 54; *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953; *Popely v Heltfield Properties Limited* [2005] EWHC 368 – where the claimant sought to establish a constructive and resulting trust.

144 For example an option to purchase: *Webb v Pollmount Ltd* [1966] Ch 548 at 603 & a right of pre-emption (s 155 LRA 2002): *Homsy v Murphy* (1997) 73 P & CR 26 at 35.

145 This is a right which one person has to either retain the property of another or have a right over it until a claim against the other is satisfied (P Spiller, *Butterworths NZ Law Dictionary* (6th ed, 2005)) – *Ferristhurst Ltd v Wallcite* [1999] Ch 355 at 367.

146 *Barclays Bank plc v Zaroovabli* [1997] Ch 321 at 328.

147 *Lee-Parker v Izzett* [1971] 1 WLR 1688 at 1693.

148 *William & Glyn's Bank Ltd v Boland* [1981] AC 487 applying the LRA 1925, s 71(g).

149 Trusts of Land and Appointment of Trustees Act 1996 - the term a 'trust for sale' is now known as a trust of land.

150 Applying LRA 1925, s 70(g).

151 E Cooke, 'E-Conveyancing in England: Enthusiasms and Reluctance,' in D Grinlinton (ed), *Torrens in the 21st Century*: (2003) at 280.

152 *Harris v Fitzmaurice* [1956] NZLR 975.

153 *Bunt v Hallinan* [1985] 1 NZLR 450.

(b) No Overriding Interest

There will be some situations in England where an unregistered proprietor will not have an overriding interest in the land. But does that mean that a registered proprietor, who for instance has actual knowledge of the interest and purchases the property with the object of defeating that interest (akin to fraud in New Zealand), can take free of it? There is very little authority on this question in the English land registration system. The LRA 1925 and 2002 seem extremely reluctant to get tangled in this debate. Cross J[154] emphatically stated, 'notice of something which is not on the register of the title in question shall not affect a transferee unless it is an overriding interest.' Does this indicate that this question is completely closed then? There was a glimmer of hope cast by Graham J in *Peffer v Rigg.*[155] It is this decision, which did not concern any issue of an overriding interest that has been branded as the 'root of the English systems unease' with Torrens fraud.[156] Graham J held that a registered proprietor was bound by an unregistered interest on three grounds,[157] the most notable of these being a lack of good faith (equivalent to Torrens fraud). Section 20[158] of the LRA 1925 seemed to state that a registered proprietor for valuable consideration would take free of the claimant's unregistered interest, regardless of whether there was good faith or notice. Graham J recognised that while the legislation's intention was to simplify matters of title as much as possible, this particular section cannot be interpreted as broadly as this.[159] So he read in tandem with section 20 the definition of a purchaser: 'in good faith for valuable consideration.'[160] This view would not enable a purchaser with knowledge of an interest to take advantage of the Act and secure to himself a flawless title which he ought not to

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[154] *Strand Securities v Caswell* [1964] 2 All ER 956, there was no actual occupation.

[155] *Peffer v Rigg* [1977] 1 WLR 285.

[156] E Cooke and P O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.

[157] There was only nominal (not sufficient) consideration under s 20(4) LRA 1925; and a constructive trust was held to exist.

[158] Equivalent to LRA 2002, s 29.

[159] *Peffer v Rigg* [1977] 1 WLR 285 at 294.

[160] LRA 1925, s 3 (xxi).

obtain.[161] Good faith was essential to the transaction.

Strong criticism[162] has been directed at Graham J's judgment, that in consideration of the issue he ignored section 74 LRA 1925 which states, 'notice of a trust does not affect the register nor any person dealing with the land.' While the analysis may have been wrong, the result must be correct. There was clear knowledge of the trust and a dishonest intention to defeat it on purchasing the property. *Peffer*, factually, closely resembles the New Zealand case of *Efastratiou v Glantschnig.*[163] The New Zealand Court of Appeal found in similar fashion, but in a far more direct manner due to the LTA provisions, that suspect behaviour between the husband and a purchaser did amount to fraud in depriving his wife of her interest (being a breach of a constructive trust). The speed of the transaction (with no inspection of the property), and the nature of it (the property was transferred for cash at 60% below its market value) had the deliberate purpose to defeat the unprotected rights of the transferor's wife. Applying *Peffer* to the law in NZ the registered proprietor's behaviour would result in fraud. It is unfortunate to note that there is no judicial comment in England of any Commonwealth registration principles relating to fraud which may have been of assistance. The decision in *Peffer* has never been directly overruled. However, persuasive authority to do so was reached by the House of Lords in *Midland Bank Trust Co Ltd v Green.*[164] This case does not represent title registration though and can be distinguished on this point.[165] However its facts and reasoning are persuasive and could well be applied to registered land. Lord Wilberforce stressed that the Court will have no regard for the motive of transactions which would be necessary for determining whether one had good faith: 'to make the validity of the transaction dependant on a

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[161] *Peffer v Rigg* [1977] 1 WLR 285 at 295.

[162] M P Thompson, 'Registration, Fraud and Notice' [1985] CLJ 280. Graham ignored the deliberate decision that notice should be irrelevant to registered land (Report of the Acquisition and Valuation of Land Committee (1919) Cmd 424, para 32) and also cases which emphasised the irrelevance of notice: *Strand Securities v Caswell* [1964] 2 All E.R. 956; *Parkash v Irani Finance Ltd* [1970] Ch 101, Plowman J stated that 'one of the essential features of registration of title is to substitute a system of registration of rights for the doctrine of notice.'

[163] *Efstratiou v Glantschnig* [1972] NZLR 594.

[164] *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

[165] Created under the Land Charges Act 1925.

person's mind, seems to make distinctions equally difficult to analyse in law as to establish in fact.'[166] It is submitted that this reasoning should not be adopted with relation to registered land. It is necessary and possible to look at the conduct and intention of the purchaser, as is done when determining fraud in a Torrens system. Assessing 'actual dishonesty'[167] precisely requires categorising the purchaser's motive which Lord Wilberforce does not support.

The issue of whether good faith is required now is not expressly addressed by the LRA 2002. As land registration is a statutory concept[168] there needs to be some 'door' in the legislation to enable importation of this requirement. However there is no definition of a 'purchaser' in the LRA 2002 and thus the words of section 29 are to be interpreted without any assistance. If the courts interpret the list referred to in section 29 as exhaustive, then arguments for the importation of notice will be futile. The Law Commission was far clearer than the LRA 2002 though. It emphasised that knowledge (actual notice) of an unprotected interest or bad faith would not have any affect upon the statutory protection of the purchaser.[169] No sympathy is shown for those in England who do not protect their interests.

3. Comparison

The absence of good faith in the LRA 2002, strong criticism and misapplication of the statutory requirements in *Peffer,* and the general reluctance for the English courts to adopt any common law principles of notice leaves the jurisdiction with a clearly different approach for dealing with unregistered third party interests over registered land. The focus in England is likely to be directed solely at whether an unregistered third party has an overriding interest. It seems clear, in the absence of an overriding interest, that an unprotected interest is defeated by a registered disposition regardless of if the registered

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166 *Midland Bank Trust Co Ltd v Green* [1981] AC 513 at 531.

167 *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101.

168 E Cooke and P O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.

169 Law Commission and HM Land Registry, *Land Registration for the Twenty-first Century: a Conveyancing Revolution,* No. 271 (London, 2001) para 5.16.

proprietor acted wholly fraudulent. The only option available to the claimant is to establish a personal claim (akin to that of an *in personam* claim in New Zealand).[170] E Cooke[171] suggests that as the avenue for any requirement of good faith is no longer available, the *in personam* claim will develop far further than anticipated. This comment seems correct as the courts surely would not permit the 'statute to be used as an instrument of fraud.'

While the status accorded to a person who has an overriding interest weakens the concept of title registration, it should at least be mentioned that surprisingly, systems like New Zealand's that do not accord paramount status to unregistered interests, are destined to face more litigation under the fraud exception to indefeasibility. However as so few cases arise, this is a valuable trade off.

Conclusion

This paper has focused on comparing the consequences of fraudulent land transactions between England and New Zealand by directing attention to these three fundamental questions. As submitted, there are few similarities between the land title registration systems. The English LRA is founded upon and deals with the fraudulent transfer of property on a wholly different conceptual basis and in a far more complicated manner. This subsequently makes the task of directly comparing cases between each jurisdiction a challenge as the judgments are naturally focused on the relevant legislation. As the LRA 2002 has only recently been enacted, one can only wait with interest for future judgments so that additional comparisons between the jurisdictions can be drawn.

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[170] An *in personam* claim arrises out of a proprietors own conduct.

[171] E Cooke and P O'Connor in 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640.

NGATI APA: A COUNTER-REFORMATION

LAURA FRASER* AND JESSE WALL**

Introduction

The Court of Appeal adjudicated a conflict of precedents unique in New Zealand jurisprudence when it decided *Attorney General v Ngati Apa*[1] *("Ngati Apa")* in 2003. The Court had refused to recognise that the doctrine of customary title was a source of the common law sixty years earlier in *Re the Ninety-Mile Beach*[2] *("Ninety-Mile Beach"),* a decision defiantly inconsistent with earlier decisions of the Privy Council.[3] *Ngati Apa* represents a bold, if not wholly unexpected, departure from this earlier Court of Appeal decision and is the most recent end of a significant shift in judicial approach to customary rights in New Zealand. Despite legislative intervention to override the immediate impact of the *Ngati Apa*, the case remains a useful example of the manner in which appellate courts overturn their own prior precedents.

This article looks to explore the latter decision of the Court of Appeal from a jurisprudential standpoint. Part A seeks to describe the change of law in *Ngati Apa* with particular emphasis on the reasoning that led to overturning *Ninety-Mile Beach.* Part B will explore some of the different jurisprudential frameworks that compete to describe such modifications in the law. It will be argued that Realist Positivism provides the most accurate description of the workings of the Court of Appeal in the *Ngati Apa* decision.

A. The Decision in *Ngati Apa*

The essence of the Court of Appeal's decision to reverse its own prior decision of *Ninety-Mile Beach* was a fundamental clash as to whether

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1 [2003] 3 NZLR 643 (CA).

2 [1963] NZLR 461.

3 *Nireaha Tamaki v Baker* [1901] AC 561; [1900] NZPCC 371.

Indigenous systems of property ownership were part of New Zealand common law at 1840. This involved clarifying relationships between the common law and statute. While the Court of Appeal in 1963 considered that a positive source of Indigenous rights needed to be found in law, the Court of 2003 felt that Indigenous rights in land continued to exist until expressly abrogated by statute.

1. The Precedent: *Ninety-Mile Beach*

The Court of Appeal had been asked to determine if the Maori Land Court had jurisdiction to investigate and grant title to land within the tidal zone of the Ninety-Mile Beach.[4] The Maori Land Court is a body of limited jurisdiction; the powers of the Court are confined to those conferred on it by Parliament. The Court had been empowered by statute to investigate any claim to a customary interest in land made by Maori with a view to issuing a certificate of title[5]. If this investigatory power was found to extend to areas of the foreshore, then there existed a potential avenue for Maori to claim an interest in some of the last remaining land in New Zealand not subject to freehold title. The Court of Appeal proceeded to analyse the legal question on the assumption that the Maori Land Court had investigated and granted title to lands adjoining the beach, although this fact has subsequently been disputed.[6]

Both North and TA Gresson JJ expressed reservations about the consequences of the Maori Land Court having jurisdiction over the foreshore. North J considered that such a result would be "startling and inconvenient"[7]. Both judges felt that the public interest dictated they decline to recognise any such jurisdiction in the Maori Land Court. Importantly, both judges accepted that the only source of title in New Zealand was the Crown. North J said:

> There is no doubt that it is a fundamental maxim of our laws that the Queen was the original proprietor of all lands in the Kingdom and consequently the only legal source of private title, and that this

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4 *Re the Ninety-Mile Beach,* supra n 2 at 466.

5 Sections 21 and 23, Native Land Act 1965.

6 R P Boast "*Re The Ninety-Mile Beach* Revisited: The Native Land Court and the Foreshore in New Zealand Legal History" (1993) 23 VUWLR 145-170.

7 Supra n 2 at 467.

> principle has been imported with the mass of the common law into New Zealand; that it "pervades and animates the whole of our jurisdiction in respect to the tenure of land": see *R v Symonds* (1847) N.Z.P.C.C. 387, 388.

TA Gresson J similarly expressed this sentiment in his judgment,[8] and Gresson P concurred with both. By adopting this position, the Court precluded the recognition of any customary rights in land, as such rights are not derived from the Crown. North J was careful to point out that this did not automatically mean that Maori had no legal rights in the foreshore. Such rights may have been created by statute or derived from a grant of title.

North J acknowledged that there existed no legislative provision limiting the scope of investigations able to be undertaken by the Maori Land Court. This indicated that investigations into the foreshore might initially have been within the Court's statutory jurisdiction.[9] However, North J felt that the Maori Land Court was required to show "due regard"[10] to the common law position that the Crown was entitled to the foreshore. In the immediate case, North J considered that the prior Maori Land Court investigation into the foreshore of the beach and the subsequent granting of title to adjoining land "wholly extinguished"[11] any claims to rights in the foreshore. Further enquiries into ownership of the foreshore were precluded, as the results of the prior investigation impliedly confirmed Crown ownership of this land. In cases where such an inquiry has been undertaken, rights in the foreshore exist only at the Crown's discretion.

North and Gresson JJ also considered that section 12 of the Crown Grants Act 1866 impliedly excluded Indigenous title in the foreshore.[12] This provision specified that where 'the sea' is the stated boundary of a title to land, this meant the high tide mark. Emphasis was also placed on section 147 of the Harbours Act 1878. This provision said that no part of the shore of the sea could be granted or disposed of without the

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[8] Ibid at 475.

[9] *Re the Ninety-Mile Beach,* supra n 2 at 469.

[10] Ibid at 472.

[11] Ibid at 473.

[12] *Re the Ninety-Mile Beach,* supra n 2 at 473 and 478.

special sanction of an Act of the General Assembly. The Court was of the opinion that these provisions removed the residual ability of the Crown to grant title to the foreshore, thereby impliedly excluding any Maori claims to rights in the area.

Most of the reasoning employed by the Court in this case can be traced to earlier decisions of New Zealand domestic courts such as *Waipapakura v Hempton*[13] and *Wi Parata v Bishop of Wellington*[14]. These decisions held that Indigenous rights in land could only be recognised by positive legal authority such as statute, and thus have no basis in the common law. *Ninety-Mile Beach* can be explained as an orthodox application of the reasoning in these earlier cases. The Court did not seriously contemplate the possibility that such rights may not have needed a positive source.

However, there was more than one approach to Indigenous rights alive in New Zealand case law in 1963.[15] The Privy Council observed the existence of Indigenous title in New Zealand common law in cases such as *Nireaha Tamaki v Baker*[16] and this approach was theoretically binding on the Court of Appeal. The decision in *Ninety-Mile Beach* epitomises the approach of New Zealand courts to this authority.[17] For the most part, New Zealand courts failed to recognise the Privy Council as a source of law regarding Indigenous rights relating to land, a position dramatically pronounced in the *Protest of Bench and Bar*[18] issued in the wake of Privy Council decisions recognising customary rights as an encumbrance on the radical title of the Crown.[19] Thus, customary ownership of the foreshore was not recognised by the Court of Appeal in *Ninety-Mile Beach*.

Consequently, the New Zealand approach to Indigenous title was for

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[13] (1914) 33 NZLR 1065.

[14] (1877) 3 NZ Jur (NS) SC 72.

[15] Paul McHugh "Aboriginal Title in New Zealand Courts" (1984) 2 Canterbury Law Review 235-265.

[16] Supra n 3.

[17] *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA).

[18] (1903) NZPCC 730.

[19] The Protest was a response to the 1903 decision of *Wallis v Solicitor-General* (1903) NZPCC 23.

the most part of the Twentieth Century governed by domestic courts. The decision in *Ninety-Mile Beach* became binding authority on legal ownership of the foreshore by default and Indigenous interests in land were only recognised where empowered by statute.

2. The Change: *Ngati Apa*

Political, social and legal circumstances changed dramatically in the decades following *Ninety-Mile Beach*. Many post-colonial jurisdictions had come to recognise the existence of Indigenous title at common law.[20] In New Zealand, the landmark decision of *Te Weehi v Regional Fisheries Officer*[21] suggested that the New Zealand judiciary was increasingly receptive to recognising Maori customary rights.[22] Importantly, other New Zealand cases such as *Te Runanga o Muriwhenua Inc v Attorney-General* [23] and *Te Runanganui O Te Ika Whenua Inc Society v Attorney-General*[24] had hinted, by analogy, that *Ninety-Mile Beach* was wrongly decided. In 2003 the Court of Appeal had an opportunity to revisit the jurisdiction of the Maori Land Court to investigate customary title to the foreshore and seabed. The opportunity arose in the context of a claim made in the Maori Land Court by the Ngati Apa iwi that they held customary title to the foreshore and seabed of the Marlborough Sounds.

The *Ngati Apa* decision did not address the factual question of whether customary title to the foreshore and seabed could be established in the Marlborough Sounds. It addressed the preliminary legal issue of whether the Maori Land Court had the jurisdiction to undertake an investigation into the foreshore and seabed with a view to declaring the land customary land within the meaning in section 129(2)(a) of Te Ture Whenua Maori Act 1993. In addition, the Court made observations on

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[20] See for example *Mabo v Queensland* (1988) 166 CLR 186; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

[21] [1986] 1 NZLR 680. Williamson J accepted a defence to a charge of possessing undersized paua based on a Maori customary fishing right given statutory effect by section 88(2) Fisheries Act 1983.

[22] Supra n 6 at 169.

[23] [1990] 2 NZLR 641.

[24] [1994] 2 NZLR 20.

the inherent jurisdiction of the High Court to declare land held under native title.

The case before the Court of Appeal had some factual differences to *Ninety-Mile Beach*. *Ngati Apa* related to both foreshore and seabed of the Marlborough Sounds. Some of the land in question had never been subject to an investigation by the Maori Land Court. However, the majority of the Court did not distinguish *Re the Ninety-Mile Beach* on the facts.[25] Elias CJ preferred the reasoning of the earlier Privy Council decisions to that of the Court of Appeal in *Ninety-Mile Beach*. Elias CJ argued that *Ninety-Mile Beach* relied on decisions that had been "discredited"[26] and consequently was not of precedential pedigree. The Chief Justice was careful to couch her decision in terms of the established precedent of *Nireaha Tamaki,* casting *Ninety-Mine Beach* and the domestic decisions that preceded it as an unfortunate aberration from settled law.

While Elias CJ described the actions of the Court as predicated on established authority, it can be argued that the departure from *Ninety-Mile Beach* in effect represented a new approach for New Zealand courts. The core disagreement with the reasoning in *Ninety-Mile Beach* is clearly explained in the opening paragraph of the judgment of Tipping J:

> When the common law of England came to New Zealand its arrival did not extinguish Maori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not, therefore, acquire wholly unfettered title to all the land in New Zealand. Land held under Maori customary title became known in due course as "Maori customary land".[27]

This approach to customary title was first taken by a New Zealand Court in the decision of *R v Symonds*[28] in 1847. The reasoning behind this approach flows from the Native Laws Act 1868 which provided

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[25] Gault P's judgment is distinguished from the majority on this point: see discussion of his judgment in Part B of this article.

[26] *Ngati Apa* supra n 1 at [14].

[27] Ibid at [183].

[28] (1847) NZPCC 387.

that English common law was applied in New Zealand only in so far as applicable to the circumstances of the colony.[29] The existence of an established regime of sophisticated Indigenous property rights is a circumstance of New Zealand sufficient to modify English common law. Starting from the premise that Indigenous title is capable of recognition at common law, two key flaws are evident in the analysis of the Court of Appeal in *Ninety-Mile Beach*.

Firstly, the Court of Appeal's earlier analysis of the Crown Grants Act and the Harbours Act is flawed insofar as the Court held that these enactments extinguished any existing customary rights. Neither statute expressly excluded the potential for customary title. If Parliament intends to extinguish any customary title by statute then it must use language that is "crystal clear"[30]. In *Ngati Apa* it was asserted in argument by counsel that several other statutory regimes extinguished customary title.[31] The Court found that no New Zealand statutes were of the clarity necessary to extinguish any existing customary title. Equally, the Court held that statutes regulating the use of the foreshore and seabed[32] did not exclude the potential for customary title insofar as customary title is consistent with such regulation.[33] The Court set a high threshold for extinguishing customary rights by statute.

Secondly, the presumption that an earlier Maori Land Court investigation precluded the existence of customary title to the foreshore does not stand if it is recognised that Indigenous title is a part of the common law. This argument rests on the assumption that the foreshore "remains with the Crown"[34] following such an investigation. Such an assumption is "not supported by authority"[35].

Numerous other issues were canvassed in *Ngati Apa* such as the powers of the Maori Land Court under the Te Ture Whenua Maori Act to

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[29] Ibid at [17].

[30] Ibid at [185].

[31] These statutes include the Territorial Sea Acts and the Foreshore and Seabed Endowment Act 1991.

[32] For example, the Resource Management Act 1991.

[33] *Ngati Apa,* supra n1 at [75 - 76] and [192].

[34] Ibid at [84].

[35] Ibid at [85].

confer use rights in land, the meaning of 'land' under the Te Ture Whenua Maori Act, and the ability to hold title to the seabed at common law. Each of these issues was decided in a manner that enabled the Maori Land Court to investigate Indigenous title to the foreshore and seabed. However, the primary effect of the decision was to reverse the approach of the courts to determining Indigenous title. After *Ngati Apa,* it must be shown that customary rights in land have been legally extinguished, rather than that customary rights have been created by statute.

The decision of the Court of Appeal is consistent with earlier overseas decisions recognising Indigenous rights in land, such as the landmark decision of *Mabo v Queensland*[36] in Australia and the long line of Canadian cases on the subject, recently confirmed in *Delgamuukw v British Columbia*[37]. These cases are indicative of broad acceptance of the view that English common law was modified to account for existing Indigenous practice on reception in a colonial setting.[38] However, the courts will not have the opportunity to reflect on the full meaning and significance of the decision in *Ngati Apa* for customary rights and title in New Zealand. The Foreshore and Seabed Act 2004 removed the jurisdiction of the High Court and the Maori Land Court to hear claims of customary rights relating to the foreshore and seabed, substituting the common law for more strenuous statutory procedures. Despite this legislative change, the reasoning in *Ngati Apa* provides a striking example of when and how appellate courts will depart from their own previous decisions. Part B will attempt to explain the approach of the New Zealand Court of Appeal to this difficult question from a jurisprudential perspective.

B. Explaining Change in the Common Law

As we have seen in Part A, *Ngati Apa* changed the common law by recognising the potential for customary native title in the foreshore and

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[36] (1998) 166 CLR 186; (1988) 83 ALR 14.

[37] [1997] 3 SCR 1010.

[38] It is worth noting that recent Australian High Court decisions have minimised the significance of this acknowledgement in that jurisdiction: See *Commonwealth v Yammir* (2001) 208 CLR 1; Ruru J "What could have been? The Common Law Doctrine of Native Title in Land under Salt Water in Australia and Aotearoa/New Zealand" (2006) 32 Mon L R 116-145.

seabed. How one perceives the change in *Ngati Apa* depends largely on how one perceives the concept of law. We suggest that there are three conceptions of law that lead to different explanations of how the common law changed in *Ngati Apa*. Part B will first outline how the change can be explained by three possible conceptions of law: 'Strict Positivism', 'Positivist Realism', and 'Dworkinism'. Secondly, the individual judgments of the Court of Appeal will be categorised as adhering to one of three conceptions of the law. Thirdly, it will be argued that Realist Positivism provides the best explanation for the law change in *Ngati Apa*.

1. Conceptions of Law

For our purposes, H. L. A. Hart provides the best explanation of the positivist account of law. At its core, the law is a union of primary rules of obligation and secondary rules of change and recognition. The former relate to the substance of the law; the latter relates to the procedure for determining the law. The way the law can change, according to Hart, is specified through secondary rules. "The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules […] and to eliminate old rules"[39]. For example, the rule that legislation may introduce new primary rules that defeat primary rules arising out of custom or precedent is a rule of recognition. Moreover, the rule that the Privy Council (prior to the New Zealand Supreme Court) could restate the common law in a way that bound the New Zealand Court of Appeal was another secondary rule.

This concept of law gives rise to the first account of the change in *Ngati Apa*: Strict Positivism. From this perspective, the Court of Appeal in *Ngati Apa* was, by using secondary rules properly, following the superior authority of the Privy Council in *Nireaha Tamaki* which recognised common law native title. Accordingly, *Ngati Apa* remedied the mistake made by the Court of Appeal in *Ninety-Mile Beach* in misapplying the rules of recognition by ignoring the Privy Council.

There is an alternative interpretation of Hart's concept of law. As Hart himself notes, secondary rules of recognition are seldom expressly

[39] H. L. A. Hart, *The Concept of Law*, (1961) 92-93.

formulated as a rule. Although the supremacy of the Privy Council over the New Zealand Court of Appeal has been expressed numerous times in case law, it is contended that Hart's conception of law is more concerned with which secondary rules are followed rather than which secondary rules are stated[40]:

> For the most part the rule of recognition is not stated, but is existence is *shown* by the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.

One way of reading Hart's conception of law is to treat secondary rules as sociological facts rather than strict legal rules. When the courts say the rule of recognition is one thing but in reality the practice of the courts is contrary to that rule, the widely accepted practice is in fact the rule. This reading gives rise to the second of our conceptual frameworks: Positivist Realism.

From this perspective, *Ngati Apa* effected a counter-reformation in the secondary rules. The initial reformation began with the*1903 Bench and Bar Protest* and was followed by the Court in *Hempton,* which failed to recognise the authority of the *Nireaha* decision. The reformation then continued with the *Ninety-Mile Beach* decision. The reformation changed a secondary rule: instead of the Privy Council being considered superior to the New Zealand Court of Appeal in the area of the law of Indigenous people's proprietary rights, the decisions of the New Zealand Court of Appeal were accorded the highest pedigree. From 1903 to the mid 1980s there was this unorthodox, yet accepted, secondary rule of recognition in this particular area of law. Hence, according to Positivist Realism, *Ngati Apa* effected a change in a secondary rule of recognition. This 'counter-reformation' returned the secondary rule back to the orthodox position based on the court hierarchy, and enabled the 2003 Court of Appeal to affirm the Privy Council position in *Nireaha Tamaki.*

The above two conceptions of law are different interpretations of a Positivist concept of law. Our third conception comes from a very different school of jurisprudence. R Dworkin in 'Is law a system of

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[40] Hart, 101.

rules?"[41] launched a general attack on Positivism and used Hart's version "as a target"[42]. Dworkin argued that the law includes principles and other standards, and that positivism "forces us to miss the important roles of these standards that are not rules"[43]. Using this framework, our task of explaining how the law came to change in *Ngati Apa* forces us to cast our net wider than the legal rules that were stated and assumed in the case law, or at least in the case law directly relevant to the foreshore.

There are two key characteristics of Dworkinian principles. The first key characteristic is that principles may have to be weighted and balanced against competing principles. It may be that one of the competing principles is certainty of law which requires attention to be paid toward promulgated rules. But that principle of certainty may be trumped in a particular case by a competing principle. Principles are never fully deprived of legal validity. When they conflict, one principle is held to be more important than the other in a particular context, but the defeated principle is not excluded from our legal system. It is simply that in that particular case, the principle was outweighed by another. According to Dworkin, rules do not have this characteristic: "If two rules conflict, one of them cannot be a valid rule."[44]

The second key characteristic is that Hart's rules of recognition cannot identify principles and cannot balance and prioritise them. This requires a normative assessment of the competing principles derived from moral or political theory. Hence, Dworkinian principles are well outside the mechanical rule-based concept of law that legal positivists defend.

Let us now view the position of the Court of Appeal in *Ngati Apa* through the Dworkinian lens. The rule in *Ninety-Mile Beach*, that property title must be derived from the Crown or from statute, might be supported by certain principles. There is the principle that the public interest is best served by not disrupting the established property regime by recognising non statutory sources of title,[45] as well as the principle in

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[41] R Dworkin, 'Is the law a system of rules?', *The Philosophy of Law* (1977).

[42] Ibid. 43.

[43] Ibid.

[44] R Dwokin, *The Philosophy of Law*, 48.

[45] North J considered that non statutory land rights would be "startling and

Wi Parata; that Maori (during the establishment of crown sovereignty) were (in the words of Prendergast CJ) "incapable of performing the duties, and therefore of assuming the rights, of a civilised community"[46] and thus incapable of possessing property rights prior to Crown sovereignty.

On the other hand, there was conflicting authority from the Privy Council in *Nireaha Tamaki*, which was supported by different principles. For instance, there is the principle (affirmed in *Te Weehi*) that for any property right to be extinguished, there must be explicitly clear statutory language to that effect. These principles were also later affirmed in analogous cases, such as *Te Weehi*, *Muriwhenua* and *Te Ika Whenua*.

The conflicting rules seem irreconcilable. However, from a Dworkinian perspective, there is more to law than rules. There are principles that are not found in the most directly relevant precedents that suggest that a court may recognise customary rights in the foreshore and seabed. These principles constitute part of the legal fabric which enabled the Court of Appeal in 2003 to prioritise the principles to find common law native title in the foreshore and seabed. The change in *Ngati Apa* can be thus viewed as an example of wider principles setting aside directly appropriate precedent, striking a better balance in the law than in *Ninety-Mile Beach*.

Therefore, there are different ways of explaining the change of law in *Ngati Apa* depending on the particular lens through which we view the decision. We shall now consider the conceptual frameworks the Judges of the Court of Appeal adopted in the *Ngati Apa* decision.

2. Elias CJ, Keith and Anderson JJ

Elias CJ seems to have subscribed to the Strict Positivist conception of legal change in *Ngati Apa*. The joint judgment of Keith and Anderson JJ purports to adopt this approach. The Chief Justice's view that *Ninety-Mile Beach* should be overturned on the grounds that it was contrary to

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inconvenient", *Re the Ninety-Mile Beach* at 467.

[46] *Wi Parata*, 77.

the Privy Council's decision in *Nireaha Tamaki* is clear from paragraph 13 of the judgment:

> …*Re Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based upon developing insights since 1963. The reasoning the court applied in *Ninety-Mile Beach* was contrary to other higher authority and indeed was described at the time as "revolutionary".

Under this approach, the Court in *Ninety-Mile Beach* in 1963 misused the secondary rules of recognition to apply the rule in *Wi Parata* as the primary rule. The court in *Ngati Apa* cured this defect by applying *Nireaha* as the primary rule that flows from the correct application of secondary rules.

However, Elias CJ later states at paragraph 61 that *Wi Parata* is "contrary to common law and the successive statutory provisions recognising Maori customary title". Moreover, Keith and Anderson JJ state in their joint judgment at paragraph 154:

> …native property rights are not extinguished by a side wind, in this case by a general statute concerned harbours. The need for "clear and plain" extinguishment is well established and is not met in this case. In the Ninety-Mile Beach case, the Court did not recognise that principle of interpretation. Accordingly, for both reasons, we consider that the court seriously misread the provisions in the harbours legislation.

What these extracts suggest is that *Wi Parata* and *Ninety-Mile Beach* were contrary to other aspects of the established fabric of the legal system. In other words, they adhered to rules that are displaced by other principles in the legal system. The relevant principles may be derived from (i) the statutory recognition of Maori customary title in legislation, (ii) common law recognition of customary rights from analogous case law (such as *Muriwhenua*), and (iii) general principles of statutory interpretation.

This would be an example of the Court revising the balance of principles in the legal system to effect change in law: an example of a

Dworkinian conception of law. However, Elias CJ rejects the notion that *Ngati Apa* is a modern revision of the law "based upon developing insights". Hence, the Chief Justice's decision is best understood as an exercise in Strict Positivism. As for the joint judgment of Keith and Anderson JJ, their jurisprudential perspective is unclear. They purport to subscribe to Elias CJ's Strict Positivism, yet they also seem to be re-balancing principles to arrive at the same conclusion.

3. Gault P

In one sense, Gault P's decision in *Ngati Apa* can be seen as a dissent. Although Gault P arrived at the same outcome as the remainder of the Court of Appeal, the avenue which his Honour took to reach the result is unique and difficult to reconcile with the other judgments. Instead of overturning the decision in *Ninety-Mile Beach*, Gault would have narrowed the scope of the decision at paragraph 121:

> But I consider that those conclusions are consistent with the intended application of the provisions of the successive Native Lands Acts. Interests in native lands bordering the sea, after investigation by the Native Land Court (which encompassed ascertaining interests of any other complaints), were extinguished and substituted with grants in fee simple. It does not seem open now to find that there could be have been strips of land between the claimed land bordering the sea and the sea that were not investigated in which the interests were not identified and extinguished once the Crown grants were made….Of course, if it is shown that the land investigated was not claimed as bordering the sea the position might be different. The Court in *Ninety-Mile Beach* case did not rule on that factual situation.

Although this approach was unique in *Ngati Apa*, it is common place for an appellate court to constrain prior precedents to limited circumstances so as to be free from the constraints of difficult precedent. The important question for our purposes is what concept of law drove Gault P to such a narrow view of *Ninety-Mile Beach*?

Gault P must have felt constrained by the precedent value of *Ninety-Mile Beach* if his Honour was unwilling to make findings with regard to the kind of strips of land that were adjudicated upon in 1963. Therefore, in showing deference to the 1963 Court of Appeal, Gault P's decision must be premised upon Positivist Realism. Namely, that

the Court of Appeal's decision in 1963 has the requisite pedigree in this particular area of the law to accurately state the substantive law. Gault P perceives his judgment in *Ngati Apa* as addressing a slightly different question than that was determined in the *Ninety-Mile Beach* decision, whilst assuming the validity of Ninety-Mile Beach. Hence, Gault P tended towards a Positivist Realist perspective, whilst not joining the counter-reformation of secondary rules.

This approach may seem counter-intuitive, but can be understood when one considers the practical impact of reversing *Ninety-Mile Beach*. Gault P's decision reflects a Formalist concern for negative impacts of retrospective change in settled law. The change in law in *Ngati Apa* had a retrospective effect, as it had the potential to attach new legal consequences to past events.[47] This is an insult on the rule of law, as those with interests in the seabed and foreshore could reasonably have relied upon the law as stated in the 1963 Court of Appeal decision. When the 2003 Court of Appeal changes the status of the law, the new law applies to past, present and future conduct which may detrimentally impact on *bona fide* interests.

4. Tipping J

Tipping J also seemed concerned about the disruption of settled law. The judgment of Tipping J recognised explicitly the change in the common law that was brought about by the *Ngati Apa* decision. Tipping J held that the Court in *Ninety-Mile Beach* did not adequately recognise the fundamental point that the Crown acquired sovereignty in New Zealand subject to Maori customary title.[48] Tipping J also recognised that although the "decision in Ninety Mile has stood for 40 years"[49]it was necessary to overturn it. At paragraph 215:

> I was initially hesitant but am now satisfied that the case for overruling *Ninety-Mile Beach* is clearly made out […] while the case has stood for a long time, it is better in the end that the law now be set upon the correct path.

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[47] See Elmer A Dreidger, Statutes: Retroactive Respective Reflections (1978) 56 *Canadian Bar Review*, 268.

[48] *Ngati Apa*, paragraph [197].

[49] *Ngati Apa*, paragraph [209].

Tipping J, by recognising that *Ngati Apa* was a change in law, adopts a non-Dworkinian concept of law. From a Dworkinian perspective, the rules and principles that determined whether there was a common law customary title in the foreshore and seabed would have always been a part of the fabric of the law, despite the failure of previous courts to properly identify them. A Dworkinian judge would not 'change' the law, but merely declare the true state of the law by relying on both rules and principles. Instead, Tipping J viewed *Ngati Apa* as setting the law upon a different path.

Furthermore, it is difficult to reconcile the Strict Positivistic account of Ngati Apa with the concession that the Court is changing the law. If it is the case that the Court of Appeal in *Ninety-Mile Beach* merely misused the secondary rules of a legal system, then it would be surprising that such an error would stand for 40 years. Under a Strict Positivist conception, ever since the Privy Council's findings in *Nireaha* the common law has recognised customary title. The decision of a subordinate court could not have the requisite pedigree to overturn the Privy Council decision. Therefore, to concede that *Ngati Apa* represents a change in the law is to view the decision in *Ninety-Mile Beach* as a reformation and the decision in *Ngati Apa* as a counter-reformation of secondary rules: the Positivist Realist conception.

5. Which conception of the law provides an adequate account of *Ngati Apa*?

A complication for both a Strict Positivism and a Dworkinian conception of law is that both conceptions are premised upon a declaratory theory of judgment. Namely, that the court does not change the law, rather declares the true nature of the law. This declaration may be made upon the basis of primary and secondary rules or following a balancing of established principles. Nonetheless, it is an unstable premise from which to explain the law. As Lord Browne-Wilkinson notes in *Kleinwort Benson Ltd v Lincoln City Council*:

> …the theoretical position has been that judges do not make the law; they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed; its true nature is disclosed, having existed in that form

> all along. This theoretical position is… a fairy tale in which no one believes. [50]

Hence, it is problematic for these concepts of law that *Ninety-Mile Beach* has been viewed as good authority for forty years before *Ngati Apa*. A descriptive conception of law needs to be able to account for this. Strict Positivism fails to account for the change in *Ngati Apa,* as the 40 year reign of *Ninety-Mile Beach* can only be explained as a failure of the secondary rules.

A Dworkinian conception could explain the change in terms of new principles and policies being introduced into the legal system after 1963, or by reference to a re-balancing of older principles against the rules. But *Ngati Apa* would not be a *change* in law, it would be a *declaration* of the law as a result of rules and principles that have always been the law. Therefore, the Dworkinian conception of law provides an adequate explanation of *Ngati Apa,* although it requires us to believe in the declaratory theory of judgment.

Positivist Realism also provides an adequate explanation of the change in *Ngati Apa*. In the words of the Chief Justice, Ninety-Mile Beach was "revolutionary". It was revolutionary as it, along with the *1903 Protest of Bench and Bar*, marked a reformation in the secondary rules of recognition in a particular area of New Zealand law. It seemed to establish that in the area of Indigenous land law, the New Zealand Court of Appeal had higher pedigree than the Privy Council. The change in 2003 was thus a counter-reformation, reverting back to the orthodox rules of recognition. This, in our opinion, is the best way to explain the change in law effected by *Ngati Apa*.

Conclusion

Ngati Apa was a case that finally brought to an end a unique disagreement between New Zealand domestic courts and the Privy Council in the area of Indigenous rights. From a jurisprudential standpoint it provides a useful illustration of the possible applications for the different classical conceptions of law, in particular, an illustration of how the conceptions of law are able account for change

[50] [1998] 3 WLR 1095 at 1100.

in law. A Dworkinian conception of law can adequately describe *Ngati Apa* as a re-balancing of legal principles, but it is constrained from describing *Ngati Apa* as a change in law. If we view *Ngati Apa* as changing the law with regard to customary rights in the foreshore and seabed, then we must to view the decision as a counter-reformation of rules of recognition.

A SEASONAL LABOUR SOLUTION? A POLICY DISCUSSION OF A MIGRATION-FOR-WORK STRATEGY WITH THE PACIFIC ISLANDS

SOPHIE GOODWIN*

Introduction

New Zealand is consistently experiencing shortages of unskilled labour in the horticulture and viticulture industries. There has been recent discussion around implementing a seasonal labour scheme, and a pilot scheme is currently in progress. The Pacific Island Community is requesting that New Zealand consider an arrangement where the labour shortages can be relieved by temporary labour from the Pacific Islands. If such a policy is to go ahead, the present issues concerning migrant worker exploitation in New Zealand need to be recognised and addressed.

As a contribution to the discussion developing around a potential seasonal labour policy, this article analyses the debates on Pacific migrant access and the economic and social implications from such policy, with a focus on the protection of migrant workers' rights within New Zealand.

A. Background

1. Competing Concerns

There is a labour shortage in New Zealand in the horticulture and viticulture industries of seasonal jobs such as the picking and packing of fruit. The Pacific Island countries are encouraging a policy where seasonal work permits can be issued to Pacific Islanders interested in carrying out this work in New Zealand. In contemplating a seasonal labour strategy, the New Zealand government is torn between a number of competing issues. A priority consideration in the discussion is how temporary migrant labour would relieve labour shortages in the

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horticulture and viticulture industries, allowing for business expansion. This would consequently have a beneficial impact on the New Zealand economy. That aside, the Government has obligations to New Zealand's own unemployed and there is a fear that a migrant labour scheme will give jobs to migrants that could be filled by New Zealanders. Importing temporary migrants to fill labour shortages raises issues around New Zealand's obligations to protect those migrants from exploitation while they are in the country. In the context of the Pacific Islands, the issue of seasonal labour requires adherence to aid and development agreements, and the evaluation of overseas pressure for liberalised markets in the Islands as an exchange for seasonal labour. The primary focus of this paper is the protection of the rights of the migrant workers in New Zealand, and how a seasonal labour agreement can be reached with the Pacific Islands that gives appropriate weight to these competing issues.

2. A valuable horticulture industry with labour shortages

Horticulture is a lucrative business in New Zealand; in fact the horticulture and viticulture industries export products worth over $2.2 billion per year and supply most of New Zealand's domestic requirements.[1] The industry has undergone increased sophistication in terms of its operations, and has continued to grow.[2] The recent expansion of orchards and vineyards has meant that demand for labour is constantly evolving and increasing.[3]

This is all taking place in a climate of low unemployment rates in New Zealand, which had reached an historical low of 3.6% in 2005.[4] Low rates of unemployment have resulted in a decrease in the availability of seasonal labour from traditional sources, such as the local labour

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[1] Department of Labour "Horticulture/ Viticulture Seasonal Labour Strategy Launch" (Media Release, 08 December 2005) http://www.dol.govt.nz/news/media/2005/horticulture-strategy.asp (at 12 April 2006), p 4.

[2] Ibid.

[3] Ibid.

[4] Hon David Cunliffe "The Future of the Pacific Labour Market Conference" (Speech delivered at The Future of the Pacific Labour Market Conference, Te Papa, Wellington, 29 June 2006). http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=26296 (at 1 August 2006).

supplies.[5] Further, the horticulture and viticulture industries are struggling to attract the labour market due to poor perceptions of employment in the industries.[6] The concern is that these labour shortages are anticipated to be an ongoing problem, which will exacerbate in the future.[7] The lack of net seasonal labour in the horticulture and viticulture industries could significantly limit industry performance, profitability and future prospects.[8] Chris Ward, Horticulture New Zealand business manager, says highly profitable horticultural exports can be compromised at the last minute if there are not enough pickers in the seasonal peak.[9]

Increasing pressure has been placed on immigration to meet immediate labour requirements from overseas.[10] The New Zealand government has reacted by allowing a large number of visitors to New Zealand to participate in seasonal work, under the current immigration policies, such as the Working Holiday Scheme and the Approval in Principle mechanism.[11] History suggests however that such shortages are likely to be cyclical, and it is therefore necessary to assess what policy adjustments might be appropriate.[12]

B. New Zealand's Current Temporary Labour Policy

New Zealand does not currently have a specific seasonal migrant labour scheme. Migrants are able to obtain work permits under general immigration categories, which allow for the employment of both

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[5] Department of Labour "Horticulture/ Viticulture Seasonal Labour Strategy Launch" (Media Release, 8 December 2005) http://www.dol.govt.nz/news/media/2005/horticulture-strategy.asp (at 12 April 2006), p 4.

[6] Ibid.

[7] Ibid, p 5.

[8] Ibid.

[9] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

[10] Hon David Cunliffe "The Future of the Pacific Labour Market Conference" (Speech delivered at The Future of the Pacific Labour Market Conference, Te Papa, Wellington, 29 June 2006). http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=26296 (at 1 August 2006).

[11] Ibid.

[12] Ibid.

seasonal and fulltime workers. The number of temporary migrant workers allowed through current immigration mechanisms is inadequate to meet the seasonal labour demands. There are a number of other problems with these schemes, which will be discussed briefly below.[13]

1. **Working Holiday Scheme** (WHS) - This programme applies to countries with which New Zealand has a reciprocal agreement, and in 2003 19,652 WHS visas were issued to 18-30 year olds under the scheme. Such schemes tend to favour European countries, namely those in the developed world that are not reliant on migrating to earn a living.[14] Australian experience in the Working Holiday Maker Scheme has shown tourists to be an unreliable source of labour, as holiday-making is a priority over employment.[15]

2. **Variation of Conditions** (VOC) - Under this mechanism, visitors already in New Zealand are able to change their visa status to allow them to work for a finite period where an absolute labour shortage is declared. During the 2003-2004 season 2,100 VOCs were issued. This system potentially has the same problems as the Working Holiday Scheme, as it does not allow people to migrate solely for the purpose of work.[16]

3. **Approval in Principle** (AIP) - This was an idea tested by a pilot scheme for 2004-2005, and allows employers to employ people from overseas on the condition that they also commit

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[13] Peter Silcock *Medium- Long-Term Horticulture and Viticulture Seasonal Labour Strategy* (The Horticulture and Viticulture Seasonal Working Group, 2005) www.hortnz.co.nz/communications/docs/Seasonal_Labour_Strategy.doc (at 12 April 2006), p 12.

[14] Ibid.

[15] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

[16] Peter Silcock *Medium- Long-Term Horticulture and Viticulture Seasonal Labour Strategy* (The Horticulture and Viticulture Seasonal Working Group, 2005) www.hortnz.co.nz/communications/docs/Seasonal_Labour_Strategy.doc (at 12 April 2006), p 12.

to employ New Zealanders.[17] In the 2005-2006 financial year, the Department of Labour figures show that New Zealand employed nearly two thousand workers using the Approval in Principle Scheme. These people came from countries such as Fiji, Kiribati, Samoa, Tonga and Vanuatu, to work in jobs such as fruit growing, as nursery workers, and market-garden labouring.[18] It is extremely difficult to get approval for workers to come into New Zealand for short-term employment, as there is a very high threshold under the Approval in Principle Scheme. One requirement is proof that there are no suitable New Zealanders to fill the position.

4. **Pacific Island Quota Programme** - this quota programme enables Pacific Islanders to be recruited to fill fulltime positions. The problem with this mechanism is that this does not allow for seasonal labour, and thus the migrant has to leave their home to live in New Zealand, rather than being able to return with their earnings.[19]

5. **Horticulture Work Permit Pilot** - A pilot was established for the 2005-2006 season to allow work in the horticulture and viticulture industries for up to nine months. This scheme also allows for the return to work in New Zealand again if the time spent out of New Zealand is longer than the time spent in New Zealand.[20] This pilot policy is evaluated in section G of this report.

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[17] Ibid.

[18] Angela Gregory "Pacific Solution Considered to Labour Market Shortages" The New Zealand Herald (New Zealand, 24 June 2006) http://www.nzherald.co.nz/author/print.cfm?a_id=61&objectid=10388069 (at 25 July 2006).

[19] Peter Silcock *Medium- Long-Term Horticulture and Viticulture Seasonal Labour Strategy* (The Horticulture and Viticulture Seasonal Working Group, 2005) www.hortnz.co.nz/communications/docs/Seasonal_Labour_Strategy.doc (at 12 April 2006).

[20] Ibid.

1. The lean towards change

In the past, seasonal labour policy has not been considered as an appropriate solution to the demand for temporary unskilled labour.[21] A 2001/2002 Work Permit Review concluded that while Working Holiday Schemes may relieve some pressure for labour shortages, other schemes for temporary immigration were not a desirable policy alternative.[22] The review considered the unavailability of labour was caused by a lack of employees prepared to work for the going rates, and immigration did not solve this problem.[23]

This lack of available seasonal labour has been aggravated by the narrowing of the New Zealand labour market. In the last few years, unemployment has decreased from 6.3 percent at the end of 1999, to just 3.6 percent at the end of 2005.[24] Over the same period, employment has increased by 10 percent.[25] Reports have indicated that employers are having substantial difficulty in recruiting unskilled labour; as many as twenty-five percent of employers have raised the complaint.[26]

In response to employers' concerns, the New Zealand government is currently undertaking work on the interface of various responses to labour market shortages. The use of immigration policy is now being considered as one possible response to seasonal labour unavailability.[27] This policy would be looking to increase the numbers of unskilled workers able to enter New Zealand for employment. The specific category of 'unskilled work' is broadly defined in this context as low or unskilled occupations that can be learnt in a relatively short period of time.[28]

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[21] Cat Moody *Migration and Economic Growth: A 21st Century Perspective* (Working Paper 06/02, New Zealand Treasury, 2006) www.treasury.govt.nz/workingpapers/2006/twp06-02.pdf (at 13 April 2006), p 35.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] Ibid.

2. Approach by the Government

The general attitude being expressed by New Zealand's current Government is that a seasonal labour scheme would be beneficial to industry in New Zealand, but it needs to be weighed against the risks and possible detriments to the New Zealand unemployed.[29] At a Forum Island Leaders meeting in Port Moresby in 2005, Helen Clark indicated that New Zealand was willing to look into the issue of seasonal labour, but noted "the issues related to the risk of overstaying and potential exploitation would need to be addressed carefully"[30]. The New Zealand Government expressed its support for the Pacific Plan, which was in the process of being launched at the Forum Island Leaders meeting.[31] The goal of access to labour markets from the Pacific Islands is a vital part of the process of the Pacific Plan, and this is something currently under consideration. The foreign minister of Papua New Guinea stated that part of New Zealand and Australia's commitment to the Pacific Plan should include permitting increased seasonal labour, as "it is one way to demonstrate that they are serious about assisting island countries to develop their capacity and their economics."[32] The Department of Labour has been scoping out the possibility of a seasonal labour scheme by evaluating past schemes in New Zealand, as well as those operating overseas.[33]

In addressing the significant labour shortages in the horticulture and viticulture industries, the Government has come through in its endeavour to consider the seasonal labour question. A Seasonal Labour Pilot for the horticulture and viticulture industries was implemented for

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[29] Hon David Cunliffe "The Future of the Pacific Labour Market Conference" (Speech delivered at The Future of the Pacific Labour Market Conference, Te Papa, Wellington, 29 June 2006). http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=26296 (at 1 August 2006).

[30] Ibid.

[31] Ibid.

[32] Nic Maclellan and Peter Mares "Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia" Paper presented to Globalisation, Governance and the Pacific Islands Conference, Australia National University, Canberra, 25-27, October 2005, p 13.

[33] Hon David Cunliffe "The Future of the Pacific Labour Market Conference" (Speech delivered at The Future of the Pacific Labour Market Conference, Te Papa, Wellington, 29 June 2006) http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=26296 (at 1 August 2006).

the 2005-2006 harvesting season.[34] The next step will be to find a replacement for the pilot, and there are indications the focus will be on increasing the use of accredited employers and working alongside them in a partnership approach.[35] The horticulture and viticulture industries in the meantime have been working on a long-term seasonal labour strategy, which contemplates the prospect of recruitment of short-term labour from the Pacific.[36]

The New Zealand Government has indicated it will consider the requests from the Pacific Islands Countries to include them in any temporary labour policy. The interests of the Pacific have been given more attention in light of the recent recommendations from the World Bank report. The Foreign Affairs Minister of New Zealand, Winston Peters commented that the issue of labour access for the Pacific, as raised in the World Bank report, was part of New Zealand's development obligations to the Pacific.[37] He described New Zealand's relationship with the Pacific as a "symbiotic relationship, one where the successes and challenges of the Pacific impact on New Zealand and likewise our successes and challenges impact on the wider Pacific".[38] Peters commented that labour mobility is a huge and complex issue for the Pacific, with significant long lasting implications and flow on effects.[39] In approaching the issue, Peters communicated that the Government was actively considering the matter with some urgency.[40]

It therefore appears that the government is giving the issue of temporary labour serious consideration. Significant research and consultation will be necessary to implement a policy that best caters to

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[34] Mark Williams "Unskilled Labour and Seasonal Work Permit Category" Paper presented to Lexis Nexis Professional Development Immigration Law, Auckland, New Zealand, 2006, p5.

[35] Ibid.

[36] Angela Gregory "Pacific Solution Considered to Labour Market Shortages" The New Zealand Herald (New Zealand, 24 June 2006) http://www.nzherald.co.nz/author/print.cfm?a_id=61&objectid=10388069 (at 25 July 2006).

[37] Winston Peters "New Horizons: The Pacific's Economic Challenge" (Speech to the New Zealand Pacific Business Council, Ellerslie Novotel Hotel, Auckland, 18 August 2006).

[38] Ibid.

[39] Ibid.

[40] Ibid.

the interests of both the New Zealand industries with labour shortages, and the source countries of the temporary labour.

C. Why the Pacific?

1. The current policy

The Pacific Islands have been encouraging increased temporary labour access, and New Zealand is in need of their labour. Under current policy, the Approval in Principle mechanism has allowed around two thousand Pacific Island workers to be issued temporary work permits.[41] This small number does not meet the demand for seasonal workers in New Zealand, nor does it satisfy the pressure from the Pacific Islands for places in a temporary work scheme.[42]

New Zealand has special relationships with the Pacific Island Countries, and has in place policies to allow for flows of migration. Immigration policy currently allows free movement between New Zealand and the home countries of nationals of the Cook Islands, Niue and Tokelau, who are all New Zealand citizens.[43] New Zealand also has a unique Treaty of Friendship with Samoa, which allows a quota of 1,100 citizens of Samoa to be granted New Zealand residence each year.[44] Similar agreements are held under the Pacific Access Category, allowing up to 250 Fijian, 250 Tongan, 75 Kiribati and 75 Tuvalu citizens New Zealand residence each year.[45] All these arrangements are subject to a guarantee of employment, age, and standard health and character, requirements. In addition, principal applicants under the Samoan Quota and the Pacific Access Category must meet a minimum

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[41] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

[42] Ibid.

[43] Hon David Cunliffe "The Future of the Pacific Labour Market Conference" (Speech delivered at The Future of the Pacific Labour Market Conference, Te Papa, Wellington, 29 June 2006) http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=26296 (at 1 August 2006).

[44] Ibid.

[45] Ibid.

level of English ability.[46] Pacific nationals from all states can also apply under other residence categories, for example, family or skilled migrant categories.[47]

These agreements with the Pacific Islands are largely aimed at residency and citizenship. The successful applicants are given the opportunity to immigrate to New Zealand permanently, and not temporarily for seasonal labour. This means that the horticulture and viticulture labour shortages are not filled, as the new migrants are usually required to have already secured permanent work in New Zealand before entry.

2. The Logic of Favouring the Pacific Island Countries

Utilising labour from the Pacific Islands is by no means a new concept for New Zealand. New Zealand has profited from the efforts of workers in the Pacific Island States in the past, such as in the 1960s and 1970s when their labour was vital for filling vacancies during the industrial boom.[48] Pacific people have since continued to contribute significantly to New Zealand's culture and have strengthened and diversified such things as sports, music, arts, dance and political fabric.[49] This relationship signals that New Zealand has an obligation to its Pacific neighbours to prefer their contribution to our labour requirements over other countries. New Zealand has promised to strengthen and protect its special relationship with the Pacific Island Countries, and facilitating a temporary labour agreement is one way in which it can do so.

Both Australia and New Zealand have an increasing demand for seasonal labour, while at the same time, the Pacific is experiencing an excess of available labour.[50] This is due to a consistent increase in the population of working-age people in the Pacific Islands, and a lagging

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[46] Ibid.

[47] Ibid.

[48] New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p11.

[49] Ibid.

[50] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

economy.[51] Employing labour from the Pacific is advantageous to New Zealand, as it provides an easily accessible and available, largely reliable, easily trainable and English-speaking workforce.[52] There are clearly advantages to facilitating labour from the Pacific Islands over other countries.

However, New Zealand and Australia have not responded willingly to suggestions from all quarters to facilitate a greater labour movement from the Islands, even on a seasonal basis.[53] One reason for this rejection of Pacific labour seems to be a preference for seasonal workers from European developed countries. For example, Australia approved permits to over ten thousand backpacker-tourists from developed western countries in 2005.[54]

3. Overstaying

The threat of large numbers of migrants overstaying is a major reason used to explain the inflexibility in the government machinery in dealing with the labour movement issue, and this continues to be the case even at the cost of hurting the country's labour-intensive industries.[55] The issue of overstaying is particularly raised in discussion of temporary labour from the Pacific Islands. The concern is not entirely unjustified. In New Zealand alone, in 2005, a third of the twenty thousand illegal over-stayers were people from the Pacific Islands.[56] There are a number of problems caused by overstaying, which range from issues with law and order, human rights and international relations, to issues of an ethno-cultural nature.[57]

However, there is also the suggestion that the concern of overstaying is out of perspective. Research carried out by Australian Peter Mares,

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[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

[56] Ibid.

[57] Ibid.

research fellow for the Institute of Social Research, Swinburne University of Technology has shown that there have been minimal issues with overstaying in the Canadian Seasonal Agricultural Workers Programme (CSAWP).[58] Mares believes the problem of over-stayers is greatly embellished, and noted that under the CSAWP over fifteen thousand workers entered Ontario as seasonal labourers in 2004, and fewer than one and a half percent were later listed as absent without leave from their job. Some had simply gone home early, and by the year's end all had returned.[59]

The issue of overstaying can be addressed in policy. A number of suggestions have been raised, such as holding a large part of the workers' earnings in a trust account for them, and have it only accessible at the airport on their way home.[60] The worker could be paid enough wages daily for sustenance, and keep the incentive of the remainder of their pay to ensure they leave once their permit has expired.[61] The chances of overstaying would substantially decrease once the period of seasonal labour had ended simply because of the lack of access to extra funds. Another alternative is for employers to have to supply guarantees for the workers. This arrangement has been successfully used in some European countries, and could be suitable for use in New Zealand.[62]

D. Economic and Social Implications for the Pacific Island Countries

1. Pacific labour economic benefits

Implementing a labour arrangement with the Pacific has mutual

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[58] Nic Maclellan and Peter Mares "Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia" Paper presented to Globalisation, Governance and the Pacific Islands Conference, Australia National University, Canberra, 25-27 October 2005, p 4.

[59] Ibid.

[60] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

[61] Ibid.

[62] Ibid.

benefits for both the Pacific nation and New Zealand. One such benefit for New Zealand is labour reliability, especially in a scheme where workers can return each season, enabling employers to plan production with greater confidence and build up a skilled workforce.[63]

Working abroad provides benefits for Pacific Island workers such as higher pay rates and the opportunity to send remittances home to improve the quality of life of their family and community.[64] On returning home, the seasonal workers have obtained skills and life experience that can be passed on and utilised within their home community. A recent report by the World Bank emphasised this point, in finding that remittances can contribute significantly to the economic and social well-being of the workers, their families, and the wider community.[65] A reciprocal arrangement for temporary migration between developing and industrial country partners not only assists the process of remittance flows and skill attainment, but also deepens cultural, economic, and political ties across the region.[66] Remittances have been shown to improve income distribution, as well as alleviate poverty, encourage savings and more spending on education.[67]

The Pacific Island Countries are experiencing difficulties retaining workers, as many permanently migrate overseas in search of employment. This is due to extremely limited employment opportunities in the Islands. Paid, formal sector work is scarce in many of the Pacific Island nations, with persistently high population growth and young people numbering up to forty percent of the overall

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[63] Angela Gregory "Pacific Solution Considered to Labour Market Shortages" The New Zealand Herald (New Zealand, 24 June 2006) http://www.nzherald.co.nz/author/print.cfm?a_id=61&objectid=10388069 (at 25 July 2006).

[64] Ibid.

[65] The World Bank "World Bank Eyes Fix for Pacific Islands Unemployment" (Media Release, 15 August 2006) http://www.nzherald.co.nz/section/print.cfm?c_id=3&objectid=10396281 (at 15 August 2006).

[66] Satish Chand *Labour Mobility for Sustainable Livelihood in the Pacific Island States* (Research Paper, The Australian National University, Canberra, 2004), p3.

[67] The World Bank "World Bank Eyes Fix for Pacific Islands Unemployment" (Media Release, 15 August 2006) http://www.nzherald.co.nz/section/print.cfm?c_id=3&objectid=10396281 (at 15 August 2006).

population.[68] Fewer than ten percent of the job seekers in some Pacific nations will find paid work at home.[69] Projections show that by about 2015 about 270,000 people in the Solomon Islands and over 110,000 people in Vanuatu will not find jobs in the formal employment sector.[70]

The need to migrate for employment impacts on the community through a loss of young, skilled people, and in some remote areas it threatens the outcome of depopulation. Temporary migration to countries such as Australia and New Zealand, would enable the continued increase of remittance flows to Pacific Island Countries, while at the same time preventing depopulation of the small communities, as the migration for work is only temporary.[71] The reverse flow of retirees, tourists, and volunteers will simultaneously replace some of those migrating for work within remote communities.[72] Thus, temporary migration is one solution to this, as the Pacific Island Country can earn revenue offshore while not loosing its population.

2. Remittances

Pacific Island Countries rely heavily on remittances from overseas labour for income. Income earned from workers abroad, unlike aid, is likely to provide a sustainable source of revenue, thus relieve the resource constraints currently an issue in the Pacific Islands.[73] A number of Pacific Island Countries have unstable economies and rely heavily on remittances, which are their biggest revenue earners.[74] Remittances already constitute a significant part of the economies of the Cook Islands, Fiji, Niue, Samoa, and Tonga. Easing conditions for temporary movement of unskilled workers will give remittances an even a greater role in the sustenance of island economies and remote

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[68] Ibid.

[69] Ibid.

[70] Ibid.

[71] Satish Chand *Labour Mobility for Sustainable Livelihood in the Pacific Island States* (Research Paper, The Australian National University, Canberra, 2004), p 3.

[72] Ibid.

[73] Ibid.

[74] Dev Nadkarni "Views from Auckland: Seasonal Labour Pains" (Media Article, 2006) http://www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=15829/overideSkinName=issueArticle-full.tpl (at 1 August 2006).

communities of the Pacific.[75] The impact of remittances on the Fijian economy was researched by the Swinburne Institute of Social Research, which noted that in Fiji remittances grew F$56 million in 1994 to F$306 million in 2004.[76] Historically, Fiji relied on sugar and gold, then tourism and garment manufacturing, but over the past decade the amount of remittances increased to a level where they earn more foreign exchange than all other sectors except tourism.[77] The International Labour Organisation notes that the sum of US$100 billion that is sent home in remittances every year by migrant workers far exceeds the sums for overseas development assistance, and is second in the international commodity trade only to global petroleum exports.[78]

It is estimated that the reliance on remittances is unlikely to change in the future, as many countries depend upon remittances and aid from overseas. Tuvalu Prime Minister Maatia Toafa acknowledges the dependence on remittances, saying that labour mobility is one of the few ways his highly-dependent resource-poor country can contribute to its own economic survival as well as to the economies of Australia and New Zealand.[79]

Increased opportunities for seasonal work in New Zealand would secure this influx of revenue, allowing for stability for the time being. This would allow Pacific Island Countries to plan how to use this revenue for enterprise and development, and aim towards self-sufficiency. Seasonal labour could be the means to provide short term funds, allowing for long term planning. A recent report by the World Bank has shown that remittances induce higher savings in both Fiji and

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75 Satish Chand *Labour Mobility for Sustainable Livelihood in the Pacific Island States* (Research Paper, The Australian National University, Canberra, 2004), p 3.

76 Angela Gregory "Pacific Solution Considered to Labour Market Shortages" The New Zealand Herald (New Zealand, 24 June 2006) http://www.nzherald.co.nz/author/print.cfm?a_id=61&objectid=10388069 (at 25 July 2006).

77 Ibid.

78 New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 4.

79 Nic Maclellan and Peter Mares "Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia" Paper presented to Globalisation, Governance and the Pacific Islands Conference, Australia National University, Canberra, 25-27, October 2005, p 13.

Tonga and there is some evidence of remittances stimulating business activities in Tonga.[80] This sort of strategy could be part of the seasonal labour arrangement between the Pacific Islands and New Zealand.

3. Social impacts on the Pacific Islands

A facet of the seasonal labour debate which needs to be considered is the negative effect that temporary migration schemes have on the source country. Research carried out by the Swinburne Institute for Social Research has raised a number of adverse impacts in the Pacific Islands.[81] The Pacific Islands are undergoing significant changes in social structures, in the areas of employment, gender roles and urbanisation.[82] It was noted in the research that a number of the people interviewed expressed concern that seasonal worker schemes could further intensify the changes taking place in the traditional rural village economies.[83] The research uncovered a thread of social impacts that temporary migration has had on the communities, such as a number of family break-ups, infidelity and new relationships forming.[84] The community leaders were anxious about how gender roles would be affected by more people heading overseas to participate in temporary labour schemes.[85] The concerns were about the loss of male role models, an ageing population left with agricultural work in the rural areas while the young migrated to work, and the burdens on ageing women in terms of care for young children in the family.[86] These social impacts need to be weighed against the economic benefit of remittances to determine whether it is worth it. In developing a seasonal labour strategy with the Pacific Islands, a partnership

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[80] The World Bank *At Home and Away- Expanding Job Opportunities for Pacific Islanders Through Labour Mobility* (World Bank, 2006) http://siteresources.worldbank.org/INT PACIFICISLANDS/Resources/Executive-Summary-Labour-Mobility-Report.pdf (at 24 August 2006), p 8.

[81] Nic Maclellan and Peter Mares "Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia" Paper presented to Globalisation, Governance and the Pacific Islands Conference, Australia National University, Canberra, 25-27, October 2005, p 9.

[82] Ibid.

[83] Ibid.

[84] Ibid, p 10.

[85] Ibid.

[86] Ibid.

arrangement needs to be reached where New Zealand addresses these concerns and works to reduce the negative social impact.

E. Risks of Worker Exploitation

1. Poor working conditions

The conditions offered to migrant workers are often only the statutory minimum, and in some cases below. The jobs carried out by labourers in the horticulture and viticulture industries are physically difficult, dangerous and dirty.[87] Undesirable occupational duties, coupled with the minimum wage, create an unpleasant and unfair working environment for migrant workers.[88] This leads to a preference of workers willing to accept the conditions, rather than an incentive for employers to improve them.

The provisions allowing the importation of migrants to work for lower wages have raised concerns in Australia. There is a history of exploitation of migrant workers in the Victorian Gold Rush of the 1850s, as well as in the sugar cane fields of nineteenth century Queensland.[89] Not only did these policies lead to the exploitation of workers in terms of wages and working conditions, but also created a popular antipathy to 'cheap foreign labour' due to a fear of foreign workers 'stealing' Australian jobs.[90] This attitude, while expressing concern for the treatment of the migrants, shows the prevalent desire to look after the members of the host country first and foremost.

The hazardous nature of horticultural work puts migrant workers at risk from careless employers who do not correctly adhere to the occupational health and safety laws.[91] There have been a number of cases reported in the media recently where workers have been injured,

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[87] New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 10.

[88] Ibid.

[89] Nic Maclellan and Peter Mares *Remittances and Labour Mobility in the Pacific* (A Working Paper on Seasonal Work Programs, Swinburne Institute for Social Research, 2006) http://www.sisr.net/cag/docs/remittances.pdf (at 20 July 2006), p 28.

[90] Ibid, p 27.

[91] Ibid, p 40.

and the correct protocol has not been followed.[92] There can be complex issues for seasonal workers returning to their home country with workplace injuries, in terms of accident compensation, which may not be available in their country.[93]

There is evidence that workers in the unskilled positions are vulnerable to sexual harassment in the workplace.[94] The risk is further increased if the worker is a migrant and a woman. An Australian survey concluded that one in three women surveyed had been sexually harassed in the workplace, but the rates were higher still for those in unskilled occupations, where forty-seven percent of women surveyed had been harassed.[95] The research showed that these women were more vulnerable due to their subordinate role, lack of information about labour rights and cultural perceptions of relationships to men.[96] These problems are intensified when are women are away from their own country, lacking a support network and information.

2. Migrant Labour Substituted for an Improvement in Conditions

Employers are aware of the poor working conditions temporary migrant employees are exposed to, though often they do not remedy them. Treasury notes that the poor working conditions, low remuneration and lack of training may contribute to the cause of labour shortages in the unskilled employment sector.[97] This view is reinforced by the statistics that show there is capacity for the unemployed in New Zealand to fill the labour gaps in the horticulture and viticulture industries. The number of jobless in New Zealand in June of this year

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[92] Sam Huggard "Problems for Tauranga Police translate to even bigger problem for migrant workers" (Council of Trade Unions Media Release, 22 June 2006) http://www.union.org.nz/news/652.html (at 23 June 2006).

[93] Nic Maclellan and Peter Mares *Remittances and Labour Mobility in the Pacific* (A Working Paper on Seasonal Work Programs, Swinburne Institute for Social Research, 2006) http://www.sisr.net/cag/docs/remittances.pdf (at 20 July 2006), p 40.

[94] Ibid, p 34.

[95] Ibid.

[96] Ibid.

[97] Cat Moody *Migration and Economic Growth: A 21st Century Perspective* (Working Paper 06/02, New Zealand Treasury, 2006). www.treasury.govt.nz/workingpapers/2006/twp06-02.pdf (at 13 April 2006), p 35.

was 161,200.[98] The Council of Trade Unions advocates that these numbers of people are able to meet the demand for seasonal labour, but a disincentive from them doing so is the poor conditions and wages offered in the industries.[99]

Migrant labour is being used to substitute the requirement to reform conditions, wages and the provision of training.[100] Thus, as opposed to raising the standards to make the industry more desirable for New Zealanders, employers are finding migrants who will accept the conditions without improvement. Using immigration to undercut the working conditions in unskilled labour fields could adversely impact on employment opportunities for New Zealanders and reduce the incentives for employers to invest in training and education, as well as offer a better working environment.[101] This undercuts improvements in a tight labour market, and consequently goes against the strategy of developing a high skills, high wage economy.[102]

Irrespective of the fact that these conditions are often compliant with the statutory minimums, if workers already residing in New Zealand will not perform work at the levels of pay or conditions offered, then they cannot be deemed acceptable for migrants to endure.[103]

3. A Lack of Information Leading to a Lack of Enforcement

Temporary migrant workers do not have access to good information about their rights in New Zealand, or how to seek redress when they believe their rights have been breached.[104] Further, complex processes to attain entitlements such as tax returns and workers' compensation can result in temporary migrant workers missing out, especially when

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98 New Zealand Council of Trade Unions Submission on the Immigration Act Review Discussion Paper (June 2006), p 7.

99 Ibid.

100 Ibid.

101 Cat Moody *Migration and Economic Growth: A 21st Century Perspective* (Working Paper 06/02, New Zealand Treasury, 2006). http://www.treasury.govt.nz/workingpapers/2006/twp06-02.pdf (at 13 April 2006), p35.

102 New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 8.

103 Ibid.

104 Ibid, p 10.

the process requires negotiating with bureaucratic systems.[105] The language barrier further complicates this for migrants, when trying to determine what their rights are, or whether they are receiving what they have been promised in terms of employment.[106] Migrant workers are concerned that if they make a complaint about their treatment or conditions that they risk loosing their job, which means they would be deported.[107]

Restrictions on enforcement of migrant workers' rights and employer accountability arise when contractors are used to supply labour.[108] It is estimated that more than half of the horticulture and viticulture industries' labour is supplied through contractors, who also supervise on the property.[109] This allows both the contractors and the employers to pass the buck when it comes to obligations and responsibility for treatment of workers.

The current Approval in Principle (AIP) programme appears to lack any enforcement or supervisory mechanism for employers who are not meeting their obligations.[110] It is unclear what consequences, if any, employers in breach of the AIP programme will be subject to, as there is no evidence at all of any enforcement.[111] Employers recruiting migrant workers under other programmes are equally likely to escape liability for exploitation.[112] The Immigration Reform Discussion paper notes that no prosecutions at all have been made since a new three-tier

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[105] Nic Maclellan and Peter Mares *Remittances and Labour Mobility in the Pacific* (A Working Paper on Seasonal Work Programs, Swinburne Institute for Social Research, 2006) http://www.sisr.net/cag/docs/remittances.pdf (at 20 July 2006), p 41.

[106] Sam Huggard "Problems for Tauranga Police translate to even bigger problem for migrant workers" (Council of Trade Unions Media Release, 22 June 2006) http://www.union.org.nz/news/652.html (at 23 June 2006).

[107] Ibid.

[108] Department of Labour "Horticulture/ Viticulture Seasonal Labour Strategy Launch" (Media Release, 08 December 2005) http://www.dol.govt.nz/news/media/2005/horticulture-strategy.asp (at 12 April 2006).

[109] Ibid.

[110] New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p5.

[111] Ibid.

[112] Ibid.

system of liability was introduced in June 2003.[113] Thus, employers who fail to honour their commitment to pay market-rate wages, or provide conditions above the minimum, for example, may not be reprimanded at all. It is not difficult to see how such a system has provisions for the manifestation of exploitation.

A lack of advocacy for migrant workers makes the opportunities for exploitation worse still. There is concern that unions are not automatically involved to inform and protect temporary migrant workers.[114] The Council of Trade Unions and other unions support an approach to migration issues within the context of looking at the industry as a whole, addressing issues such as investment in training, labour-matching, improved wages and conditions, technology, productivity and industry strategies.[115] Unions are able to monitor conditions and increase the bargaining power of migrant workers through collective advocacy. The Council of Trade Unions has implemented a new migrant employment-related education project, which is aimed to assist in situations of exploitation, and preferably prevent it through education of rights.[116]

4. Rogue employers

In this climate of low accountability migrant labour exploitation, a number of rogue employers have emerged, taking advantage of the situation by employing migrant workers to undermine the terms and conditions of the industry as a whole.[117] By reducing the conditions of their workers, employers are able to consequently reduce their labour costs.

Rogue employers are at an advantage under seasonal labour programmes that allow for only one employer to be specified on the migrant's work permit.[118] This means temporary migrants risk

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[113] Ibid.

[114] Ibid, p 9.

[115] Ibid.

[116] Ibid.

[117] Ibid, p 6.

[118] Nic Maclellan and Peter Mares *Remittances and Labour Mobility in the Pacific* (A Working Paper on Seasonal Work Programs, Swinburne Institute for Social Research, 2006)

expulsion from the country if the employer dismisses them, so they are unlikely to make a complaint. Rogue employers are able to get away with exploitation and abuse of workers who are unable to protest against dangerous working conditions, underpayment or unreasonable demands by their employer.[119]

A recent example involving a rogue employer in New Zealand was where the Service and Food Workers Union came across a young Samoan worker who arrived in New Zealand to work in the horticulture industry in the Hawkes Bay. After the fruit picking season was over, he carried out all necessary protocol to apply for a further work permit for a job in Wellington. His employer was left to provide the necessary information to complete the permit, but instead took advantage of the situation, and used the permit application to force the worker to accept new employment conditions. The employer subsequently dismissed the worker.[120] Situations such as this one are occurring all the time in New Zealand, with a lack of enforcement allowing rogue employers to take advantage of vulnerable employees unable to enforce their rights.

F. International Obligations

This section will discuss New Zealand's obligations at an international level, with regard to how international conventions can help to reduce worker exploitation and improve employer accountability. In particular the section will evaluate New Zealand's compliance with the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the International Labour Organisation's Migration for Employment Convention.

1. New Zealand's Compliance with International Conventions

Temporary migrant workers are vulnerable to mistreatment by their employers and the community at large. One such way to strengthen the rights of migrant workers, and to offer some protection, is for the

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http://www.sisr.net/cag/docs/remittances.pdf (at 20 July 2006), p 40.

[119] Ibid.

[120] New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 6.

government to endorse international treaties that impose obligations on New Zealand that can be enforced by the international community. The Council of Trade Unions supports a rights-based approach to immigration issues, and points out that there are a number of international instruments in this area that New Zealand has not recognised.[121] Such rights-based approaches are found in the International Labour Organisation's Migrant Workers Convention and the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their families.[122]

As part of the international community, New Zealand has obligations to migrant workers. The United Nations has drafted covenants that New Zealand should comply with, and which prescribe the expectations of treatment of migrant workers, both permanent and temporary. New Zealand has not acceded to the United Nations Convention on the Rights of Migrant Workers and their Families, and has only ratified the International Labour Organisation Convention 143. Yet, the Human Rights Commission points out that "the standards used in these instruments can be used as the basis for reviewing legal provisions relating to migrant workers and their families with a view to increasing compliance."[123] Therefore, even though New Zealand is not yet a party to these conventions, the provisions can be used to guide the development of a seasonal labour strategy.

The fact remains that vast numbers of migrant workers are uninformed and ill-prepared to cope with life and work in a foreign country. Equally, most of them are unaware of the human rights protections and fundamental freedoms which they are guaranteed under international treaties and national laws.[124] The best way to deal with this is the implementation of these treaties and conventions, and education of both employers and employees of their rights and obligations under international law. The more information out in the open, the less room

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[121] New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 1.

[122] Ibid, p 15.

[123] Ibid, p 16.

[124] Office of the High Commissioner for Human Rights Fact Sheet No. 24 *The Rights of Migrant Workers*, International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Art.2, para 1 UN Doc A/Res/45/158 (1990), p3.

there is for exploitation.

2. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

In December 1990 the General Assembly adopted the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (ICPRMW).[125] The ICPRMW is a comprehensive international treaty, inspired by existing legally binding agreements, by United Nations human rights studies, by the conclusions and recommendations of meetings of experts, and by the debates and resolutions on the migrant worker question in United Nations bodies over the past two decades.[126] The need to adhere to the International Convention has been recognised by the Pacific Conference for Churches, which is calling on New Zealand, and other Pacific countries to sign, ratify and implement the provisions of the convention.[127] To date, this has not been done by Australia, New Zealand or any Forum Island state. There has been a significant international dialogue around the promotion, ratification and implementation of the ICPRMW and the other ILO Conventions.[128] The controversy is over the incompatibility of a human rights approach to social protection and the increasingly deregulated globalised use of labour.[129] New Zealand's approach to international conventions is to ratify those with which it is already compliant. The ILO has outlined the policy requirements for compliance with the ICPRMW, which New Zealand will have to address, ideally, before ratification. These are a human-rights approach to:

- migration policies and practices;
- an informed and transparent labour migration admission system;
- enforcement of minimum national employment conditions;

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[125] Ibid, p 1.

[126] Ibid.

[127] Nic Maclellan and Peter Mares *Remittances and Labour Mobility in the Pacific* (A Working Paper on Seasonal Work Programs, Swinburne Institute for Social Research, 2006) http://www.sisr.net/cag/docs/remittances.pdf (at 20 July 2006), p 39.

[128] Human Rights Commission *The Rights of Migrants and Their Families,* Human Rights Commission, Human Rights in New Zealand Today http://www.hrc.co.nz/report/chapters/chapter17/migrants01.html (at 4 August 2007).

[129] Ibid.

- challenges to discrimination and xenophobia; and
- institutional mechanisms to ensure coordination of Government and social partners.[130]

This sort of approach would require New Zealand to completely revisit its outlook on migration for labour, which currently targets the highly skilled categories, and people seen of most benefit to the economy.

As a well-researched internationally recognised convention, the ICPRMW provides a reliable framework of rights for New Zealand to apply to a seasonal labour strategy. The articles of the Convention address many of the exploitation issues discussed above, and require specific action by the party state to alleviate the risks of exploitation. Broad human rights issues are addressed in the convention, such as entitlement to fundamental human rights and basic labour protections. Migrants are also entitled to certain human rights protections specifically linked to their vulnerable status.[131] The ICPRMW stipulates the human right to safe working conditions and a clean and safe working environment, as well as reasonable limitations of working hours, rest and leisure.[132] These provisions address the concern that the employment of temporary migrant workers is being used as a substitute for an improvement in conditions in New Zealand. The convention can help regulate the working conditions in the horticulture and viticulture industries through setting standards of what is acceptable. Further, granting labour protections that can be assessed at an international level may increase employer accountability where abuses occur.

Part of the cause of worker exploitation in New Zealand is a lack of information, leading to a lack of enforcement. Article 33 of the ICPRMW requires state parties to ensure that migrant workers and members of their families are openly and freely informed, in a language they are able to understand, of their rights under the Convention and on all matters that will enable them to comply with administrative or

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[130] Ibid.

[131] Office of the High Commissioner for Human Rights Fact Sheet No. 24 *The Rights of Migrant Workers,* International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, Art. 2, para 1 UN Doc A/Res/45/158 (1990), p 2.

[132] Ibid.

other formalities in the state of employment.[133]

As with other United Nations conventions, the ICPRMW is not binding international law. The criticism is that the non-binding nature makes such conventions more something to aspire to than a statement of the reality. However, if New Zealand were to ratify the convention, and incorporate it in New Zealand law, it would be binding on employers and contractors who are to blame for the exploitation of migrant workers. The rights of migrant workers encoded in the ICPRMW would become more than an ideal, and be legally enforceable.

3. International Labour Organisation's Migration for Employment Convention

Unlike the United Nations Convention mentioned above, the International Labour Organisation's (ILO) Migration for Employment Convention has been ratified by New Zealand. The ILO Convention provides a Multilateral Framework on Migration, which is founded on a respect for human rights.[134] The ILO believes that a human rights base is important for migrant policies to prevent detrimental costs on individual migrants and their home societies, and this is recognised in Article 1 of the Convention.[135] The ILO places emphasis on member states ensuring the equality of opportunity and treatment of migrant workers at Article 10, particularly in the areas of employment and right to participate in trade unions.[136] This is particularly useful in the New Zealand context, as one cause of worker exploitation is a lack of union involvement. The membership of a trade union strengthens the enforcement of worker rights, and a seasonal labour strategy could systematically register temporary migrant workers with a trade union at the commencement of their employment in New Zealand.

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133 Ibid.

134 New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 16.

135 Ibid.

136 International Labour Organisation C143 Migrant Workers (Supplementary Provisions) Convention, (1975).

The ILO Convention promotes cooperation and partnership with employers, and educational programmes on the observance of correct practice in Article 12.[137] This emphasis on involvement by employers may help reduce the occurrence of rogue employers and strengthen enforcement of appropriate working conditions, which is an issue in New Zealand at present. The ILO Committee of Experts has commended New Zealand's compliance efforts with the ILO Convention in some respects. Legislation such as the Employment Relations Act 2000 has extended the prohibited grounds of discrimination.[138] However, the ILO Committee of Experts has been critical of a number of issues New Zealand has not taken any action in regard to. For example, there have been no special provisions to ensure the rights of migrant women as a vulnerable category.[139] Another area of concern is the lack of recognition of foreign qualifications, resulting in skilled workers migrating to New Zealand, unable to practice their profession.[140] The recommendations of the ILO Committee of Experts need to be taken seriously by the Government, with every effort directed at compliance.

The combination of both the United Nation's ICPRMW, and the ILO Convention 143, if incorporated into New Zealand domestic law, would significantly strengthen the rights of temporary migrant workers. Further, it would allow regulation at an international jurisdiction that could be enforced at international law, whatever the country of origin of the migrant worker.

G. Development of a Seasonal Labour Strategy

1. New Zealand's Short-term Solution

A short-term solution in the form of a pilot scheme has been initiated in the horticulture and viticulture industries to run until September 2006. The industries have been very receptive to this pilot scheme, as it

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[137] Ibid.

[138] CEACR Individual Direct Request concerning Convention No. 97, Migration for Employment Convention (2002) International Labour Organisation http://www.ilo.org/ilolex/english/newcountryframeE.htm (at 6 August 2007).

[139] Ibid.

[140] Ibid.

has meant that their labour requirements for the season have been met.

The main purpose of the pilot is to provide a short-term solution to the labour shortages in these industries during the peak in the season. Immigration policy states the purpose of the scheme is to:

> "allow for the grant of permits for employment of workers to plant, maintain, harvest, and pack crops in the horticulture and viticulture industries, in regions where an absolute shortage of labour in these industries has been identified by the Ministry of Social Development [immigration policy manual]."[141]

The pilot has facilitated the employment of over two thousand overseas workers on seasonal labour contracts to pick and pack crops in regions of declared labour shortages.[142] In terms of specifics, as at 26 May 2006, 2,253 people had been approved under the pilot scheme. The top five nationalities are Brazil (553); Malaysia (317); Czech Republic (259); Israel (205) and Great Britain (107).[143] These figures show that the Pacific Islands did not largely feature in the scheme.

Under the pilot, the Department of Labour allocated four thousand permits, of which eight hundred were issued for the Hawkes Bay region. Peter MacKay, the national seasonal worker co-ordinator for Horticulture New Zealand gave the pilot scheme rave reviews.[144] He stated "For the first time in four years we have not had significant labour shortages which put our crops at risk".[145] MacKay noted that the

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[141] Immigration New Zealand Operations Manual http://www.immigration.govt.nz/migrant/general/generalinformation/operationsmanual/ (at 10 August 2006).

[142] Angela Gregory "Transient Worker Scheme gets the Thumbs-up from Growers" The New Zealand Herald (New Zealand, 1 July 2006) http://www.nzherald.co.nz/author/print.cfm?a_id=61&objectid=10389227 (at 25 July 2006).

[143] Mark Williams "Unskilled Labour and Seasonal Work Permit Category" Paper presented to Lexis Nexis Professional Development Immigration Law, Auckland, New Zealand, 2006. p 4.

[144] Angela Gregory "Transient Worker Scheme gets the Thumbs-up from Growers" The New Zealand Herald (New Zealand, 1 July 2006) http://www.nzherald.co.nz/author/print.cfm?a_id=61&objectid=10389227 (at 25 July 2006).

[145] Ibid.

$2.4 billion horticulture and viticulture industries had in the past suffered from lost production due to delayed picking or crop maintenance.[146] Further, David Cunliffe, the Immigration minister, says he has been pleased with the results, and stated that the pilot is "providing a responsive, fast and efficient process to help meet the immediate labour needs of one of our most vital industries".[147] However, a problem experienced in the scheme was identifying exactly the areas that were short of labour, in terms of quantifying seasonal shortages. This was due to the fact that the unskilled positions were filled by both unlawful immigrants and "under the table labour".[148]

The Hawkes Bay horticulture and viticulture industries have been participating in the pilot, and have implemented some initiatives of their own. Hawkes Bay was seen to be one of the regions with the largest shortage of labour relative to demand, and the horticulture and viticulture industries there have been very receptive to the pilot scheme.[149] Hawkes Bay Fruitgrowers Association Executive officer Dianne Vesty said the 'Pick NZ' pilot initiated in Hawke's Bay in 2005 was a huge success and it has provided a platform to make regular contact with workers.[150] An initiative taken by the Hawkes Bay Fruitgrowers Association is a website called Pick NZ which is used as a recruitment tool with a long term aim to create a New Zealand Harvest Trail of seasonal work where people can travel and work up to eight months of the year through New Zealand's fruit and vegetable growing regions.[151] The website links employees with employers, which hopefully results in long-term positions.[152] A benefit of dealing directly with the employer is the opportunity to negotiate better employment

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146 Ibid.

147 Hon David Cunliffe "Seasonal Work Permit Pilot extended to September" (Media Release, 24 March 2006) http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=25268 (at 01 August 2006).

148 Mark Williams "Unskilled Labour and Seasonal Work Permit Category" Paper presented to Lexis Nexis Professional Development Immigration Law, Auckland, New Zealand, 2006, p 4.

149 Pick NZ "Pressure on to Find Seasonal Workers" (Media Release, 13 February 2006) http://www.scoop.co.nz/stories/print.html?path=BU0602/S00124.html (at 01 August 2006).

150 Ibid.

151 Ibid.

152 Ibid.

conditions and pay rates. [153]

The pilot scheme appears to have been a quick fix to this season's labour shortages. While it may have been successful in alleviating gaps in the labour market, there has been no research into how the pilot has affected New Zealand's unemployed or how the risks of exploitation of migrant workers have been addressed. At the start of the pilot, the Associate Minister for Immigration, Clayton Cosgrove, stated that the aim of the seasonal labour strategy is to ensure that there is an emphasis on employing New Zealanders first and using immigration as a secondary option where there is a genuine shortage.[154] Indeed, David Cunliffe recently conveyed that the pilot had successfully ensured that "employment of New Zealanders has remained a top priority" throughout the scheme, but there is no evidence to show how this was done. The long-term needs of the horticulture industry need to be addressed, with the implementation of a medium-long-term seasonal labour strategy.[155] The concerns are about prioritising local labour, and using immigration as a backup, and the goal of a well managed and fully legal work force.[156] A group called the Horticulture and Viticulture Seasonal Labour Strategy Governance Group is developing a medium/long term strategy for seasonal labour and skill shortages.

2. Canada's Seasonal Agricultural Workers Program

Canada's Seasonal Agricultural Workers Program (CSAWP) has operated to bring temporary workers to Canada from the Caribbean since 1966 and from Mexico since 1974.[157] The scheme allows workers to enter Canada for seasonal labour for a period of up to eight months. Canada is dealing with migration on a much larger scale than New

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[153] Ibid.

[154] (2005) 262 New Zealand Parliamentary Debates 17 November 2005 (Hon Clayton Cosgrove).

[155] Department of Labour "Horticulture/ Viticulture Seasonal Labour Strategy Launch" (Media Release, 8 December 2005) http://www.dol.govt.nz/news/media/2005/horticulture-strategy.asp (at 12 April 2006), p 5.

[156] Ibid.

[157] Nic Maclellan and Peter Mares "Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia" Paper presented to Globalisation, Governance and the Pacific Islands Conference, Australia National University, Canberra, 25-27 October 2005, p 4.

Zealand is considering for temporary labour schemes. For example, in 2002, the CSAWP brought nineteen thousand workers to into the country for an average of four months employment.[158]

Similar to New Zealand's Approval in Principle Scheme, farmers using the CSAWP need approval from local employment centres to certify that no Canadian workers are available to fill the jobs they are offering to migrants. The reality of this practice is largely perfunctory when dealing with workers returning under the scheme, as workers are able to work for the same employer for subsequent years.[159] There are a number of safeguards under the CSAWP to regulate the treatment of migrant workers. The CSAWP allocates responsibility on the employer to provide migrant employees with free housing, and free meals or cooking facilities.[160] The working conditions are controlled by provisions guaranteeing workers forty hours of work per week over six weeks, at or above prevailing minimum wage rates.[161] Additional to that, employers must take out workers' compensation insurance to cover the migrants in the case of industrial accidents, and must pay the costs of the migrants' international airfare, which can be partially recouped (to about 50 percent).[162] Migrant workers are covered by Canada's universal health care system, which contribute towards through paying local taxes while they are working.[163]

Research into the effectiveness of the CSAWP undertaken by the North South Institute in Canada found that the scheme has benefits on a number of levels.[164] One aspect where the Canadians have been successful is in the area of preventing overstaying. This seems to be a major concern for the New Zealand government in its consideration of a seasonal labour scheme. With the CSAWP, there have been very low rates of overstaying, due to the fact that workers are able to return to their homeland with the expectation that they will be re-engaged to

[158] Ibid.
[159] Ibid.
[160] Ibid, p 15.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Ibid.

work in Canada under CSAWP the following year.[165]

The research by the North South Institute has also uncovered flaws in the CSAWP. There have been protests and strikes by workers, cases of abuse, exploitation, examples of sub-standard or overcrowded accommodation and industrial accidents, despite the safeguards provided under the scheme.[166] In fact, the United Food and Commercial Workers union in Canada describes the exploitation of migrant workers under CSAWP as "Canada's shameful little secret".[167]

This shows the reality of any seasonal labour scheme, that there will always be cases where people exploit the situation. Perhaps if New Zealand were to implement a similar scheme to the CSAWP, substantial regulation and supervision would be required to ensure employers were fulfilling their obligations to the migrant employees. A recent report by the World Bank recommends that New Zealand set up a pilot programme for temporary workers akin to the CSAWP.[168] The successful aspects of this policy are worth consideration by New Zealand.

3. Agricultores Solidarios (Farmers for Solidarity)

The approach taken to seasonal labour in Spain is a development-based, reciprocal arrangement. The seasonal labour scheme is called Agricultores Solidarios, or the Farmers for Solidarity. This scheme was set up by The Farmers Union of Catalonia, the Livestock and Produce Farmers of Valencia and Farmers Union of Majorca.[169] The programme is designed to meet Spain's need for additional seasonal labour while also encouraging "human, economic and social development in less

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[165] Ibid, p 19.

[166] Ibid, p 15.

[167] Ibid.

[168] The World Bank *At Home and Away- Expanding Job Opportunities for Pacific Islanders Through Labour Mobility* (World Bank, 2006) http://siteresources.worldbank.org/INTPACIFICISLANDS/Resources/Executive-Summary-Labour-Mobility-Report.pdf (at 24 August 2006).

[169] Nic Maclellan and Peter Mares "Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia" Paper presented to Globalisation, Governance and the Pacific Islands Conference, Australia National University, Canberra, 25-27 October 2005, p 28.

favoured agrarian societies".[170] Under the programme, seasonal migrant workers are recruited from Colombia, Morocco and Romania. There is a strong emphasis on training and on encouraging positive interaction between migrant workers and their host communities in Spain. Programme coordinator Maria Peix describes it as "a two way exchange that involves civil society", with the temporary workers becoming "development agents that boost new processes led by themselves in their countries of origin."[171] In the New Zealand context, this relates back to the discussion on benefits for the Pacific Island countries from temporary migration. Pacific seasonal workers can be provided with training and a development of skills in New Zealand which can be passed on when they return. An agreement with an emphasis on development and a concern for the source country is vital to ensure everyone's interests are best met. The Council of Trade Unions has recommended that some aspects of Agricultores Solidarios be considered in the New Zealand context as a useful example of good seasonal labour practice.[172]

Conclusion

New Zealand needs a seasonal labour strategy. The Pacific Islands are eager to source temporary workers to New Zealand, and New Zealand has development and aid obligations to the Pacific. A temporary labour policy should be developed with the consultation and agreement of the Pacific Island Countries. In developing a seasonal labour policy, New Zealand must recognise the social implications to the Pacific Island Communities. Part of the policy should address these social impacts and work towards reducing them. Development should be a focus of the temporary migrant labour policy, including provisions for enterprise and business education to allow for long-term economic stability in the Pacific Islands. The risks of worker exploitation need to be addressed. Working conditions need to be improved, and more information provided to migrant workers notifying them of their rights. There needs to be increased accountability for rogue employers, and the agents

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[170] Ibid.

[171] Ibid.

[172] New Zealand Council of Trade Unions *Submission on the Immigration Act Review Discussion Paper* (June 2006), p 1.

responsible for illegal permit scams. New Zealand needs to comply with international law, through incorporating the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and the International Labour Organisation's Migrant Workers Convention into domestic law. A migrant labour scheme would be beneficial to both New Zealand and the source countries and is a progressive step towards the globalised future.

THE INTERTWINING OF TWO STREAMS: TIKANGA, TE TURE WHENUA MAORI ACT 1993 AND TAINUI

NAOMI JOHNSTONE*

Introduction

Former Maori Land Court Chief Judge Eddie Durie holds that the Treaty of Waitangi is authority for the idea that New Zealand's law has "its source in two streams", that is, both English law and tikanga Māori.[1] Te Ture Whenua Maori Act 1993 (TTWMA) appears to support this by its recognition of the Treaty of Waitangi and its spirit of exchange.[2] The Minister of Māori Affairs at the time of TTWMA's enactment clearly thought this when he asserted that "concepts of tikanga Māori" were "at the heart of the Act."[3] For example, the Act's provision for a new type of trust, the 'whenua topu trust', aimed to promote and facilitate the use and administration of the land in the interests of the iwi or hapu, was thought to provide a land holding structure which would reflect tikanga Māori.[4] However, this paper will demonstrate that there are significant gaps between TTWMA and tikanga Māori. In response, some iwi have chosen to opt out of TTWMA regarding their land returned in Crown settlements of historical breaches of the Treaty of Waitangi.[5] In 1995, Tainui was the first group to opt out in this way. Since then, the two other iwi involved in the largest Treaty settlements, Ngāi Tahu, and more recently, Ngāti Awa, have followed suit.[6] This paper will look at this developing trend

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1 E. T. Durie, F W Guest Memorial Lecture 1996, *Will the Settlers Settle? Cultural Conciliation and Law*, (1996) 8 Otago Law Review 449, 461.

2 Te Ture Whenua Māori Act 1993, preamble.

3 Hon. Doug Kidd MP, (1994) 6 NZPD 833.

4 TTWMA, above n 2, s 216(2), and as explained in Law Commission, *Māori Customs and Values in New Zealand Law* NZLC SP 9, Wellington, 2001, 61.

5 Waikato Raupatu Claims Settlement Act 1995, (WRCSA) s 22.

6 Ngāi Tahu chose to have their land returned as general land. See Ngāi Tahu Claims Settlement Act 1998. Ngāti Awa chose to have theirs in a very similar title to Tainui,

by focusing on Tainui within the context of the idea that New Zealand law should take into consideration both English law and tikanga Māori.

The first part of this paper briefly outlines how the Treaty of Waitangi is authority for recognising tikanga Māori and how TTWMA relates to this. The second part outlines Tainui's story, while the third part examines the tikanga Māori as it relates to land, especially the concept of mana whenua. The fourth part looks at the land holding features of Tainui's settlement with the Crown, compared with TTWMA's whenua topu trust, and endorses Tainui's decision as one which best enabled them to assert their mana whenua.

A. The Treaty of Waitangi

Different aspects of the Treaty of Waitangi have been held as authority for the idea New Zealand law has its source in both English law and tikanga Māori. The first of these is the oral discussion at signings of the Treaty.

At the signing of the Treaty in Waitangi there was discussion around Māori concerns that their own laws and custom should be respected. The Governor adjourned to consider the issue and came back with the following response which was read out at the time[7]:

> The Governor says that the several faiths [beliefs] of England, of the Wesleyans, or Rome, and also of the Māori custom, shall be alike protected by him.[8]

This has been known as the fourth article of the Treaty. There were numerous other times in the Treaty's travels, where both oral and written promises of the same nature were made and officially recorded.[9] One such example is when the Treaty reached Kaitaia. Although the

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called the Awanuiarangi II title, and land may be directed to be 'protected land', which comes under the jurisdiction of limited specified sections of TTWMA. See Ngāti Awa Settlement Claims Act 2005, ss 154-159.

[7] Durie, above n 1 at 460.

[8] W. Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, (Wellington, 1980) 32, see also Waitangi Tribunal, *The Whanganui River Report* (WAI 167, 1999) 264.

[9] Law Commission, above n 4 at 72.

Governor could not attend the debate and signing, his explicit message that "The Queen will not interfere with your native laws or customs" was announced.[10] Eddie Durie regards as correct the American precedent of regarding verbal promises surrounding treaties with indigenous people of oral tradition, to be just as much part of the treaty as anything written down.[11] Similarly, the Waitangi Tribunal has found that these Crown representations are important in Treaty jurisprudence.[12] The Tribunal has also given weight to the importance of oral representations made by both sides, including the statement by Tamati Waka Nene saying that governor Hobson "must preserve our customs and never permit out lands to be wrested from us."[13]

In the second article of the Treaty, Māori are guaranteed:

> …the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess…

This affirms and protects aspects of tikanga Māori, in particular recognising that Māori ways of holding land and other properties is different than English tenure as it may be collectively held. This article guarantees that this form of ownership shall be retained by Māori "as long as it is their wish and desire".[14] The second article of te Tiriti (the Māori version of the Treaty), guarantees Māori "te tino rangatiratanga o o ratou wenua, o ratou kainga me o ratou taonga katoa." Sir Hugh Kawharu has translated this as "the unqualified exercise of their chieftainship over their lands, villages and all their treasures."[15] Kawharu adds that this would have emphasised the Crown's intention to give the chiefs "complete control according to *their* customs",[16] thus

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[10] Durie, above n 1, at 460. For another example see Alan Ward *A Show of Justice: Racial amalgamation in Nineteenth Century New Zealand* (Auckland University Press, 1995), 45.

[11] Ibid. at 460.

[12] Waitangi Tribunal, *Muriwhenua Land Report* (WAI 45, 1997), 112-114.

[13] Ibid.

[14] The Treaty of Waitangi, Article 2.

[15] I. H. Kawharu, "Translation of Māori text", appendix, in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* Edited by I. H. Kawharu (Oxford University Press, 1989), 319; 321.

[16] Ibid. at 319.

affirming the recognition of tikanga Māori, especially in relation to property.

However in the years following the Treaty, legislation, and particularly Māori land legislation, has had a history of not protecting or highly valuing tikanga Māori. The Native Lands Acts and their creature, the Native Land Court, have effectively extinguished many aspects of tikanga through reinterpretation of tikanga Māori.[17]

The most recent piece of Māori land legislation, Te Ture Whenua Maori Act 1993, was hailed as a historic turning point when it was enacted.[18] It was held to recognise a Māori view of land, affirm the Treaty and promote control of Māori land by Māori owners.[19] The preamble of the Act recognises the special relationship between Māori and the Crown created by the Treaty, and desires that "the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed".[20] This particularly affirms articles 1 and 2 of the Treaty, of which the latter has been cited above as authority for the recognition of tikanga. At the time of enactment of TTWMA, it was said in Parliament that the Treaty was "basic" to the Act,[21] and that "concepts of tikanga Māori" were "at the heart of the Act."[22]

There is authority contained in both English, Māori and oral versions of the Treaty for tikanga Māori to be protected and recognised in New Zealand's law. While TTWMA purports to recognise this, this paper shall go on to show that there are areas in which this aspiration is not being met. The story of the historical grievances of the Tainui people regarding Crown breaches of the Treaty, and their settlement with the Crown over these issues illustrates this.

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[17] Michael Belgrave, *Māori Customary Law: From Extinguishment to Enduring Recognition* (unpublished paper for the Law Commission, Massey University, 1996), 43.

[18] See Hon. Doug Kidd MP (1992) 63 NZPD 12363.

[19] Ibid.

[20] TTWMA, above n 2, preamble.

[21] See Hon. Sonja Davies MP (1992) 63 NZPD 12419.

[22] Hon. Doug Kidd MP (1994) 6 NZPD 833.

B. Tainui: Nga Kōrero o Tainui

Around 1350 the people of Tainui sailed to New Zealand and settled in the central North Island.[23] The descendants formed different hapu who were united under the leadership of Pōtatau Te Wherowhero from the 1820s.[24] Though Te Wherowhero did not sign the Treaty of Waitangi, the colonial government applied the Treaty to all Māori.[25] The Treaty purported to guarantee protection of tino rangatiratanga over Māori lands, "which they may collectively or individually possess so long as it is their wish."[26]

While initially land sales were conducted in a way that was equal for both sides, Māori soon became aware that too much land was being sold too quickly. There was substantial pressure from the Crown to sell and land issues became very important for Māori.[27] As a result, Pōtatau Te Wherowhero was made the first Māori King in 1858, to preserve rangatiratanga in an increasingly challenging environment.[28] The chiefs of Tainui pledged their land to Pōtatau, giving him "mana-o-te-whenua", or "ultimate authority over their lands" in order to resist further alienation of their land.[29] In the same year notice was given that Tainui would refuse to sell lands south of the Mangatawhiri Stream.[30]

The New Zealand government of the time perceived the Kingitanga as a threat to their sovereignty and land purchase aspirations. In 1863 hostilities were initiated by the Crown sending military forces over the Mangatawhiri Stream.[31] A year later, Tainui had been forced back to the King country and under the New Zealand Settlements Act 1863, 1.2 million acres of Tainui land had been unjustly confiscated.[32] It was

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[23] R T Mahuta "Tainui, Kingitanga and Raupatu" in *Justice and Identity* edited by Wilson and Yeatman (Bridget Williams Books, 1995), 19.

[24] Ibid. at 20.

[25] Ibid.

[26] Treaty of Waitangi, article 2.

[27] Mahuta, above n 23 at 22.

[28] WRCSA, above n 5, s 1, para B.

[29] WRSCA, above n 5, s 1, para C.

[30] Mahuta, above n 23 at 22.

[31] WRCSA, above n 5 , s 1, para D, E.

[32] WRSCA, above n 5, s 1, para E, F.

recognised in the Court of Appeal in 1989 that the land was confiscated in breach of the Treaty of Waitangi and its principles.[33]

Around 314,000 acres were later returned to Māori ownership.[34] However this land had been changed from customary tenure to individualised title. This was done by means of the Māori Land Court and the Native Lands Acts of 1862 and 1865. Furthermore, much of the land was returned to Kaupapa (or 'loyalists') who had fought with the Crown, and also to people who were not of Tainui tribes.[35] The Waitangi Tribunal has found that tenure reform was an enforced denial of the right of Māori to hold their land according to tikanga Māori.[36] They also found that tenure reform was a breach of the Treaty of Waitangi guarantee in article 2 of tino rangatiratanga of their lands, held collectively or individually.[37] The war waged against Tainui, confiscation of their lands and tenure reform have had devastating effects for Tainui that have lasted for generations.[38]

Throughout this history, Tainui held their land in accordance with tikanga Māori and in particular, with the concept of mana whenua. It is important to understand more fully what this means, in order to understand the way they have chosen to hold their returned land today.

C. Mana Whenua

1. Tikanga Māori and mana whenua

Broadly speaking, tikanga Māori can be interpreted as Māori customary law.[39] 'Tikanga' can be translated as "system, value or principle which is correct, just or proper," having derived from the root word 'tika,' which means the correct or true way.[40] Chief Judge Williams of the

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[33] *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 516.

[34] Ibid.

[35] Ibid.

[36] Waitangi Tribunal, *Rekohu Report* (WAI 64, 2001) 184.

[37] Ibid. at 185.

[38] WRSCA, above n 5, s 1, para G and para N.

[39] Law Commission, above n 4 at 15.

[40] J. Williams, 'He Aha te Tikanga Māori?', paper presented at the Mai I Te Ata Hapara conference, Te Wānanga o Raukawa, Otaki,11-13 August, 2000, 1.

Māori Land Court has described it as "essentially the Maori way of doing things."[41] Eddie Durie identifies a number of fundamental Māori values, which act as "conceptual regulators of tikanga."[42] Values he includes are whanaungatanga, manaakitanga, aroha, wairua, utu and mana.[43] Mana has been categorised into four main ideas by kaumatua Cleve Barlow: mana atua, mana tupuna, mana tangata and mana whenua.[44] Mana whenua can be seen as being made up of both a physical and metaphysical dimension.[45] The physical concept of mana whenua as the "political authority possessed by a group over a given piece of land" will be the main focus of this paper.[46]

To fully appreciate the meaning of mana whenua the wider spiritual beliefs must also be understood. [47] Māori hold many spiritual beliefs that are crucial to understanding the way they relate to the land. Lenihan believes the spiritual dimension of mana whenua can be seen as an embodiment of these cultural concepts.[48] One important belief is that Māori are descended from the land, in the sense that Papatuanuku, the earth mother conceived the Māori ancestors.[49] The word whenua means both land and placenta, so the term tangata whenua reflects this belief that they are people from the earth's womb.[50] Thus Māori regard themselves as being owned by the land, rather than owners of the land.[51] Regarding use rights to a particular piece of land, the community's right was by descent from the earth of the place.[52] The individual's right to use the land arose from membership of that

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[41] Law Commission, above n 4 at 15.

[42] E. T. Durie, Custom Law, (unpublished confidential paper for the Law Commission January 1994) 4-5, as cited in Law Commission, above n 4 at 5.

[43] Ibid.

[44] Cleve Barlow *Tikanga Whakaaro, Key concepts in Maori culture* (Oxford University Press, 1991) 61-62.

[45] Lenihan, "Māori Land in Māori Hands" (1997) 8 AULR 570, 573.

[46] Ibid.

[47] Mason Durie, *Te Mana, Te Kawanatanga-the politics of Māori self-determination* (1998) 30.

[48] Lenihan, above n 45 at 573.

[49] *Muriwhenua,* above n 12 at 23.

[50] Ibid.

[51] Ibid.

[52] Ibid.

community.[53] While descent would give a right of entry into the community, participation in the community and adherence to its standards were crucial to belonging in the community.[54]

The concept of turangawaewae, as a place where one belongs, refers to the ancestral land over which one's whānau, hapu or iwi holds mana whenua (in the political sense).[55] Ancestral lands are also the place where one's ancestors were born, lived and died, and where their placentas and bones were buried.[56] Thus the land is not regarded as something that can be divided, rented or sold permanently but a place that could provide for the community, and which gives "a sense of identity, belonging, and continuity."[57]

Mana whenua has also been submitted as an alternative claim to prove ownership rights in land.[58] However this is outside the scope of this paper.

2. "Violence to traditional ethics"?

The Waitangi Tribunal has claimed that the concept of mana whenua comes from a nineteenth century attempt to "conceptualise Māori authority in terms of English legal concepts."[59] As such, it was held to be a modern thought which "does violence to traditional ethics."[60] The Tribunal's main problem with the concept of mana whenua is how it has been incorporated into statute. In assessing claims of both Moriori and Ngāti Mutunga to the Chatham Islands, the Tribunal had to deal with the definitions given in the Resource Management Act 1991 for mana whenua and tangata whenua. Mana whenua is defined as

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[53] Ibid. at 24.

[54] Ibid. at 24.

[55] Lenihan, above n 45 at 571.

[56] Ibid. at 572.

[57] Ibid.

[58] For more on this aspect of mana whenua, see Māori Appellate Court decisions *Ngati Toa Decision* 8 December 1994, 21 Nelson MB 1, and *Re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Trust Board*, 12/11/90, Te Waipounamu District, Case Stated 1/89, 4 South Island Appellate Court Minute Book, folio 673.

[59] *Rekohu Report*, above n 36 at 28.

[60] Ibid. at 24.

"customary authority exercised by an iwi or hapu in an identified area".[61] Tangata whenua "in relation to a particular area, means the iwi or hapu, that holds mana whenua over that area."[62] The Tribunal concluded that they could not support the statutory meanings because they seem to only allow for one group to be the tangata whenua. They concluded that both claimants are tangata whenua:

While the statutory definition of mana whenua is problematic, the issues that the Waitangi Tribunal has with its use can be addressed. It is recognised that traditionally more than one group might have mana over the same piece of land in the form of different use rights.[63] Therefore the concept that more than one group may hold mana whenua is acceptable. The general Courts are starting to recognise this, as demonstrated in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*.[64] Judge Jackson's decision is based on the premise that more than one hapu may hold mana whenua in the same area.[65]

Also it is noted that the Waitangi Tribunal is not entirely consistent in its approach to mana whenua, as in other reports it recognises the concept in a more positive manner. For example, in the Te Roroa Report they note that "traditions record that Manumanu had mana whenua over Waipoua".[66] Similarly, in Te Whanau o Waipareira Report, it was recognised that Waipareira's functions were performed "within the mana whenua of Ngāti Whatua".[67] The Te Pouakani Report talks of the mana whenua of the land being vested in Tia, who was an original member of the Te Arawa canoe, thus affirming mana whenua as a traditional idea.[68] The process of preparing a claim for the Tribunal itself acknowledges the relevance and traditional nature of

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[61] Resource Management Act 1991, s 2 (1).

[62] Resource Management Act 1991, s 2 (1).

[63] See Andrew Erueti, "Māori Customary Law and Land Tenure: An Analysis" in *Māori Land Law*, edited by Richard Boast et al. (LexisNexis, 2004), 42.

[64] *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111.

[65] *Rekohu Report*, above n 36 at 29.

[66] Waitangi Tribunal, *Te Roroa Report* (WAI 38, 1992) 5; 6.

[67] Waitangi Tribunal, *Te Whanau o Waipareira Report*, (WAI 414, 1998) 3.

[68] Waitangi Tribunal, *Te Pouakani Report* (WAI 33, 1993) 17.

mana whenua by including in the traditional evidence to be prepared, a "written mana whenua report".[69]

3. A foundation of Tino Rangatiratanga

Te Ture Whenua Maori Act 1993 states in its long title that its purpose is to reform the laws relating to Māori land in accordance with the principles set out in the preamble.[70] The first principle is that of recognising the Treaty of Waitangi. In particular the Act aspires to reaffirm the exchange of kawanatanga for the "protection of rangatiratanga embodied in the Treaty of Waitangi".[71] It is the contention of this paper that mana whenua is an essential element of rangatiratanga. Therefore mana whenua ought to be able to be exercised effectively and supported within TTWMA.

Mason Durie holds that the generally agreed upon foundations of tino rangatiratanga include mana wairua, mana tangata, mana Ariki and mana whenua.[72] He defines mana whenua as the iwi or hapu's right "to exercise authority in the development and control of resources that they own or are supposed to own and to interact with the Crown according to their needs and inclinations".[73] He goes on to say that mana whenua is strongest in relation to tribally owned resources.[74]

Thomas J of the Court of Appeal however, has recognised a meaning of mana whenua that is much less than rangatiratanga. In *McRitchie v Taranaki Fish and Game Council*, a case about customary fishing rights, it was accepted in the facts that "the hapu or iwi held mana whenua and tino rangatiratanga over the river since time immemorial".[75] However these concepts were substantially distinguished. Thomas J said that by

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[69] The Claims Process, Waitangi Tribunal site: <http://www.waitangitribunal.govt.nz/claims/claims_intro.asp at 16/5/07>

[70] TTWMA, above n 2, long title.

[71] TTWMA, above n 2, preamble.

[72] Mason Durie, 'Tino Rangatiratanga' (1995) 1 He Pukega Korero: A journal of Māori Studies 44, 45.

[73] Mason Durie, 'Tino Rangatiratanga' in *Waitangi Revisited: Perspectives on the Treaty of Waitangi* edited by Michael Belgrave et al. (Oxford University Press, 2005)3, 9.

[74] Ibid.

[75] *McRitchie Kirk v Taranaki Fish and Game Council* [1999] 2 NZLR 139, 154 (Dissenting judgement of Thomas J).

assertion of mana whenua, Māori sought recognition of "the power and influence associated with the possession of their taonga," compared to the recognition of tino rangatiratanga, which would accept the hapu's "authority to control" the river.[76] Thus the aspect of control over their resource was reduced to mere influence.

There is much authority for mana whenua having a stronger and closer relationship with tino rangatiratanga than the Court of Appeal suggest. One of the main authorities is found by looking at how Māori saw the Māori version of the Treaty of Waitangi (Te Tiriti o Waitangi) in relation to concepts of mana as it related to the land, and the guarantee of tino rangatiratanga contained in the Treaty.

In the 1835 Declaration of Independence, the phrase 'mana i te whenua' was used to affirm sovereignty of the chiefs over their land.[77] However the word 'mana' in relation to the land, was not used in Te Tiriti o Waitangi. Article 2 of Te Tiriti confirmed that Māori rangatira may exercise "te tino rangatiratanga o ratou whenua". Sir Hugh Kawharu has translated this as "the unqualified exercise of their chieftainship over their lands".[78] 'Mana' and 'rangatiratanga' are "inextricably related words" according to the Waitangi Tribunal in Te Atiawa Report.[79] The Tribunal developed this in the Orakei Report, where they concluded that tino rangatiratanga is equated with full authority and to Māori meant mana.[80] The Tribunal also notes that in 1860, at the conference in Kohimarama of 200 Māori chiefs that discussion on the Treaty was virtually always put in terms of the mana that had been guaranteed them.[81] For example one chief was recorded as saying, "The Queen stipulated in the Treaty that we should retain the mana of our lands".[82]

Notable historians agree with the closely related idea of mana whenua

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[76] Ibid. at 156.

[77] Precious Clarke, 'Te Mana Whenua O Ngati Whatua O Orakei', (2001) 9 Auckland U. L. Rev. 562, 570.

[78] Kawharu, above n 15 at 319, 321.

[79] Waitangi Tribunal, *Te Atiawa (Motunui-Waitara) Report* (WAI 6, 1983) 51.

[80] Waitangi Tribunal *Orakei Report*, (WAI 9, 1987) 188.

[81] Ibid.

[82] Ibid.

and rangatiratanga. Claudia Orange writes of the fear Māori had at the time of the signing of Te Tiriti that the "mana of the land might pass from them" but holds that this fear was quelled by the guarantee of rangatiratanga in Te Tiriti.[83] Ranganui Walker asserts that had mana whenua been ceded to the Crown in article 1, instead of "te kawanatanga katoa," Māori would not have signed.[84] Thus the meaning of mana whenua must be stronger and closer to rangatiratanga than "the complete government"[85] as "te kawanatanga katoa" was translated by Sir Hugh Kawharu. Similarly, Peter Shands considers that "te kawanatanga katoa" that was ceded does not "connote an equivalent for mana whenua or sovereignty to be vested in the Crown".[86]

Seen this way, Tainui's vesting of mana-o-te-whenua to King Pōtatau was an assertion of their right to have authority over the land and to control it as they desired. For Ranganui Walker the concepts of sovereignty over the land and mana whenua are the same, and he holds that the King was a symbol of these ideas.[87] As Sir John Gorst noted in 1864, Tainui meant to have a system that would protect them and their land from possible encroachment on their rights and enable them to uphold tikanga where they wished.[88] Importantly, as per Mason Durie's definition of mana whenua, it enabled them to "interact with the Crown according to their needs and inclinations".[89]

4. Mana whenua and the dynamism of tikanga

If one does not accept that mana whenua was traditionally held as a foundation of tino rangatiratanga, it is contended that mana whenua may still be seen as an example of the dynamism of tikanga.

It is widely accepted that while tikanga is based upon fundamental

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[83] Claudia Orange, *The Treaty of Waitangi* (Allen & Unwin 1987), 58.

[84] Ranganui Walker, "The Treaty of Waitangi as a focus of Māori Protest" in *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* Edited by I. H. Kawharu (Oxford University Press, 1989), 264.

[85] Kawharu, above n 15 at 321.

[86] Peter Shands, Settling Treaty Grievances, (1997) 8 Auckland U. L. Rev. 742.

[87] Walker, above n 84 at 271.

[88] Sir John Eldon Gorst *The Maori King* (Reed Publishing, 2001), 37.

[89] Mason Durie, above n 73 at 9.

principles, it has the ability to change and adapt to circumstances.[90] Therefore mana whenua can be seen as part of the development of the concept of mana, that by asking King Pōtatau to take the mana-o-te-whenua, it was a timely Māori-initiated response to threats of further loss of Tainui land. Furthermore, the concept of mana whenua has been evolving in the changing political and legal climate of New Zealand's last 150 years, and will continue to be a valuable concept in the future. This is in accordance with the view that tikanga Māori is based upon continuous reflection on the core principles, involving "a dialogue between the past, the present and the future."[91] Kaumatua Cleve Barlow supports this idea by including mana whenua as one of the four major usages of mana that have developed in modern times:[92]

The Privy Council has recognised that while custom relating to land was based on traditional tikanga as it was before the Pākehā arrived, it developed in the process of adapting to the changing circumstances.[93] The Waitangi Tribunal has also recognised significant developments in tikanga Māori in response to the contact with Europeans. In the Ngāti Awa Raupatu Report, they found that the killings of Volkner and Fulloon were not excused in Māori customary law, because of the influence of missionary ideas.[94] The Tribunal acknowledged that throughout the changes, Māori law was not impaired or replaced, but rather augmented.[95]

In *Tararua District Council* the main issue was who the tangata whenua of the Tararua district were.[96] While the Māori Appellate Court acknowledged that mana whenua was a much-debated concept and did not come to any firm conclusions on a meaning, the dynamism of Māori social, political, economic and cultural affairs was emphasised throughout the judgment.[97] Thus the Court felt it should not be exactly bound by the way title was determined in the 19th century, and in the

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[90] Hirini Moko Mead, *Tikanga Mäori, Living by Mäori Values* (Huia Publishers, 1970), 21.

[91] Law Commission, above n 4 at 3.

[92] Barlow, above n 44 at 62.

[93] *Hineiti Rirerire Arani v Public Trustee of NZ* [1919] NZPCC 1; 6.

[94] Waitangi Tribunal, *Ngäti Awa Raupatu Report* (WAI 46, 1999) 74-75.

[95] Ibid. at 30.

[96] *Tararua District Council* (23 June 1994)138 Napier MB, 1.

[97] Ibid. See 4, 5, 6, 7.

discussion on mana whenua and politico-social structures, held that Māori society was never static.[98]

Whether one accepts the concept of mana whenua as traditional or as a legitimate nineteenth century development in tikanga Māori, it is contended that it is a foundation of rangatiratanga. As such, according to the preamble of TTWMA, it should be a concept that is supported and able to be exercised within the Act. The last part of this paper will show how attempts have been made in TTWMA to achieve this end, but also how these attempts have not been met with enthusiasm by Māori. In particular, Tainui's response shall be examined.

D. The Whenua Topu Trust and Tainui's Settlement

1. The Whenua Topu Trust

Whenua topu trusts are one of five specific trusts for Māori land set out in Te Ture Whenua Māori Act 1993 that are constituted by the Māori Land Court and are limited by TTWMA.[99] It was envisioned that the provision of a whenua topu trust in section 216 TTWMA would be used to enable Māori owners to retain their land in accordance with tikanga Māori values regarding land tenure.[100] However, in the year ending 30 June 2004, there were only 51 blocks of land in whenua topu trusts.[101] It is the contention of this paper that one of the reasons is that iwi or hapu want to be able to assert tikanga and mana whenua, and can do this most effectively outside the confines of TTWMA.

To constitute a whenua topu trust the Court must be satisfied that the constitution of the trust would "promote and facilitate the use and administration of the land in the interests of the iwi of hapu."[102] This trust is different from the other Māori trusts in that its purpose is a

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[98] Ibid. at 5.

[99] TTWMA, s 211.

[100] Law Commission, above n 4 at 61.

[101] Ministry of Justice Annual Report, 1 July 2003- 30 June 2004. (http://www.justice.govt.nz/pubs/reports/2004/annual-rpt-04/partc.html#Special%20 Jurisdictions) at 14/5/07. This number can be compared with 11,176 blocks with Whānau Trusts, 6 713 blocks with Ahu Whenua Trusts, and 3302 blocks with Kai Tiaki Trusts also set up by 30 June 2004. No Putea trusts had been set up.

[102] TTWMA, s 216 (2).

collective one.[103] The emphasis is on the benefit to the *whole* group, rather than to promote the interests those individual "persons beneficially entitled to the land".[104] In this respect the whenua topu trust is touted as an example of tikanga being recognised. However there are several discrepancies between this trust and the effective exercise of tikanga concepts, in particular mana whenua. For example, it is difficult to see how iwi or hapu would be able to fully exercise mana whenua over their land when it is the Court rather than the iwi themselves who, firstly, determine the criteria to be met before a whenua topu trust is set up, and secondly, determine whether these criteria are met. The Court must also be satisfied that the owners of the land have had sufficient notice of the application, along with sufficient opportunity to discuss and consider it, and that there is no "meritorious objection" to the application.[105]

In a whenua topu trust the assets of the trust must be held for Māori community purposes, as defined in section 218.[106] Similarly any income from the trust must also be applied for Māori community purposes.[107] It is conceivable however that an iwi or hapu may wish to apply their income for purposes which are not covered under the definition of Māori community purposes in section 218 (2). The Court may order income be applied otherwise than as specified in section 218, but only for the general benefit of members of the iwi or hapu.[108] This leaves the iwi or hapu bound by the legislation's definition of what constitutes

[103] There are four other Māori trusts provided for in TTWMA. The first is the Putea trusts, where the interests in land are managed for those beneficially entitled to that interest but any income must beheld for Māori community purposes (s 212 (2), (6)). Whanau trusts manage interests in land for the benefit of descendants of any tipuna named in the order (s 214 (3)) or those beneficially entitled to the interests in the land (s (5)). The Ahu whenua trust manages the land for the benefit of those beneficially entitled to the land (s 215 (2)) while the Kai tiaki trusts manages interests in Māori land for the benefit of the person beneficially entitled to those interests (s 217 (1),(5)). The Whenua topu trust is the only one where land is managed for the benefit of the whole iwi or hapu, whether they are beneficially entitled to the land of not.

[104] TTWMA, s 215(2).

[105] TTWMA, s 216(4).

[106] TTWMA, s 216(5).

[107] TTWMA, s 218(1).

[108] TTWMA, s 216(5).

Māori community purposes, or by what the Court may decide to otherwise order.[109]

Section 216(6) provides that no one shall succeed to any interests in a whenua topu trust. However, the Court is given the power to deem interests held for a person named in the order, and pay them and their successors income if the Court is satisfied that it is necessary to protect interests of those with a large interest in land vested in the trust.[110] This insists on recognising individual ownership. The Law Commission found that by focussing on individual rights of ownership, the Māori view of how land is customarily held is ignored.[111] Also the Court can terminate the trust at any time, and the land will be vested back to those individuals legally entitled.[112] This means that the collective land holding is not secure.

The general powers of trustees are limited not only by other sections of TTWMA, for example regarding alienation or decision making processes[113] but also by the Court's discretion. According to section 226 the Court may confer such powers on trustees as the Court thinks fit and may impose limitations or restrictions on trustees.[114]

It was envisioned that upon receiving Crown settlements, iwi could put their land in the whenua topu trust.[115] However this option clearly has substantial drawbacks for iwi looking to assert tikanga, and in particular mana whenua. In response, iwi such as Tainui have come up with their own land holding options.

2. Tainui's final settlement with the Crown

Following decades of negotiations, Tainui and the Crown finally came to a settlement enacted in the Waikato Raupatu Settlement Claims Act

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[109] TTWMA, s 216(5).

[110] TTWMA, s 216(7), (8).

[111] Law Commission, above n 4, at 25.

[112] TTWMA, s 241(1).

[113] See for example TTWMA ss 150A, 172.

[114] TTWMA, s 226 (1), (2).

[115] Video recording: Toitu te Whenua: A guide to Te Ture Whenua Māori Act 1993 (Wellington Maori Legal Services, 1996) (copy filed at University of Otago Library).

1995. As part of the settlement, 14,483 hectares of Crown-controlled land was transferred to Tainui, along with $65 million to acquire lands.[116] Land that was returned as part of the settlement was put either in the status of general land or is held by a land holding trustee, registered in the Land Transfer Act in the name of Pōtatau Te Wherowhero.[117] These arrangements and their significance are explained in the Act:

> Land transferred to Waikato under the deed of settlement will be held communally in a trust to be established by Waikato and part of that land will be registered in the name of Pōtatau Te Wherowhero as provided for in this Act, that name giving expression to the significance of the pledges made by the chiefs to Pōtatau Te Wherowhero and of the reaffirmations of those pledges, as expressed in the kawenta, by those who have continued in support of the Kingitanga.[118]

The land in the name of Te Wherowhero is to be held communally for the whole of the iwi,[119] as is the collective benefit from these lands for the whole iwi, under the mana of the Kingitanga.[120] Section 22 of the Waikato Raupatu Settlement Claims Act makes it clear that nothing in TTWMA shall apply to the land holding trust or land held in the name of Pōtatau Te Wherowhero.

Tainui have been careful to design the trust deed which governs the land held in Te Wherowhero title to reflect how the land holding was when they were able to most effectively exercise mana whenua. The land in registered in the name of Pōtatau Te Wherowhero is practically inalienable, thus ensuring Tainui remain in control of their lands:[121]

> The trust deed for the trust to be established by Waikato will provide that no land of the trust that is registered in the name of Pōtatau Te

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116 Waikato-Tainui Deed of Settlement, Office of Treaty Settlements, http://nz01.terabyte.co.nz/ots/DocumentLibrary/Waikato-TainuiDeedofSettlement.pdf on 16/5/07.

117 WRCSA, above n 6, s 19(1)(a).

118 WRCSA, above n 5, s 1, paragraph U.

119 WRCSA, above n 5, s 1, paragraph U.

120 WRCSA, above n 5, s 1, paragraph W.

121 WRCSA, above n 5, s 1, paragraph V.

> Wherowhero shall be sold or mortgaged to, or be capable of being vested in or transferred to any person or body, and that no land may be transferred out of the name of Pōtatau Te Wherowhero without the consent of the "custodians of Te Wherowhero title" referred to in that trust deed.[122]

There are three of these custodial trustees who are appointed to protect the title, and who are drawn from the judicial leadership of Tainui.[123] These provisions for the inalienability of the title are akin to the tikanga idea that as a taonga and part of their whakapapa, land cannot be permanently sold or transferred.[124] Effectively Tainui has created a new land status that is akin to how land was customarily held by Māori according to tikanga Māori.

The land holding trust and the Te Wherowhero title allows Tainui to most effectively exercise mana whenua over their land. According to Tainui's legal advisor Shane Solomon, Tainui felt that the Pōtatau title would reflect "land holding as it was prior to the land confiscations, prior to the establishment of the Māori Land Court and prior to the wholesale loss of lands" from Māori holding.[125] Tainui preferred that the Māori Land Court would not be able to "interfere with how (Tainui) view land tenure for the tribe".[126] Tainui also believed that the being under the jurisdiction of the Māori Land Court would mean the continually possibility of ending up in Court on any kind of dispute, interfering with how they chose to manage their land.[127]

The way Tainui have chosen to manage their returned lands has enabled them to trace their history back to when mana whenua was vested in the first King Pōtatau Te Wherowhero. In the 1860s this was an assertion of their right to exercise mana whenua, to have authority over the land and to relate to it as they desired according to tikanga Māori. The land now being held in the inalienable title of Te

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[122] WRCSA, above n 5, s 1, paragraph V.

[123] Mahuta, above n 23 at 31.

[124] *Muriwhenua Report*, above n 12 at 25.

[125] Video recording: Marae - the Māori Land Court (NZ Channel 1, 1998) (copy filed at University of Otago Library)

[126] Ibid.

[127] Ibid.

Wherowhero allows Tainui the same today. By holding land in a title set up by an Act of Parliament and registered in the Land Transfer system, yet reflecting tikanga Māori and in particular, mana whenua, Tainui have successfully affirmed New Zealand's law as one with "its source in two streams."[128]

[128] Durie, above n 1 at 461.

NAME SUPPRESSION, THE MEDIA AND JUVENILE OFFENDERS

NATALIE JORDAN*

Introduction

The purpose of this paper is to examine the law surrounding name suppression in relation to children who commit crime. In particular it will focus on those young offenders who are tried in the adult courts, where name suppression is purely discretionary. I will examine some well known cases in both New Zealand and the United Kingdom to illustrate that name suppression is in the best interests of both the offender and the public, in cases involving serious juvenile offenders.

Name suppression is a prohibition on publication of an offender's name and may be automatic or discretionary.[1] In the case of automatic name suppression it is an offence to publish the names of certain persons, or particulars likely to lead to their identification, in a report of court proceedings. No direction needs to be given by the court, as the names are automatically suppressed.[2] Name suppression is automatic in the Youth Court. In all other courts, section 140 of the Criminal Justice Act[3] gives the court power to order suppression of name. So varied are the circumstances that the legislature has not thought it wise to lay down rules to regulate its exercise.[4] It is argued that name suppression opposes the principle of open justice and freedom of expression, however, as I will demonstrate, any so called restrictions it places on these principles are minimal at best, and reasonably justified.

Under the Criminal Justice Act the court is required to balance

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1 J. Burrows and U. Cheer. *Media Law in New Zealand* (5th ed.) Oxford University Press, Auckland, New Zealand, 2005, 333.

2 Ibid.

3 Criminal Justice Act 1985 (NZ), s 140.

4 Burrows and Cheer, above n 1.

opposing interests. Fisher J summarised these as follows: [5]

> Supporting suppression are the accused's privacy interests, the presumption of innocence, the risk of irrecoverable harm notwithstanding ultimate acquittal, the possibility of serious harm to family and others associated with the accused and the risk that a fair trial could be indirectly affected by public pressure and personal stress of identification prior to verdict. Supporting publication are the public interest in freedom of information, the importance of allowing the public to know what is going on in their own public institutions, the possibility that identification will encourage other relevant witnesses to come forward, the removal of unfair suspicion from others, and protection of the accused against arbitrary and secret oppression by state authorities.

I believe people underestimate the power of the media. Many people take what they read in the paper and see on television as the absolute truth. The media have quite an effect on public attitudes and opinions towards juvenile justice. Media portrayals of crime are also not always accurate. I feel this has resulted in increasingly punitive attitudes towards juveniles, treating them as adults and not as the children they are.

B. The New Zealand Experience

The Michael Choy trial was New Zealand's most notorious and well known serious juvenile offender case.[6] Eight accused faced charges of murder, aggravated robbery, attempted aggravated robbery and theft. Of the eight, six were children or young persons as defined by the Act.[7] One of them was Bailey Kurariki, who, aged twelve at the time of the incident, is now New Zealand's youngest convicted killer. Due to all the accused and especially Kurariki's age there was intense media interest in the case. All eight applied for continuation of name suppression on committal from the Youth Court to the High Court for trial. Justice Fisher granted it for Bailey Kurariki (the youngest) and also for an accused who was facing a less serious charge of attempted

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[5] *R v Whatarangi Rawiri, Casie Rawiri, PK, AP, RR, DH, JK and BK* (3 July 2002), HC, Auckland T014047, Fisher J at pp 3-4.

[6] See *Rawiri,* above n 5.

[7] Children, Young Persons and their Families (CYPF) Act 1989 (NZ) s 2.

aggravated robbery. However following conviction, name suppression was lifted and the media onslaught continued.

Bailey Kurariki has since become somewhat a 'celebrity' in his own right. In an article entitled "Young Killer No Star" the Southland Times writes "Bailey Kurariki is right about one thing. He is a celebrity."[8] The paper describes Kurariki as being a "big noter" at the Kingslea Residential Centre in Christchurch. It states that he is aware his picture is on the front page of the newspaper and that other inmates want his autograph, the effect of this is that "he has become puffy in the knowledge that whatever else has happened to him, at least now he seems to matter to people." The article quotes Kingslea Residential Centre manager, Shirley Johnson as saying that Kurariki's high profile after his crime is sending a terrible message to other young people. The paper goes on to note that "of course there is public outrage at this latest revelation that he is enjoying his new celebrity status." I think it seems ironic that it was this attention and 'outrage' that caused his perceived heightened status in the first place. This brings me to the question of whether name suppression should have been lifted. Does open justice always ensure justice is done and should public "interest" override the interests of the child?

This paper will explore whether, in the case of juvenile offenders, judges should in fact have discretion in ordering name suppression under the Criminal Justice Act.[9] I will argue that the principle of open justice can cause more harm than good in situations involving young offenders. It will further be argued that name suppression orders do not actually restrain open justice in practice, nor inhibit the public interest in media reporting. It is suggested that our current obsession with open justice and wide publication of the identities of serious young offenders may actually be causing higher rates of recidivism and crime, and that this "naming and shaming" goes against the principles of youth justice in New Zealand. It is also proposed that to ensure a fair trial, all children should be tried in either private adult courts or the Youth Court. The paper will further illustrate that it is the media who

[8] "Young Killer is No Star" *The Southland Times* (Southland, New Zealand, 2 September 2002), page 6.

[9] Criminal Justice Act 1985 (NZ), s 140.

are contributing to the punitive nature of society by creating a false impression of juvenile delinquency.

B. Open Justice

One of the most prominent and widely used justifications for disallowing name suppression is the principle of open justice. Burrows and Cheer state that the starting point for the courts is always the principle of openness.[10] The Privy Council in *McPherson v McPherson*[11] reflected on the question of what is open justice. Lord Blanesburgh regarded public access as a fundamental feature of the openness of proceedings. He stated:

> [t]he actual presence of the public is never necessary […] the court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.

The principle is entrenched in Article 10 of the Universal Declaration of Human Rights which provides for a "fair and public" hearing of criminal charges,[12] as well as in Article 14(1) of the International Covenant of Civil and Political Rights[13] which stipulates: "…In the determination of any criminal charge against him […] everyone shall be entitled to a fair and public hearing." Baylis[14] states by including "public" in Article 14 it may in modern terms be reasoned to encompass radio and television reporters.

Baylis[15] describes Article 14[16] as allowing some exceptions to the

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[10] See Burrows and Cheer, above n 1.

[11] *McPherson v McPherson* [1936] AC 177, this was a case concerning the legality of divorce proceedings which had taken place in the Judges' law library. One of the grounds the applicant appealed on was that the hearing had not taken place in an open court.

[12] Universal Declaration of Human Rights 1948, Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[13] International Covenant of Civil and Political Rights 1976, Article 14(1).

[14] C. Baylis "Justice done and Justice seen to be done – the Public Administration of Justice" (1991) 21 VUWLR 177.

[15] Ibid.

[16] See *ICCPR*, above n13

general principle of open justice. She interprets it as affirming that at the very least open justice requires the actual judgment of the court to be made public, except in very limited circumstances.[17] However the wording of the Article raises an interpretation question as to whether "judgment" means the judges' reasoning and the finding, or just the decision or judgment. If we take a strict black letter approach to interpretation this will limit the requirements of public justice by a much greater amount, to perhaps just the actual judgment. Baylis[18] goes on to note that the Criminal Justice Act[19] clarifies this, in that in the criminal context, the requirement of publicity is that only the decision and sentence need to be made public. It states that:

> The announcement of the verdict or decision of the court […] and the passing of sentence shall in every case take place in public; but if the court is satisfied that exceptional circumstances so require, it may decline to state in public all or any of the facts, reasons, or other consideration that hit has taken into account in reaching its decision or verdict or in determining the sentence passed by it on any defendant.

This seems to imply that it is acceptable for the trial or hearing to be held in private or restricted access under the open justice principle. Baylis[20] also adds that Article 14 is framed in such a way to entail that the publicity principle protects only an individual's right to a public hearing. This could mean that the public and media could be excluded if the parties wanted to give up this right. She does however state that in New Zealand it has, by and large been accepted that there is not only the individuals' entitlement to a public hearing but also generally a public entitlement of access to proceedings.

In relation to the granting of name suppression under the Criminal Justice Act,[21] the courts have stressed that there is always a prima facie

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[17] Ibid, Article 14: "…any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

[18] See Baylis, above n 14.

[19] Criminal Justice Act 1985, (NZ) s 138(6).

[20] See Baylis, above n 14.

[21] Criminal Justice Act 1985 (NZ), s 140.

presumption in favour of openness in reporting. In *R v Liddel* the Court stated:

> The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates' of the public.[22]

The Court of Appeal also emphasized it was to be departed from only for "compelling reasons" or "very special circumstances". In *Lewis v Wilson & Horton* the Court of Appeal said that "the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome."[23]

Baylis[24] states that the public administration of justice has developed to be viewed as a fundamental trademark of a democratic society, and that the overriding concern is to ensure that justice is done, both between the parties and in the wider sense. Slevin[25] discusses the importance of publicity, as having long been regarded as society's most effective guarantee of judicial accountability and that therefore, the principle of open justice should only be compromised for the most important reasons. What is in the public interest however, is not always certain. It has been held in cases such as *H v Police*[26] that there is a public interest in the offender being rehabilitated anonymously and in some circumstances this will prevail over any other interest the public may have.

In analysing the reasons for the publicity principle Baylis[27] examined its historical basis. She noted that it was claimed by Chief Justice Burger in

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[22] *R v Liddell* [1995] 1 NZLR 538 at p 456.

[23] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 559. Lord Stein also said 'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be very much a disembodied trial': *Re S (a child)* [2004] 4 All ER 683 at 697.

[24] See Baylis, above n 14.

[25] G Slevin "Name Suppression, Questioning the Law Commission's Reasoning" (2004) NZLJ 223-224.

[26] *H v Police* (1989) 4 CRNZ 215.

[27] See Baylis, above n 14.

Richmond Newspapers, Inc v Virginia[28], that throughout the history of the common law courts, there has always been a presumption that the public can attend trials, and therefore the public must be allowed to continue to attend. However, using a historical background as a rationale may be criticised. Resnik claims that "simply because we have, in the past, either included or excluded the public does not confirm we should do the same today."[29] Customs may change over time. An example of this is that historically family and juvenile matters were heard in open courts. Baylis[30] notes that the perception of the morality of these separations has changed, so that today the public has very limited access to both the Family and Youth Courts. What was traditionally an area of public access has changed as public attitudes have developed. Puplick[31] thinks that the concept of open justice has also been changed by the advent of the internet. This has meant that the protective barriers of time and space, which traditionally made open justice socially acceptable, have been abolished and replaced with a potential global audience, and that this is perhaps reason for restricting it.

Various benefits and the theoretical underpinning of open justice have been said to include; enhanced fact finding, improved quality of testimony, to induce unknown witnesses to come forward, and to act as a deterrent and a punishment.[32] It has been suggested that publicity encourages judges to educate themselves in public morality and thereby avoid public criticism, and educates the public about the legal system as well as social problems. Baylis[33] notes that because ignorance of the law is no excuse, there must be some way for the public to know what the courts are determining. Justice must be seen to be done. An open justice system stops the public from building up an imaginary and uncomplimentary picture of the courts.[34] Open justice may be said to lead to people having more trust in the system.

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[28] *Richmond Newspapers, Inc v Virginia* 448 US 555, 580 (1980), 573.

[29] J. Resnik "Due Process: A Public Dimension" (1987) 39 U. Florida L.T. 405, 409.

[30] See Baylis, above n 14.

[31] C. Puplick "Open Justice to Whom?" (2002) 6 TJR 95.

[32] C. Davis "The Injustice of Open Justice" (2001) 8 JCULR 92.

[33] See Baylis, above n 14.

[34] See Burrows and Cheer, above n 1.

The key to the benefits listed above however, is not the openness of the court proceedings, but the publicity given to them. The majority of people are totally uninterested in court proceedings, open or closed, until such proceedings affect them personally. Without media coverage of court cases, few people would have knowledge of the court system and processes.[35] Lord Diplock in *Attorney General v Leveller Magazine*[36] agreed that the media play a function in the notion of a public justice system. He described this role in that the media circulate and broadcast reports of court proceedings to society, meaning a far greater number of the public will learn about the court hearing. Lord Denning certainly agrees with this proposition, he states:[37]

> A newspaper reporter says nothing but writes a lot. He notes all that goes on and makes a fair and accurate report of it. If he is to do his work properly and effectively we must hold fast to the principle that every case must be heard and determined in open court. It must not take place behind locked doors. Every member of the public must be entitled to report in the public press all that he has seen and heard.

This often means that what people know is determined by individual reporters and what news media outlets determine newsworthy enough to cover. It takes us back to what Lord Justice Cooke said in *R v Liddel*[38] when he described the media as surrogates of the public.

The word surrogate is defined in the Oxford English Dictionary as meaning "a person who stands in for another in a role or office."[39] So is this really true, do the media really act as a substitute or stand in for the public in court? Clausen[40] argues that by determining where the public interest lies and what the public interest is when considering section 140 applications,[41] the courts are effectively controlling what the media will report to the public. In doing so, the courts are usurping

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[35] See Davis, above n 32.

[36] *Attorney General v Leveller Magazine* [1979] AC 440, 450.

[37] L.J. Denning "A Free Press" (1984) 17 Bracton LJ 13.

[38] See Liddell, above n 22.

[39] C. Soanes *Oxford English Dictionary* (Oxford University Press, Oxford, 2002) at p843.

[40] B. Clausen (1998) "Redefining and Restricting the Veil of Anonymity: Name Suppression for Defendants in Criminal Proceedings." Dissertation LLB(Hons), University of Auckland, 1998.

[41] Criminal Justice Act 1985, (NZ) s 140.

the media's roles as 'surrogates of the public.'[42] Davis,[43] on the other hand, contends, and I agree, that the media are commercial organizations driven by commercial objectives and not non-profitable bodies there to serve the public good. She argues that the priority for many media companies is profit, not the welfare or education of the community, and suggests that to say the media represent the public in court "is naïve at best."[44] When the media dispute an application for a name suppression order, it may be that the incentive for this is more likely to be related to its own vested business-related interests rather than a drive to serve public interest. Davis[45] goes on and describes large media organizations as powerful opponents, due to the economic and legal resources on hand to them, and their easy access to a most effective instrument, the media, for influencing politicians and the community to support their cause, often dressed up as a 'public interest of open justice argument.' Baylis[46] describes negative aspects of the media's role as 'surrogates' of the public as including when reports of proceedings are sensationalized, or when pre-trial publicity may put at risk the fair trial of the accused. She also notes that as publicity may have a punitive effect and given that the media do not cover all trials without bias, this arbitrary coverage of cases does not sit well with the concept of every person being treated equally by the justice system. Baylis states "If the amount of publicity that a particular person is likely to receive means that they are punished to a much greater extent that would ordinarily be the case, this may justify a permanent name suppression order."[47]

The question then is whether open justice really is impeded by suppression orders. Davis[48] proposes that name suppression may be seen as an effective compromise between the rights of the media and the rights of individuals. I think this is especially so in the case of young offenders who because of the seriousness of the charge, are in the adult courts, but would otherwise have their name suppressed. Name

[42] As stated in Liddell, above n 22.

[43] See Davis, above n 32.

[44] Ibid, at p 99.

[45] See Davis, above n 32.

[46] See Baylis, above n 14, at 180.

[47] Ibid, at 206.

[48] See Davis, above n 32.

suppression orders do not affect the ability of the media to publish or air their story, including those sensational facts their readers or listeners want to know, nor do they go to the extent of closing the court to everyone, as is the practice of the Youth Court. This was recognized in the case of *R v his Honour Judge Noud: Ex Parte McNamara*[49] where Justice Williams acknowledged the significant distinction between closing courts and suppression orders. The public therefore are still informed of the pressing social problems and court processes which are in the 'public interest.'

Although the open justice principle is fundamental to our legal systems, it is suggested that the theoretical basis of the principle and general perception of the role of the media in its implementation are unsound.[50] In the case of Bailey Kurariki[51], public interest, including publication of the names of parties before the court, has prevailed over private interests. I think it is doubtful in most cases whether there is a "public interest" in knowing the identities of parties before a court, although it is undoubtedly interesting to the public. This is especially true in cases of serious offending by young persons which, because of the rarity and traditional 'innocent perceptions' of children, attract significant media attention. I would suggest that in the case of juveniles the ultimate "public interest" should lie in their rehabilitation and reintegration back into the community and to avoid criminal behavior carrying on into adulthood.

C. Children: A special case?

This paper suggests that juvenile delinquents are a special case and that the court should not have discretion to order name suppression under section 140.[52] All criminal trials involving juveniles should be conducted in private or if in public, the media should not be permitted to publish any name or identifying information. It has been recognized that children do not have the same developmental levels as adults and statistics have shown that a high degree of violent offending amongst

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[49] *R v his Honour Judge Noud: Ex Parte McNamara* [1991] 2 Qd R 86.

[50] See Davis, above n 32.

[51] See Rawiri, above n 5.

[52] Criminal Justice Act, 1985, (NZ), s 140.

youths tails off once offenders reach their twenties.[53] In a recent Court of Appeal decision Justice Hammond referred to a report by registered consultant psychologist, Dr Ian Lambie, which set out the reasons as follows:[54]

> It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.

Hammond J described the report as being grounded on "well accepted professional literature."[55] Wolff, Alexander and McCall[56] contend that as children get older their maturity of reasoning, and their grasp of moral issues increase and that this point is inadequately recognized in the law today.

The impact of peer pressure can be seen in the James Bulger case.[57] Robert Thompson was seen to be the ringleader, Venables followed his

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[53] *R v Slade & Hamilton* (28 February 2005) CA245/04, CA266/04, Anderson P, Hammond and William Young JJ – in this case Slade and Hamilton, along with a third offender violently attacked a passer by, who later died of massive head injuries. Their appeal concerned their sentence of 17 years and the application of Youth Justice Principles.

[54] Ibid, Hammond J at para [43].

[55] See *Slade*, above n53, per Hammond J at para 45.

[56] S. Wolff, R Alexander & A. McCall Smith "Points of Law: *Child Homicide and the Law; Implications of the Judgments of the European Court of Human Rights in the Case of the Children who Killed James Bulger*" (2000) 5 Child Psychology and Psychiatry Review 133.

[57] *R v Secretary of the State for the Home Department, Ex p Venables, Ex p Thompson* [1998] AC

lead. Both were convicted of manslaughter. If children are mentally so different to adults, then why is it that, in the case of serious offences, they are treated the same? The seriousness of the offence does not make them any more of an adult, or any less of a child. The irony is that our youth justice system does, to some extent, recognize the fact that a child's mental culpability develops as they grow older, but this seems to be ignored in the case of serious offending. I do not think, as an inescapable consequence of growing up, that this should be the case for child offenders. It is contradictory that the principles developed in the Youth Court are not relevant to offenders who are still youths, yet in the adult courts.

D. Criminal Culpability of Children

In New Zealand children do not become criminally responsible upon reaching one specific age, instead there are four separate age categories to which different rules apply.[58] This is what known as a graduated approach.

> (1) Children under 10 years: No criminal prosecution can be brought.[59]
>
> (2) Children aged 10-13 years: Can only be charged with murder, manslaughter or minor traffic offences and the prosecution must prove they knew their act was wrong or illegal.[60]
>
> (3) Young people aged 14-16 years: Can be charged with any criminal offence but usually their case will be heard and decided in the Youth Court.[61]
>
> (4) Young adults aged 17: Can be charged with any offence

407.

[58] Robert Ludbrook *Criminal Responsibility of Minors,* Brookers Family Law Database (Child Law) <http://www.brookersonline.co.nz.ezproxy.auckland.ac.nz/databases/modus/family/childlaw/DISC-CHILD!21~GRP1.YJ2?tid=8770509&si=15> at 1 August 2006.

[59] Crimes Act 1961, (NZ), s 21.

[60] Crimes Act 1961, (NZ), s 22.

[61] See *Brookers Child Law*, above n 58.

> and the charges will be heard in an adult Court, namely the District Court or High Court.[62]

In New Zealand we have a separate court, the Youth Court which has jurisdiction over any child or young person who commits an offence. The Children, Young Persons and Their Families (CYPF) Act,[63] defines 'child' as "a boy or girl under the age of fourteen" and 'young person' as "a boy or girl over the age of fourteen, but under the age of seventeen." The Youth Court's jurisdiction however, is not absolute. A child or young person who is charged with murder or manslaughter is dealt with in the High Court in the same way as if the charge was brought against an adult.[64] For those offences classified as 'purely indictable' offences, which are those at the more serious end of the spectrum, for example sexual violation or aggravated robbery, if a child or young person pleads 'not guilty' and the Youth Court considers there is sufficient evidence for the matter to be tried, it may decide whether to commit the offender to the District or High Court for trial, or to hear the matter itself.[65] Alternatively the offender may elect to have their case heard by trial in which case it would most likely be heard in the District Court.[66] In summary therefore young offenders charged with either summary or indictable offences will generally have their cases dealt with in the Youth Court.

There are two bills currently before Parliament which, if enacted, will introduce another exception to young offenders being generally dealt with by the Youth Court. If enacted, clauses 17 and 20 of the Children, Young Persons and their Families Amendment Bill (No. 4) 2004 will give a judge in the Youth Court power to commit a young person to the District or High Court where he finds that the offence arose out of the same event or series of events as an indictable offence or offence for which the young person has elected trial by jury. The Young Offenders (Serious Crimes) Bill,[67] if enacted, will expand the scope of offences for which a young person over twelve can be charged with in

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[62] Ibid.

[63] See CYPF Act, above n 7, s 2.

[64] See *Brookers Child Law*, above n58.

[65] Ibid.

[66] Ibid.

[67] Young Offenders (Serious Crimes) Bill, March 2006, introduced by Ron Mark.

the adult courts. The most likely effect of both bills will be that more juveniles will end up in the adult courts. At the same time however, there is international pressure from the United Nations Committee on the Rights of the Child[68] to raise the age of criminal responsibility to be better in alignment with our responsibilities under the convention.[69] It does seem somewhat inconsistent that a child aged ten can be charged with murder, and be treated with the same level of responsibility as an adult in court, yet is not considered old, or responsible enough to stay home alone or baby-sit another under current New Zealand law.

E. Children, Young Persons and Media Reporting

For those cases that are heard in the Youth Court, offenders are granted automatic name suppression; this is absolute. Media are allowed to attend the Youth Court, but this is only with permission of the judge and proceedings are mostly conducted in private. Under section 438(1) CYPF Act[70] no report on any proceedings in the Youth Court can be published without leave of the court that heard the proceedings. If leave is granted to any report, name suppression shall still apply and nothing may be published that names the young person, their parent or guardian, the school they were attending or anything else that may lead to the identification of the young person or school.[71]

These restrictions do not apply when a young person is tried in, or transferred to the District or High court for sentencing.[72] In the 'adult courts' name suppression is at the discretion of the judge. This was confirmed by Chambers J when he held that the protection accorded by section 438[73] which restricts publication of a young persons name, applies only to reports under that Act.[74] Justice Fisher, in the well known New Zealand case of *R v Rawiri (Choy Trial)* confirmed that

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[68] New Zealand's First Report: CRC/C/15 Add 71, 24 January 1997 at para 10 and 23, New Zealand's Second Report: CRC/C/15 Add 216 at para 4, 5 and 9.

[69] United Nations Convention on the Rights of the Child, 1990, ratified by New Zealand on 14 March 1993.

[70] See CYPF Act, above n 7, s 438(1).

[71] Ibid.

[72] *Police v Young Person* (1991) 8 FRNZ 609.

[73] See CYPF Act, above n 7, s 438.

[74] *R v Fenton*, 1/2/00, Chambers J, HC, Auckland T992412.

section 438[75] ceased to apply once the accused were committed to the High Court for trial.[76]

For those children who are committed to the District or High Court for trial or sentencing, name suppression may still be granted under section 140 of the Criminal Justice Act.[77] Section 140 states that the court may prohibit publication of names "or any particulars likely to lead to any such persons identification." It gives no indication of when a judge should order name suppression, which means all considerations relevant to an application by an adult for name suppression will be just as relevant for youth, as well as the important qualification of the offender's age. Munday[78] argues that this has left the court with a broad discretion and considerable leeway in making its decisions. There are a number of criteria which have commonly been considered relevant in applications for name suppression. These were referred to in *Lewis v Wilson*.[79] One of the criteria, where publication may "militate against his or her established prospects of rehabilitation," is especially relevant in relation to children.[80] This is consistent with the objective of the Youth Court and the CYPF Act[81] which take a restorative rather than a punitive approach to juvenile delinquents.

F. Naming, Shaming and the Restorative Justice Basis of our Youth Justice system

Though not premised on restorative justice ideas, our system of youth justice in New Zealand is broadly compatible with them.[82] The Youth Court website advises that our youth system in New Zealand is the "first legislated example of a move towards a restorative justice

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[75] See CYPF Act, above n 7, s 438.

[76] See *Rawiri*, above n 5.

[77] Criminal Justice Act 1989, (NZ), s140.

[78] R. Munday "Name Suppression: an adjunct to the Presumption of Innocence and to mitigation of Sentence – 1" (1991) Criminal Law Review 753.

[79] See *Lewis v Wilson*, above n 23.

[80] See *Brookers Child Law*, above n 58.

[81] See *CYPF Act*, above n 7.

[82] Achieving Effective Outcomes in Youth Justice, Final Report February 2004, Ministry of Social Development, Wellington, New Zealand.

approach" to offending.[83] This means that it focuses on "repairing harm, reintegrating offenders, and restoring balance within the community."

It is proposed that one reason for not granting name suppression is accountability on the part of the accused, and the implication of public shame for what they have done.[84] The idea of re-integrative shaming provides much of the theoretical basis for restorative justice.[85] Yet as Winfree Jnr[86] contends, there are two different kinds of shaming. Shaming is disintegrative (or stigmatising) if it blames offenders and denies them re-entry into the community. Re-integrative shaming, on the other hand, first establishes the wrongfulness of the act or deed (as opposed to the person's evilness) and then provides a public means of bringing them back into the community or group. In summary re-integrative shaming may help rehabilitation whilst disintegrative shaming may do the opposite.

If the goals and principles of our youth justice system are to focus on "repairing harm and reintegrating offenders," and to prevent re-offending, then one would assume that we would be trying to practice re-integrative shaming. To some extent this is correct. In the Youth Court offenders may be referred to a family group conference, where those affected by the crime have a chance to contribute, as well as the offender and only those directly involved with the crime know the offender's identity. However, this is not the case for those that are tried in the adult courts, who do not receive automatic name suppression. If name suppression is not granted, their names are put into the public arena where naming and shaming takes on a new life, and has a far different effect.

As an extreme example take the Bulger case.[87] Dame Elizabeth Butler Sloss in considering the threat to the boy's lives under Article 2[88]

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[83] Ministry of Justice, *About Youth Justice – Overview of Principles and Process,* <http://www.justice.govt.nz/youth/aboutyj.html> at 10 August 2006.

[84] T. Winfree Jnr "New Zealand Police and Restorative Justice Policy" (2004) 50 Crime and Delinquency 189.

[85] Ibid.

[86] Ibid.

[87] See *Secretary of the State for the Home Department*, above n 57.

looked into the kind of newspaper items concerning the case. She noted the Sunday Mirror, 31 October 1999 which ran an article titled "Society must be protected from this pair of monsters" and another on 27 August 2000 was titled "Throw away the Key." *The Guardian*, 31 October 2000 titled "Bulger Father Vows to Hunt Killers down" and many more of this kind, including hate mail to the boys' secure units and threatening phone calls.[89] In New Zealand after the Michael Choi killing, the Sunday Star Times[90] ran an article titled "teenagers doomed for life of crime", and The Southland Times; "Young Killer is no Star."[91] This seems much more like stigmatization, focused on the offender's personality.

Braithwaite[92] argues that when people shame us in this kind of stigmatizing and degrading way it poses a threat to our identities. One way that people deal with this is to "reject our rejecters." He makes a connection between this type of shaming and criminal subcultures. Stigmatization increases the attractiveness of these criminal subcultures as disrespect begets disrespect, because 'you don't respect me, I won't respect you.' As these people have no hope of gaining a respected identity under the community's values, they turn to delinquent subcultures which look more promising as a basis of respect. Winfree Jnr[93] proposes that these groups of stigmatized mutually reinforcing criminal subcultures provide the perfect learning environment for crime and other illegitimate activities, and may therefore create continued and perhaps increased crime. I would argue that this would be more powerful in young people who by nature care much more than adults about what others think of them, and are in a phase of their lives in which they are already seeking for both their identities and acceptance. Cast out by the community, this lowers their chances of re-entry and rehabilitation significantly.

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[88] European Convention on Human Rights, 1950, Article 2.

[89] *Venables v News Group Newspapers Ltd and Others, Thompson v Newsgroup Newspapers Ltd and Others* [2001] 2 WLR 1038 page 457.

[90] E. Wellwood "Teenagers Doomed for Life" *The Sunday Star Times* (Auckland, New Zealand, 25 August 2002), edition A, page 1.

[91] See *"Young Killer No Star"*, above n 8.

[92] J. Braithwaite "Shame and Criminal Justice (Changing Punishment at the Turn of the Century)" (2000) 42 Canadian Journal of Criminology 281.

[93] See Winfree Jnr, above n 84.

Granting name suppression would turn the focus of such newspaper articles and public debate onto the nature of the crime, the act and "not the person's evilness."[94] Only those people directly involved would know the perpetrator's identity. Braithwaite justifies this approach by theorising that when we do something wrong, the people who are in the best position to communicate the shamefulness of what we have done are those we love. Our family and friends are those we respect and have the most influence over us, and because these relationships are based on love and respect, when they shame us they will do so re-integratively.

Lord Judd, commenting on the naming and shaming of young offenders under the United Kingdom's Anti-Social Behaviour Act 2003 questions what is important; venting our frustration by naming and shaming the young person or working on the tougher job of helping the child become a responsible member of the community and "do something that will overcome a repetition of the problem in the future."[95] Lord Judd also discusses a "badge of honour" among some young people, in that they may feel it fascinating or desirable to have their name in a newspaper. He questions whether this would really help with rehabilitation and enabling the child to understand the damage and harm their conduct has done to others. This notoriety may in fact feed into the young person's sense of satisfaction about causing trouble. We can see evidence of this in Bailey Kurariki, after the media frenzy that followed his case, as discussed above. There was also evidence of this "badge of honour" attitude in Ngatia Rewiti, the fourteen year old boy who threw a concrete slab from an over-bridge, killing passing driver Christopher Currie.[96] In a New Zealand Herald article titled "The Streets of No Shame" the paper describes how the mechanism of justice seemed like a 'badge of honour' for the boys, that Rewiti had become a star. "He's achieved the sort of fame TKS (south Auckland young person's gang) adores - a Tupac Shakur-style exit from court,

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[94] See Braithwaite, above n 92.

[95] Lord Judd, Lord Hansard Home page 2006, <http://www.shaka.mistral.co.uk/lord hansard.htm> at 1 August 2006.

[96] *TV3 v R and Ngatai Tamahou Rewiti* HC-Auckland, 2006, CRI-2005-092-14652, Winkelman J.

captured by the cameras for the evening news."[97] The reference to a "Tupac Shakur-style exit" is to that of a celebrity, with cameras flashing in all directions. It was also reported that Rewiti was proud of what he had done, boasting to other children at school before he was apprehended, "he was the kid all those people were talking about."[98] This bad publicity is getting such children the attention that they may lack at home, attention that they revel in and want more of.

Equally for those who want to make a fresh start, for whom being caught and reprimanded has had an effect, the impact of negative publicity about them can only prolong their problems in engaging with their community more positively. People, who may never have known them or met them, will know them only as a troublemaker, long after their behavior has changed. The rehabilitative work that social workers and psychologists would have carried out with the offender during their time in custody would be put to waste, as the community only knows them by name as a criminal. So then what about Bailey Kurariki who will come out of prison still a teenager, after spending seven years in jail (provided he does not get paroled earlier), does he have any realistic chance of reintegration and a normal adult life?

G. The English Experience

The 'James Bulger'[99] case as it is known, is the most notorious child murder case in the United Kingdom. Two English schoolboys, Jon Venables and Robert Thompson were tried and convicted in November 1993 for the murder of two-year old James Bulger. They had dragged their victim from a supermarket for four kilometres, then stoned him to death and left his body on the railway track so as to try to conceal their crime. The boys were at the time of the trial eleven years old and ten at the time of the murder, only just able to be convicted of a crime at all. There was so much intense pre-trial publicity that the trial was moved from Liverpool, where the killings had occurred, to Preston Crown Court. Both boys received name suppression during trial, however this was lifted following conviction. The attitude of the public and media was menacing. Two further cases

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[97] "Streets of No Shame" *The New Zealand Herald* (Auckland, New Zealand, July 9 2006).

[98] Ibid.

[99] See *Secretary of the State for the Home Department*, above n 57.

which I will examine resulted from the original trial. The first was the appeal the European Court of Human Rights[100] and the second was the application by both boys for permanent identity suppression following their release (with new identities) from the secure units and their attaining the age of majority.[101]

H. Name Suppression Before and During Trial

Venables and Thompson appealed to the European Court of Human Rights. One of the bases of their appeal was a violation of Article 6(1) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that everyone has a "Right to a Fair Trial." The court found that a child is denied this right when he or she cannot effectively participate in his or her trial.[102] It stated that a public trial in an adult court must be regarded 'in the case of an eleven year old child as a severely intimidating procedure. Taking into account the applicants' age it found that "the application of the full rigours of an adult, public trial deprived him of the opportunity to participate effectively in the determination of the criminal charges against him."[103]

I agree with Sentlinger who contends that the decision tends to suggest that children should be tried in private, less formal proceedings in order to allow the offenders to participate in the process and reduce intimidation by the public.[104] Dyer goes farther and argues that the decision suggests that children who are Venables' and Thompson's age should never be tried in adult criminal proceedings again. Indeed, although the judgment avoids the issue, the court said that "it is highly unlikely that the applicant would have felt uninhibited, in the tense courtroom and under public scrutiny."[105] This may be read to conclude that a private trial may be required to ensure an element of fairness to the child.

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[100] *V v United Kingdom* (2000) 30 E.H.R.R. 121.

[101] See *Venables v News Group Newspapers Ltd* above n 89.

[102] See *V v United Kingdom*, above n 97.

[103] Ibid.

[104] E. D. Sentlinger, "*V v United Kingdom*: Is it a "New Deal" for Prosecuting Children as Adults" (2000) 16 Conn. J. Int'l L. 177.

[105] See *V v United Kingdom*, above n 100, at para 90.

In both the United Kingdom and New Zealand, courts are encouraged to take the best interests of the child into consideration at all stages of the proceedings. Buckley argues that without doubt the interests of the child should always come before satisfying public opinion.[106] Sentlinger[107] contends that closing the doors to a juvenile criminal trial increases the ability of the child to participate in the proceedings. By excluding the public, courts can create an atmosphere that benefits the interests of the child while also serving the interests of justice. Given the public scrutiny and its potential effects on the child's ability to participate, the question of a public or private trial is central to determining whether a child can effectively participate at trial. In addition the child's ability to handle the rigors of a public trial should be considered in determining whether to remove a child to an adult criminal court. It has been said that during trial Venables and Thompson heard tapes of their emotionally charged police interviews, Venables cried most of the time until he found a way to distract himself from listening to the proceedings, by counting in his head or drawing circles on the floor with his feet.[108] Bailey Kurariki was given pen and paper to draw on during proceedings. They could not pay attention to something they did not understand. Although the decision of the European Court is not binding on New Zealand, it is persuasive. If Bailey Kurariki had been tried in a private, age appropriate setting, he may have been able to better understand and appreciate the seriousness of what he had done, instead of being sidetracked, reveling in media attention. In the same way Ngatai Rewiti wouldn't have received his "Tupac Shakur-style exits" from the court room, and both boys would not be celebrities in the eyes of their peers, not to mention themselves.

Wolff, Alexander and McCall Smith contend that for children under fourteen there should neither be a public trial, or revelation of their names, to avoid the damage done by publicity and labeling. Justice[109] also recommends that children under fourteen should not be liable to a public trial in adult criminal courts and that for homicides committed

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[106] F. Buckley "One Murder, Three Victims, James Bulger, Robert Thompson and Jon Venables" [2002] C.O.L.R. (10).

[107] See Sentlinger, above n 104.

[108] See *Wolff, Alexander & McCall Smith*, above n56.

[109] Justice (1996) "Children and homicide: Appropriate Procedures for Juveniles in murder and homicide cases". London: Justice.

by children between fourteen and eighteen there should be a public hearing in a crown court with the judge able to rule about restrictions on reporting and revelation of identity. Children must be able to understand the trial procedure as it may well constitute the beginning of treatment. International legislation supports a closed trial. The International Covenant on Civil and Political Rights[110] provides "in the case of juvenile persons, the procedures shall be such, as will take account of their age and the desirability of promoting their rehabilitation. The Beijing Rules[111] which preceded New Zealand's own Child, Young Persons and their Families Act, provide:

> 8. Protection of Privacy
>
> 8.1 The Juvenile's privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

Fisher J refers to the enactment of section 329[112] and 438[113] of the CYPF Act as being entirely consistent with the Beijing rules. The CYPF Act however is limited to the Youth Court, while the Beijing Rules extend to all courts. The Beijing Rules were followed by the United Nations Convention on the Rights of the Child.[114]

The European judgment and international legislation clearly weigh in favour of at least name suppression before and during trial, and perhaps even further to the extent of a closed court. Our own experience in New Zealand illustrates that this may have resulted in a far better outcome in the cases of Bailey Kurariki and Ngatai Rewiti. I think it is integral that all children receive their fundamental right to

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[110] See ICCPR, above n 13.

[111] United Nations Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Although these rules are not binding on New Zealand the significance is that they directly preceded our own CYPF Act (Fisher J in *R v Rawiri*). See Appendix.

[112] See CYPF Act, above n 7, s 329

[113] Ibid, s 438.

[114] See Convention on the Rights of the Child, above n 69, Article 40.

participate in their own trial, and that media interest and presence is likely to frustrate such a right.

I. Post-Trial Permanent Suppression

On attaining majority and pending the release of the two from their secure units with new identities, Venables and Thompson sought indefinite prohibition of anything which would identify them.[115] Dame Elizabeth Butler Sloss found that there was a real threat to their lives and possibility of revenge attacks. She noted that the media were in a unique position to provide the information that could lead to this risk and found that therefore the law of confidence could be extended to cover the indefinite injunctions sought in this case. She found the right to life was an overriding right and therefore a reasonable limit on freedom of expression.[116]

She did however note that she was uncertain whether it would have been appropriate to grant such injunctions if only Article 8[117] were likely to be breached. She said:

> Serious though the breach of the claimants' right to respect for family life and privacy would be, once the journalists and photographers discovered either of them, and despite the likely serious adverse effect on efforts to rehabilitate them into society, it might not be sufficient to meet the importance of the preservation of the freedom of expression in Article 10(1).[118]

She expressly stated it was not necessary for her to conclude on this issue due to the real risk of a breach of the rights of the claimants under Articles 2 and 3.[119] She placed emphasis on the intense media interest which remained seven years later and the continued hostility toward the claimants. The judgment is indicative that only in the case of a threat to the offender's life on release would permanent identity suppression be

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[115] See *Venables v News Group Newspapers*, above n 89.

[116] Ibid.

[117] See ECHR, above n 88, Article 8 'Respect for private and family life'.

[118] See *Venables v News Group Newspapers Ltd*, above n89, at para 464.

[119] See *ECHR*, above n 88, Article 2 "Right to life" and Article 3 "right to not be subjected to torture."

granted. I do however think that the adverse effect media attention would have on their rehabilitation and reintegration justifies a limit on freedom of speech.

Any restriction placed upon the media and reporting in the Youth Court and any grant of name suppression limits freedom of expression under the New Zealand Bill of Rights.[120] The question then, is whether these limits can be demonstrably justified in a free and democratic society.[121] In the Canadian case of *Southam Inc.,*[122] the court said that these limits could, so as to promote the rehabilitation of young offenders. As a means to achieve this objective the state chose to protect young offenders from the harmful effects of publicity. Martin[123] questions this objective. He asks whether society in fact has an equal interest in promoting the rehabilitation of adults. "If the rehabilitation of young offenders is prejudiced by the harmful effects of publicity, why should it not create a similar protection for adult offenders? Are adult offenders not going to be affected by publicity?" Martin[124] argues that the reasons of the court for protecting young offenders must stand or fall on a comparison of the recidivism rates for young offenders and the recidivism rates for adult offenders. He argues that if it turned out that the recidivism rates of young offenders were significantly lower than adult offenders, then we could conclude the limits were justified in a free and democratic society.

I think that the fact alone that young offenders are still in their formative years surely means that there is a much higher chance of rehabilitation than in adults. Young children are very impressionable and those that offend have often been led down the wrong track and just need someone to care enough to lead them in the right direction again. The CYPF Act recognizes this in having rehabilitation as one of

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120 New Zealand Bill of Rights Act 1990, s 14 'Freedom of Expression.'

121 Ibid, s 5 'Justified Limitations.'

122 *Southam Inc. v. R.* (1984), 48 O.R. (2d) 678 (H.C.J.) – In this case the applicant sought a declaration that the Young Offenders Act limited or denied their fundamental freedom of expression under the Canadian Charter and sought to get a court order excluding the public and press from the court to be set aside. The court agreed that their rights were limited but thought it was a reasonable limitation which could be demonstrably justified in a free and democratic society.

123 R. Martin *Media Law* (2nd ed) Irwin Law, Toronto, 2003.

124 Ibid.

it objectives.[125] It seems absurd that after having spent many years and resources helping Venables and Thompson develop into mature respectable young adults, the court would allow it all to be reversed. On all accounts it is reported the boys are genuinely very remorseful for what they have done and have grown into likeable young adults with little chance of re-offending. The boys would forever be caught in their past and not allowed to move on with their lives. They have served their punishment; the media should not be able to inflict a further and possibly indefinite one. Wolff, Alexander and McCall Smith argue that with proper care and treatment child offenders can become very different adults from the children they once were.[126] The European Court of Human Justice[127] recommended that the penal system of countries should in the case of children have objectives of social integration and education and that strictly punitive approaches are inappropriate. I think that the court, in considering name suppression must take into account the punitive approach the media take to create controversy and public interest to sell papers.

The victims of the crime often want the offender's name published to serve as additional retribution. Revenge is sweet, but it is a very basic human instinct and as members of a civilized society we must ask ourselves whether in the long run it is in our best interests. If our approach promotes re-offending the cost to the public will be far greater than one which helps produce citizens who are able to contribute effectively to society. I think that given that they are children and have many more years to live, society would prefer they rehabilitate, rather than cause much more potential harm by following a life of crime. So, given the evidence, why are the public continuing to demand harsher treatment of juvenile offenders? Could the media be to blame for this as well?

J. The Media and Public Perception of Juvenile Offenders

Davis[128] argues that for the media to fulfil their so called role of 'informer' and 'educator' of the public as surrogates in court, the press

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[125] See CYPF Act, above n 7, at s 4.

[126] See Wolff, Alexander & McCall Smith, above n56.

[127] See *V v United Kingdom*, above n100.

[128] See Davis, above n32.

should be able to and should make every effort to report on everything that happens in court. This would be so to ensure no bias so the public are allowed and able to form their own opinions on cases and on our justice system in general. In reality however, news media will only allocate resources to cases that are deemed newsworthy, which results in only a select few cases being reported in the press. Serious juvenile offender cases are usually deemed 'newsworthy' as they are sure to invoke strong public reaction and sell papers.

Public attitudes and opinion unavoidably depend on public knowledge. However, few people know much about the juvenile justice system or how it works. Their knowledge tends to be filtered through the mass media and often involves notorious ("newsworthy") cases such as the Bulger and Choy cases discussed above. Roberts[129] contends that news media coverage of youth crime conveys a distorted portrait of the cases being processed by the courts and that youth crime in the papers is heavily skewed towards violence. He refers to studies by Dorfman and Schiraldi who conclude:[130]

> Rather than informing citizens about their world, the news is reinforcing stereotypes that inhibit society's ability to respond effectively to the problem of crime, particularly juvenile crime.

Roberts[131] goes on to add that coverage of youth crime in the media may affect public reaction to youth justice by promoting an offence-based view of processing and sentencing. If people do this they are less likely to take account of the offender's age and more likely to oppose mitigated punishments for young offenders and criticize the Youth Court for doing so. This is significant, as the existence of our separate youth justice based system is founded upon the recognition that the offender's age affects his degree of culpability. I think this is evident in that many people claim to support lifting name suppression on the basis of the seriousness of the offence, although as I mentioned before, the seriousness of the offence does not make them any less a child or any more of an adult.

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[129] J. V. Roberts "Public Opinion and Youth Justice" (2004) C & J 11.

[130] Dorfman, L., and V. Schiraldi (2001) "Off Balance: Youth, Race and Crime in the News." Building Blocks for Youth, 20.

[131] Ibid.

The abduction and murder of James Bulger became a global media event. Alison Young contends that it also became a kind of global benchmark against which to measure the extent of juvenile crime as a problem or the depths of national depravity.[132] Young describes how the media portrayed Bulger as "the quintessential child: small, affectionate, trusting, vulnerable, high spirited. He was frequently referred to as 'baby James.'"[133] She also discusses how James' photo accompanies most articles, wearing a t-shirt or pyjama top adorned with the words "Teenage Mutant Hero Turtles." He is taken as representing many of the symbolic ideals of childhood and most importantly, he appears to be what he is, innocent. Newspaper headlines included ones such as "Death of the Innocence". In stark contrast Thompson and Venables are portrayed as "*appearing* to be children, but they are not, they are more like miniature evil adults or monsters in disguise."[134] Young argues that James Bulger's status as a child was elevated, while Venables and Thompson were subjected to strategies by the media which undercut their childlike appearances, treating them more like adults. Franklin and Horwath[135] describe how the newspapers seemed unwilling to pay any serious attention to the mitigating circumstances which may help to explain the behaviour of Thompson and Venables, "without recourse to accounts based on biblical notions of 'inherent evil.'"[136] They argue the most worrying effect of this type of media abuse is the cultivation of the image of a child as a powerful, destructive being.[137]

I think that this message that children are bad or evil can have a spiraling effect. The public see these people who, although biologically children, as adults with adult minds capable of realizing the effects of their crime and therefore demand they receive adult treatment and punishment. It adds to the perception that children are becoming more

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[132] A. Young "In the Frame: Crime and the Limits of Representation" (1996) 29 ANZJ Crim 81.

[133] Ibid.

[134] Ibid, p 84.

[135] B. Franklin & J. Horwath "The Media Abuse of Children" (1996) 5 Child Abuse Review 310.

[136] Ibid, p 313.

[137] Ibid, p 316.

violent and out of control, which in turn intensifies the punitive nature of society today, and leads to demands for harsher treatment. The idea that a child such as Robert Thompson or Jon Venables fully understands the effect of what he did at such a young age is plainly wrong. Children do not have the life experience to understand the long term effects of what they do. These are children who only learnt to read and write not so long ago and who are not even a quarter of the way through their lives.

Roberts[138] argues that the public are encouraged by the media to draw general inferences about young people on the basis of a few specific instances. This public misconception of juvenile justice influences public attitudes towards juvenile justice policies. New Zealand is becoming more and more of a punitive society with promises of harsher treatment of juvenile offenders being given frequently in election campaigns and two bills before parliament which if passed will mean more unforgiving treatment of young offenders.[139] The portrayal of children as calculating, wicked and conniving gives the public and the government reasons to justify their harsher treatment and leads them to become desensitized to the offenders' needs. Hill[140] refers to the analogy of dropping a stone into a pond to explain the ripple effect of the social amplification and dissemination of information by the media. This negative media imagery creates the wrong impression of children, which leads to a public response that is wrongly based, and punishments that are not in the best interests of the child or the community.

Conclusion

Bailey Kurariki will have served his sentence by 2009.[141] Although his appearance would have changed with age, there are not many people in New Zealand who will not remember or recognize his name. If any

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138 See *Roberts*, above n129, p 11.

139 Child, Young Persons and their Families Amendment (No 4) Bill and Young Offenders (Serious Crimes) Bill 2005.

140 A. Hill "Media Risks: The Social Amplification of Risk and the Media Violence Debate" (2001) 4 Journal of Risk Research 209, at 215.

141 Sensible Sentencing Trust *Junior Bailey Kurariki* <http://www.safe-nz.org.nz/Data/kurarikibailey.htm> at 1 August 2006.

further cases involving murder or manslaughter committed by a child occur, the media are likely to drag his name through the papers and on television all over again. He will probably have trouble finding meaningful employment if he ever tries. Robert Thompson and Jon Venables on the other hand will not have such trouble. They are free to enjoy the rest of their lives in peace. Having completed their sentence, and punishment for their crime, they are able to move on with their lives and look into the future, have goals, ambitions, and dreams. They have a chance of becoming good, contributing members of society. Bailey Kurariki and Ngatai Rewiti will have no such opportunity.

Had Bailey Kurarirki and Ngatai Rewiti been granted name suppression they would at least have the opportunity to start afresh on release. The public could still have been informed that a child had killed and the media would have been able to report on the sequence of events. The 'public interest' and principle of open justice would not have been hampered in any significant way. Instead, stigmatized, Kurariki and Rewiti are likely to become more involved in criminal subcultures, with gangs of other youths who perhaps saw them on television, or their picture in the paper and look on them as celebrities, icons perhaps. If Kurariki and Rewiti follow this path, chances are high they will end up back in prison as adults, and the cost to society will be far greater than if it had worked harder on their rehabilitation and reintegration. If they were to ever get in trouble with the law again, the media attention would intensify and the cycle would repeat itself.

We have a Youth Court that is strong on reintegrating the offender into society and yet when a child commits a serious offence this aim seems to be thrown out the window. This contradiction should not be present. As recognized by the Youth Court, name suppression in particular plays a large role in the prospects of reintegration and rehabilitation. It should therefore be applied to all child offenders, because they are children, not conditional on what crime they committed. Although Thompson and Venables were not granted permanent name or identity suppression initially, I believe that this would be more expedient, efficient and far less costly for our justice system, than going through the process of creating and maintaining new identities on release. It also promotes consistency with the overall treatment of youth offenders as dictated by the CYPF Act and the Youth Court. To pour huge resources into creating a new life for these

offenders, I feel, creates public resentment, as the victims have to live the rest of their lives with their loss. This resentment is easily avoidable.

For these purposes a child is someone who, but for the seriousness of their crime, would have had their case heard by the Youth Court. The seriousness of their crime should not mean that they are treated as an adult. They should be treated as a child with permanent name and identity suppression until they are no longer considered a 'child' or 'young person' as defined by the CYPF Act. In New Zealand this would be until they are eighteen. On reaching age eighteen I propose that the offender may apply to the court for further suppression, and if the court thinks that this is necessary for their rehabilitation and reintegration into society, or as in Thompson and Venables' case, their safety, it may be granted.

The word child has connotations of innocence, playfulness and vulnerability. However when a child commits a serious crime, for most people, those connotations disappear and instead are replaced by a belief this child has displayed an adult behaviour and must therefore be mature. I believe this to be wrong. A child's brain is not yet fully developed, and neither are their thought processes. With a child, previous history is hopefully minimal and definitely short, while the potential for change is huge. Let us not ignore this potential. Surely a child should get a second chance. Name suppression will go a long way towards this.