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FOREWORD

RT. HON.DAME SIAN ELIAS,
CHIEF JUSTICE OF NEW ZEALAND

Reviewing the collection of essays published here, it is impossible not to feel pride in the scholarship being produced by New Zealand law schools in 2008. The work is not only of a very high standard but the topics are also at the cutting edge, as good law review articles should be. They provide insights into a number of issues which are currently agitating New Zealand law. And the conclusions tentatively or firmly put forward offer some practical suggestions for future development. Since these essays engage with difficult issues as well as topical ones, the ideas expressed may well spur action.

The effectiveness of insider trading regimes is a matter of concern not only in New Zealand but in comparable jurisdictions, as the recent Australian litigation which sparks S Cunliffe's essay illustrates. Cunliffe notes a divergence in the rationales for regulating insider trading in the US, Australia and New Zealand and suggests, after reviewing the New Zealand case-law, that the US basis, with its lower threshold for materiality is more effective. K. Ewing raises the question why New Zealand traders have been slow to take advantage of the United Nations Convention on Contracts for the International Sale of Goods. It is not a question that would have occurred to me. And, indeed, Ewing identifies ignorance on the part of New Zealand lawyers as a major obstacle to its use by New Zealand traders, an ignorance this article will do much to dispel. K. Venning addresses a topic that is of immediate practical importance to the operation of the courts, the use by lawyers of the news media in winning hearts and minds outside the courtroom. This is a topic I know the Chief Judge of the High Court has firmly in his sights. And he will gain much useful ammunition here for the solution recommended, the development of guidelines for the conduct of lawyers. In "Law as a Secular Enterprise" M. Forster provides a spirited response to Steven Smith's "Law as a Religious Enterprise". It argues, using Ronald Dworkin's theories of interpretation, that law rests on secular liberal values. The practical

consequence (and the necessary reminder) for a working judge is that comfortable application of law as scripture is not available; we need to work harder to express the rational values that underpin law. This essay is thinking at its hardest. As is any essay that tackles causation, as Y. Yasui does in relation to criminal law. Some of the more difficult problems to come before the courts relate to causation. Yasui's essay sees the way forward as maintenance of a strict distinction between causation in fact and causation in law. Her essay may help some of us to do rather better for the future. C Moody makes the case for reform of the Adoption Act 1955. The essay is a compelling argument why the Act is out of date and inadequate to meet the rights and welfare of the child, which should be central in any modern law. It represents the social values of a society that has changed completely. This essay would repay reading by legislators. So too, would C Hornibrook's essay on "The Problem of Parental Control", a measured critique of s 59 of the Crimes Act 1961, which the author argues to have been an opportunity fumbled. The final essay in the collection is also concerned with law reform, in this case the proposal to abolish the Mäori seats. A Wicks argues, in the essay that is the winner of the Ministry of Justice prize, that the abolition of the Mäori seats would be inconsistent with the principles of the Treaty of Waitangi. In making out the case for retention the author draws not only on Article 2 of the Treaty of Waitangi but Article 3 and the guarantee of substantive equality it contains. The emergence of Article 3 in Treaty dialogue has taken some time. It may be predicted that it has far to go in a society based on the rule of law.

As this survey of the contents of the review indicates, the editors as well as the contributors are to be congratulated. All in the profession can take heart from the standing of legal scholarship in our law schools. More importantly, the range of topics and the liveliness of the critical engagement of the authors with their themes are indications that these essays are concerned with "the living law". Justice Brandeis once said of the living law that it is "not a formula, pinched, stiff, banded and dusty like a royal mummy of Egypt" but "a reality, quick, human, buxom and jolly".[1] While law may not always be jolly (or quick or buxom), at its best it must combine the intellectual and the practical if it

[1]Louis D Brandeis, *The Living Law* (1914) 359-360.

is to be fit for the needs of men and women in our society. These essays are intellectual and practical and a worthy contribution to the living law in 2008.

Rt. Hon. Dame Sian Elias
Chief Justice of New Zealand.

EDITORIAL

GREGORY AMBLER

Academic writing is a fundamental part of scholarship, and in the legal arena it is especially significant. Not only can it provide a valuable commentary and critique on past or present legal issues, but it can look forward, and allow an author to analyse or forecast the consequences of particular actions affecting particular parts of our legal system.

This journal, publishing articles resulting from the labours of student scholarship, is an excellent opportunity for students to contribute to the annals of legal academia, and the perspective of a student is unique indeed. A youthful perspective can be refreshing and engaging, resulting in work that can challenge long-held attitudes, fortify those which are well-established, or simply provide an alternative way of looking at things. What is more, this perspective is often refined and inspired by the nurture and dedicated advice of a staff devoted to legal education, a presence in all universities which must be gratefully acknowledged.

The production of such an edition is accompanied with similar merits - as well as acting as a voice for student research, this journal provides the maniacal but tremendously rewarding experience of publishing an academic journal, and I wish to express my immeasurable gratitude to those involved in any part of the publication of this issue.

I am more than pleased with the quality and style of the articles selected this year and I have every belief that this journal will continue to maintain a high standard of content and presentation, allowing students to employ and impart an innovative outlook, and contribute meaningfully to the academic world.

Greg Ambler
Editor

THE TREATY AND THE SEATS

ANTHONY WICKS*

Introduction

As the 2008 general election approaches widely differing views on the continuing desirability of the Māori seats in Parliament have been expressed. On the one hand, Māori party candidate Rahui Reid Katane, consistent with her party's policies, has claimed that the seats are "our [Māori] Treaty right" and that on this basis the seats should be entrenched.[1] At the other end of the spectrum, in a recent paper for the New Zealand Business Round Table, Professor Philip Joseph claims that the belief that the seats are mandated by the Treaty of Waitangi (the Treaty) is "repugnant".[2] He goes on to argue that the seats are an "insidious form of reverse discrimination" that should be abolished.[3] It is thus timely to consider the relationship of the Treaty to the Māori seats.

The overall desirability of the seats is a complex debate involving the question of the relationship of the Treaty to the seats and the question whether separate representation is consistent with the nature of the New Zealand state.[4] In this article I will examine the first of these two questions. Specifically, I will consider whether the abolition of the seats in the face of substantial Māori opposition, by ordinary legislation

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* Studying towards LLB(Hons)/BA(Hons) (French), University of Otago. The author would like to thank Daniel Pannett, Jesse Wall, Poppy Haynes and the anonymous reviewers from the New Zealand Law Students' Journal for their valuable comments on previous drafts of this article.

[1] For an outline of the Maori Party's Treaty of Waitangi Policy see 'Te Tiriti o Waitangi' http://www.maoriparty.com/index.php?option=com_content&task=view&id=61&Itemid=44 accessed 30/7/08. The Maori Party is a New Zealand political party with its policies founded in *tikanga* (Maori customary law). Its policies reflect the needs and desires of Māori both in terms of social policy and in terms of promoting greater self-determination and authority for Māori. See K. Smith 'Māori Party' in R. Miller (ed), *New Zealand Government and Politics* 4th ed (2006, Melbourne, Oxford University Press) at 405-411.

[2] P. Joseph, *The Maori Seats in Parliament*, (2008, Wellington, The New Zealand Business Round Table) at 5.

[3] Ibid, at 17.

[4] A. Geddis 'A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand's electoral system', (2006) 5(4) *Election Law Journal* 347, 363-368.

enacted by a simple majority, would be consistent with Treaty principles. The first section of the article provides some context by giving a brief outline of the current legal position of the seats and some background to the Treaty principles. The second section examines the relationship of Article 3 of the Treaty to the seats. The third section then considers whether New Zealand's Mixed Member Proportional (MMP) electoral system fulfils the obligations under Article 3.[5] The final section considers the relationship of Article 2 of the Treaty to the seats.

A. Background to the current legal position of the seats and the Treaty principles

The Māori seats are a form of "dedicated" or "reserved" representation. They guarantee that a certain number of seats in Parliament will be filled by Māori directly elected by Māori.[6] The legal authority for the existence of the Māori seats is contained in the Electoral Act 1993. Sections 76 to 79 of the Act give all Māori the option of enrolling either on the general electoral roll, which is open to all voters, or the Māori roll, which only Māori voters can enrol on.

"Maori" are defined in section 3(1) of the Electoral Act as "a person of the Maori race of New Zealand; and includes any descendant of such a

[5] Under the New Zealand MMP system voters get two votes: an "electorate vote" and a "party vote". Electorate Members of Parliament (MPs) are elected to represent 69 "electoral districts". Within each electoral district the constituency candidate who wins the most votes wins that electoral district's seat in Parliament. Once the electorate seats have been filled an additional 51 MPs enter Parliament from party lists. List seats are distributed so that the overall share of seats in Parliament a party gains is close to the proportion of the party vote the party won at the election. A party becomes eligible to receive list seats if it gains over 5% of the party vote or wins a constituency seat. Thus, if a party gains 20% of the Party vote it will have at least 24 seats in Parliament. These will consist of however many electorate seats the party won plus the necessary amount of list seats to ensure proportionality. Usually, this results in a 120 member Parliament. However, if a party wins more constituency seats than its proportion of the party vote then extra list seats are distributed to the House of Representatives. This ensures all parties still receive a share of representation proportionate to the party vote, resulting in a Parliamentary "overhang": See A. Geddis, *Electoral Law in New Zealand* (2007, Wellington LexisNexis) at 31-32. For further explanation of MMP see the New Zealand's Electoral Commission's discussion in 'MMP: How it Works, Quiz & Calculator', (Wellington, New Zealand Electoral Commission) http://www.elections.org.nz/voting/mmp/ accessed 30/7/08.

[6] Supra n4, at 357.

person". Therefore, any person with any degree of Māori descent may choose to enrol on the Māori roll. However, the choice of which roll to enrol on may only be made the first time a person enrols to vote or during the Māori electoral option.[7] Voters are prohibited from changing rolls outside the Māori electoral option period.[8] The Māori electoral option is held for a four month period every five years in conjunction with the New Zealand census (unless Parliament is due to expire that year in which case it must be held the following year).[9]

Section 45 of the Electoral Act then provides that the Representation Commission must divide New Zealand geographically into Māori electoral districts. A formula for the creation of the districts is provided in subsection 3. It ties the number of districts to the number of people on the Māori electoral roll and ensures that the population of each Māori electoral district is derived using the same procedure as for the population of general electoral districts. Each Māori electoral district then forms a constituency that corresponds to a seat in Parliament. Then on election day, voters on the Māori roll vote for a candidate in their Māori electoral district.

As enrolment on the Māori roll is voluntary, and the number of Māori seats is directly tied to the number of electors on the Māori roll, the Māori electoral option acts as a "de facto referendum" of all Māori electors on the question of whether the Māori seats should be retained.[10] If Māori no longer wanted the seats they could simply choose to enrol on the general roll.

Over the past decade the numbers of Māori enrolling on the Māori roll has increased in both absolute and relative terms.[11] In 2006, nearly twice as many Māori transferred to, or enrolled on, the Māori roll than on the general roll.[12] In 2001 and 1997, nearly three times as many Māori transferred to, or enrolled on, the Māori roll than on the general

[7] The Electoral Act 1993, s 76(2).
[8] Ibid, s 79.
[9] Ibid, s 77.
[10] C. Geiringer 'Reading English in context' (2003) *The New Zealand Law Journal* 239, 241; supra n4, at 355.
[11] Supra n4, at 356.
[12] Elections New Zealand, '2006 Māori Electoral Option: Results' (2006) http://www.elections.org.nz/enrolment/maori-option-now/maori-option-results.html accessed 31/7/08.

roll.[13] These figures accord with the overwhelming opposition Māori have shown to the abolition of the seats.[14]

Despite strong support from Māori, the Māori seats are still vulnerable to repeal by a simple majority in Parliament. Unlike the provisions of the Electoral Act that set out the formula for creating general electoral districts, the Māori seats are not entrenched. [15] Accordingly, it would be entirely possible for the Māori seats to be repealed by a simple Parliamentary majority in the face of strong Māori opposition.

Before turning to whether such a move would be consistent with Treaty principles it is convenient to give some background to the principles. Signed in 1840, the Treaty of Waitangi is the founding document of New Zealand.[16] However, its exact effect is a matter of significant debate.[17] The English and Māori versions of the Treaty are not exact translations of each other and the passage of time since the signing of the Treaty compounds difficulties in its interpretation.[18]

In brief then, the English version of the first article of the Treaty cedes sovereignty over New Zealand to the British Crown.[19] However, the Māori version of the first article cedes *kawanatanga*, which translates to

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[13] Ibid.

[14] Between 1992 and 1993 Parliament's Electoral Law Reform Select Committee attended a series of *hui* to consult with Māori on whether the seats should be abolished. The *hui* revealed such deep opposition to the abolition of the seats that the select committee concluded that it would be illegitimate to abolish the seats. Electoral Law Reform Committee, *Report on the Electoral Reform Bill 1993*, I. 17C, (1993, Wellington, House of Representatives).

[15] The general electorates are entrenched by s 268(1)(c) of the Electoral Act. Section 268(2) requires a 75% majority in the House of Representatives, or a simple majority in a referendum of all electors, to amend or repeal the seats.

[16] Sir Robin Cooke described it as "simply the most important document in New Zealand's history". See R. Cooke, 'Introduction', (1990) *New Zealand Universities Law Review*, 1.

[17] For perspectives on the debate see P. Joseph, *Constitutional and Administrative Law in New Zealand* (2007, Wellington, Brookers) at 45-60*;* M. Belgrave, M Kawharu and D Williams (eds), *Waitangi: Revisited Perspectives on the Treaty of Waitangi* (2005, Melbourne, Oxford University Press)*;* P. McHugh, *The Māori Magna Carta* (1991, Auckland, Oxford University Press).

[18] Ibid (McHugh), at 3-9.

[19] Treaty of Waitangi/Te Tiriti o Waitangi, First Schedule to the Treaty of Waitangi Act 1975.

governance.[20] The second article then guarantees to Māori in the English version "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties".[21] However, the Māori version of Article 2 guarantees to Māori their *rangatiratanga*.[22] Sir Hugh Kawharu has rendered *rangatiratanga* as "the unqualified exercise of [Māori] chieftainship".[23] Finally, Article 3 of the Treaty guarantees to Māori "all the rights and privileges of British subjects".[24]

In following sections of this essay I will examine whether the guarantee of equality in Article 3, and the guarantee of *rangatiratanga* in the Māori version of Article 2 of the Treaty, support the provision of reserved seats for Māori.

Due to the difficulty involved in interpreting the Treaty's text, the courts and the Waitangi Tribunal have developed a set of Treaty principles to determine the obligations of the Treaty partners.[25] The Privy Council has stated that the principles have become more important than the precise terms of the Treaty.[26] According to the Privy Council, the Treaty principles are the "underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole." [27] Importantly, the use

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[20] I. H. Kawharu, 'Translation of Maori text by I.H Kawharu' in Kawharu (ed), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (1989, Auckland, Oxford University Press) at 319-321. Accordingly, there is much debate over whether the Treaty does in fact cede sovereignty to the Crown as the British version of the first article states. However, this debate over sovereignty is not immediately relevant to the provision of separate seats for Māori in the New Zealand legislature. For a collection of differing perspectives on the debate see supra n17 (Belgrave, Kawharu and Williams). As will be seen, arguments for a Treaty right of separate representation have been based on articles two and three of the Treaty.

[21] Supra n19.

[22] Ibid.

[23] Supra n20.

[24] Supra n 20. The Māori version of Article 3 is substantively similar to the English version. Kawharu translates it as a guarantee that the Crown will "give [Māori] the same rights and duties of citizenship as the people of England". See supra n20.

[25] The Waitangi Tribunal is charged with hearing Māori claims for breaches of the Treaty. Its jurisdiction, which is set out in s 6 of the Treaty of Waitangi Act 1975, is to inquire into any official act "that was or is inconsistent with the principles of the Treaty of Waitangi".

[26] *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (the *Broadcasting Assets* case*)* at 517 per Lord Woolf.

[27] Ibid at 516 per Lord Woolf.

of Treaty principles is not merely a judicial approach. The adoption of the phrase "the principles of the Treaty" in legislation creates a parliamentary mandate for their application.

The most significant statement of the Treaty principles was in the landmark case *New Zealand Māori Council v Attorney-General (*the *Lands* case).[28] Here, the Court of Appeal recognised that the Treaty creates a relationship of partnership between Māori and the Crown.[29] This requires the Treaty partners to act towards each other reasonably, and with good faith.[30] Justice Cooke, the then President of the Court of Appeal, held that the Treaty "creates responsibilities analogous to fiduciary duties".[31]

In the years since the Court of Appeal's decision a considerable body of Treaty jurisprudence has been developed by the Waitangi Tribunal and the courts.[32] The effect of these developments will be considered in more detail in discussing the obligations under Articles Two and Three of the Treaty. For the moment though it is enough to note that the Treaty continues to be interpreted according to its principles and that *Lands* case is still recognised as the founding case on Treaty principles.[33]

Although the Treaty creates obligations "binding on the honour of the Crown", it is not automatically incorporated into New Zealand law. [34] The provisions of the Electoral Act that set up the Māori seats do not make any reference to the Treaty. Therefore, regardless of the relation of the Treaty to the seats, the question of their overall desirability is dependent on the wider debate over the constitutional status of the Treaty and the status of Māori as the indigenous people of New Zealand. However, interpretation of the Treaty is, and will continue to be, fundamental to this debate. As will be seen, those who seek the retention of the seats frequently justify their position by reference to

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[28] *New Zealand Maori Council v Attorney-General (*the *Lands* case*)* [1987] 1 NZLR 641.
[29] Ibid, at 664 per Cooke P, at 693 per Somers J and at 702 per Casey J.
[30] Ibid, at 664 per Cooke P and at 693 per Somers J.
[31] Ibid, at 664 per Cooke P.
[32] For a summary of the developments in the jurisprudence see the summary of Treaty principles provided by Heath J in *Carter Holt Harvey Ltd v Te Runanga O Tuwharetoa Ki Kaweraus* [2003] 2 NZLR 349 at para 27.
[33] *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 at paras 62, 71.
[34] *Hoani Te Heu Heu Tukino v Aotea District Māori Land Board* [1941] AC 308.

the Treaty.[35] The rest of this article aims to answer one part of the puzzle over the desirability of the Māori seats by clarifying their relationship to the Treaty.

B. The guarantee of equality in Article 3 and the Māori seats

As has been seen, both the English and Māori versions of Article 3 of the Treaty contemplate equality for Māori in terms of legal rights, privileges and duties. However, this raises the question of whether Article 3 is a guarantee of formal or substantive equality. Formal equality refers to treating people identically in order to treat them equally.[36] Substantive equality refers to treating people differently in order to treat them equally.[37] The meaning of these definitions is best explained by the example used by the New South Wales Law Reform Commission to distinguish the two forms of equality: [38]

> [If] there are two people stuck down two different wells, one of them is 5m deep and the other is 10m deep, throwing them both 5m of rope would only accord formal equality. Clearly, formal equality does not achieve fairness. The concept of substantive equality recognises that each person requires a different amount of rope to put them on a level playing field.

In the context of an electoral system, according formal equality means ensuring that all people have identical voting rights, that is, the same chance to participate in the electoral process. Accordingly, if Article 3 is a guarantee of formal equality, then under it Māori will be entitled only to voting rights identical to the rest of the population. Therefore, Article 3 will be unable to justify reserved seats for Māori.

On the other hand, if Article 3 is a guarantee of substantive equality, then something more than simply ensuring Māori have equal voting rights will be necessary. A guarantee of substantive equality must ensure that Māori achieve equality in representation; the outcome of the

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[35] Supra n4, at 365.
[36] D. Rae 'Two Contradictory Ideas of (Political) Equality', (1981) 91(3) *Ethics* 451, 452.
[37] Ibid.
[38] Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report, The interaction of Western Australian law with Aboriginal law and culture*, Project 94, (2006, Perth, Law Reform Commission of Western Australia) at 8-9.

electoral process.

In considering what substantive equality in the context of political representation of an indigenous minority meant, the Canadian Royal Commission on Electoral Reform and Party Financing turned to John Stuart Mill's "Of True and False Democracy: Representation of All, and Representation of the Majority Only".[39] The Commission adopted Mill's position that "in a really equal democracy every or any section would be represented, not disproportionately, but proportionately."[40] The Commission found that having numerical minorities represented in national legislatures in proportion to their number was "one of the fundamental tenets of liberal democracy."[41]

Similarly, the 1986 New Zealand Royal Commission on the Electoral System found that membership of the House should reflect significant characteristics of the electorate, such as ethnicity.[42] The Commission stressed that in view of Māori's particular historical, Treaty and socio-economic status, it was particularly important that they be fairly and effectively represented.[43]

Accordingly, if Article 3 is a guarantee of substantive equality, then it will be met if the proportion of Māori in Parliament matches the proportion of Māori in the general population of New Zealand. Thus, if structural features of the electoral system mean that Māori fail to achieve equality in representation, then the provision of reserved seats may be justified as a way of achieving the necessary level of representation.

The history of the Māori seats shows that the distinction between substantive and formal equality does have very real consequences for Māori representation. Before 1867 the right to vote was determined by a freehold property franchise set out in the Constitution Act 1852.

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[39] Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report,* vol.4 (1991, Ottawa, Minister of Supply and Services) at 248-249, citing J. S. Mill,*Considerations on Representative Government*, (1958, Indianapolis, Bobbs-Merill).

[40] Ibid, at 249.

[41] Ibid, at 248.

[42] Royal Commission on the Electoral System, *Report of the Royal Commission of the Electoral: Towards a Better Democracy*, (1986, Wellington, Government Printer) at 11.

[43] Ibid.

Formally, this applied equally to Māori and the settlers. However, while Pākehā were guaranteed representation by virtue of their ownership of property, Māori were effectively excluded from representation as almost all Māori property was communally owned.[44]

Similarly, the 1986 Royal Commission noted that, under New Zealand's former First Past the Post (FPP) electoral system, because Māori were a minority in all the general electorates, there was little chance of them gaining representation in general electorates.[45] There was also little incentive for candidates or parties to promote Māori interests where these clashed with Pakeha interests.[46] Thus, in the past, the provision of separate seats has allowed at least some level of political representation for Māori to be achieved despite the structural features of the electoral system that worked against it.

The ambiguity over what Article 3 of the Treaty means by its guarantee of equality has led to differing interpretations of the article in the High Court and Waitangi Tribunal. In *Taiaroa v Minister of Justice,*[47] the High Court heard a judicial review application of the exercise of the Māori Electoral Option. During the course of his judgment Justice McGechan considered the meaning of Article 3 of the Treaty.[48] The Crown had argued that Article 3 was a guarantee of formal equality only, submitting that: "Article 3 conferred the right of franchise upon Māori but not the right to separate representation in Parliament".[49] Justice McGechan did not accept this submission in such bald terms but seems to have gone a long way towards doing so. His Honour accepted that: "Article 3 conferred on Māori equivalent rights to vote for, and rights to stand for election to, any future Parliament".[50] However, he went on to state: "I do not accept that vision extended precisely at the time to a

[44] Supra n4, at 352.
[45] Under FPP, New Zealand was divided into a number of geographic constituencies, each of which corresponded to a seat in Parliament. At a general election individual candidates would run for election in each constituency. Voters in each constituency voted directly for their preferred candidate. The person who gained the most votes in each constituency would then represent that constituency in Parliament. See supra n6 (Geddis), at 26.
[46] Supra n42, at 90-93.
[47] *(No 1)* (High Court, Wellington CP 99/94, 4 October 1994, McGechan J).
[48] Ibid, at 68-69.
[49] Ibid, at 69.
[50] Ibid.

right to separate Māori seats in such future Parliament."[51]

Just before the *Taiaroa* litigation, the Waitangi Tribunal too was called upon to consider the relationship of Article 3 to the Māori seats in order to determine whether the Māori Electoral option had been run in accordance with Treaty Principles. The Waitangi Tribunal found in the *Maori Electoral Option Report*[52] that Article 3 guaranteed more than merely formal equality. The Tribunal stated: "The fact that [the form of Māori political representation] is, and has been since 1867, different from that of Pakeha representation does not mean that it is not embraced by [A]rticle 3 of the Treaty".[53] The Tribunal found that the right to representation is such an important and fundamental right that it was "clearly included in the protection extended by the Crown to Maori under [A]rticle 3".[54]

Neither the Waitangi Tribunal nor the High Court gives extensive discussion of their reasons for preferring their particular interpretation of Article 3. Justice McGechan argues that as the Treaty partners were "not clairvoyant" they would not have contemplated separate representation for Māori at the time of signing.[55] He concludes that this means Article 3 cannot guarantee separate representation.[56] Similarly, academics have argued that an historical analysis of the seats reveals that they were created more as a political expedient to foster co-operation with the Government than to give expression to Article 3.[57]

However, with all due respect, a focus on the state of minds of the parties at the time of signing the Treaty seems to be misplaced. In his landmark judgment in the *Lands* case, Justice Cooke rejected approaching the Treaty with the "austerity of tabulated legalism".[58]

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[51] Ibid.
[52] Waitangi Tribunal, *Maori Electoral Option Report* (1994, Wellington, Brooker and Friend).
[53] Ibid at 12.
[54] Ibid.
[55] Supra n47, at 69.
[56] Ibid.
[57] M P K Sorrensen, 'A History of Maori Representation in Parliament' in supra n42 Appendix B at B-18-21; supra n2 at 8-9. Whether the history in fact does show this is a matter of debate. See S A McClelland 'Maori Electoral Representation: Challenge to Orthodoxy' (1997) 17 New Zealand Universities Law Review 272.
[58] Supra n28, at 665. Similarly, Bisson J rejected "a strict or literal interpretation of the Treaty" at 714 and Richardson J held that the Treaty required "a broad interpretation and

Rather, His Honour recognised that "The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas."[59]

Joseph provides an alternative approach to arguing that Article 3 is a guarantee of formal equality.[60] He argues that as liberal democracies "rail against electoral privilege based on racial or ethnic distinction" Article 3 cannot be read to mandate separate representation for Māori.[61] He asserts that partnership is a "substantively neutral concept" that cannot be used to justify electoral privilege.[62] Joseph's concern, that the Treaty is not used to create social division, echoes similar concerns held by Justice Baragwanath in *Ngati Maru Ki Hauraki Inc v Kruithof*.[63] Here, Justice Baragwanath noted: [64]

> It is time to recognize that the Treaty did not contemplate a society divided on race lines between two groups of ordinary citizens – Maori and non-Maori, set against each other in opposing camps.

No doubt, Joseph is correct to point out that the Treaty principles do not condone social division through granting Māori unfair electoral advantage. However, Joseph is incorrect to assert that the provision of separate seats results in any such advantage for Māori voters. The legislation that provides for the seats is entirely consistent with the ideal of democratic equality.[65]

As Māori and general electorates have the same population and the votes from them are counted in exactly the same way, votes cast in the Māori electorates are no more determinative of the election result than those cast in general electorates.[66] The MPs from both rolls then sit in one legislature. Moreover, the party vote, which is the most important under MMP, is counted on a national basis.[67] Accordingly, the

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one which recognizes that the Treaty must be capable of adaptation to new and changing circumstances as they arise" at 673.

[59] Supra n28, at 663 per Cooke P.

[60] Supra n2, at 11.

[61] Ibid, at 17.

[62] Ibid, at 67, citing supra n26, at 517 per Lord Woolf.

[63] Unreported, (Baragwanath J, High Court, Hamilton, CIV2004-485-330, 11/6/2004).

[64] Ibid at para 48.

[65] This is the foundational principle of the electoral system. It states that each person should have an equal say on matters affecting them. See supra n4, at 362-363.

[66] Ibid.

[67] Ibid.

provision of separate seats for Māori does not create social division by giving Māori an unfair electoral advantage.

In fact, the overall nature of the Treaty relationship strongly supports viewing Article 3 as a guarantee of substantive equality. Although the Court of Appeal has recently confirmed that the Treaty does not create directly enforceable fiduciary duties, the Court did accept that the relationship envisaged under the Treaty is analogous to a fiduciary duty.[68] The Court also accepted that the law of fiduciaries informs key characteristics of the obligations under the Treaty.[69] Specifically, the Court noted that the relationship was one of "good faith, reasonableness, trust, openness and consultation".[70] This accords with the foundational statements in the *Lands* case that the Treaty created an obligation of the "utmost good faith".[71]

Nowhere would the obligations outlined by the Court of Appeal seem to be more important than within the national legislature. If the Treaty is to truly signify a "partnership between races" it must ensure that both Treaty partners have a fair say in the most powerful political and law-making institution in the country.[72] If Article 3 is a guarantee only of formal equality, then it would be possible for the obligations under it to be fulfilled while Māori had little or no representation in the national legislature. This cannot be consistent with an obligation of partnership. A partnership cannot sensibly be said to occur within the New Zealand legislature if one Treaty partner is not fairly represented.

Accordingly, Article 3 should be interpreted as a guarantee that Māori will be represented in the legislature in proportion to the national Māori population. I will now turn to considering whether the advent of MMP means that there is no longer any need for the Māori seats in order for the Crown to fulfill its obligations under Article 3.

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[68] Supra n42, at paras 71, 81.
[69] Ibid, at para 81.
[70] Ibid.
[71] Supra n28, at 664 per Cooke P.
[72] Ibid, at 664 per Cooke P.

C. MMP and substantive equality in representation

It is clear that within some electoral systems separate Māori representation would be essential to give effect to a substantive right of political representation. However, it can be argued that MMP is not one of these systems. Indeed, the 1986 Royal Commission on Electoral Reform recommended the abolition of the Māori seats on this basis.[73] The Commission reasoned that under a proportional system of representation it is in the interests of each party to gain as many votes as possible from all segments of society.[74] Therefore, as a numerically significant minority, Māori were very likely to be strongly represented in Parliament.[75]

Certainly, MMP has been successful in promoting Māori representation. Since MMP was adopted the number of Māori in Parliament has more than doubled compared with the number under FPP.[76] At the last two elections the number of Māori MPs in Parliament has been in rough proportion to the national Māori population. After the 2002 election Māori MPs made up 15.8 per cent of Parliament's seats. At the time Māori made up 14.0 per cent of the population.[77] After the 2005 election the national Māori population remained at 14.0 per cent of the national population whilst Māori MPs made up 19.0 per cent of the seats in Parliament.[78] Furthermore, the introduction of MMP has seen more Māori Members of Parliament in positions of power in parties and in government, including more gaining ministerial portfolios.[79] Thus the status quo of the MMP system combined with separate seats for Māori ensures that Māori are represented roughly proportionately.

Joseph has recently argued that the increased number of Māori

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[73] Supra n42, at101-103, 106.
[74] Ibid, at 101-103.
[75] Ibid.
[76] Elections New Zealand, 'Māori, Pacific and Asian MPs 1990-2005' <http://www.elections.org.nz/electorates/ethnicity-mps.html> accessed 4/5/07
[77] Ibid.
[78] Supra n2, at 11 and accompanying footnote.
[79] C. I. Magallanes, 'Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Self-Determination' (2003) *Murdoch University Electronic Law Journal*, <http://www.murdoch.edu.au/elaw/issues/v10n4/iorns104.html> accessed 15/8/08.

represented in Parliament in list and general electorate seats in the last two elections means that there is no longer any need for the Māori seats.[80] He points out that in 2002 Māori MPs in general electorate and list seats made up 10 per cent of Parliament's membership.[81] This was 4.0 per cent below the proportion of Māori in the general population.[82] He then notes in the 2005 election that Māori MPs in general electorate and list seats made up 12.4 per cent of Parliament. This was 1.6 per cent below the proportion of Māori in the general population.[83] Joseph then concludes:[84]

> On those figures, the percentage of Maori members holding list or constituency seats in the next Parliament will exceed that of the relative national population.

He then argues that when this occurs Māori will have achieved equal representation, meaning that Article 3 can no longer justify the provision of separate seats.[85]

However, it is extremely speculative to predict the outcome of this year's election based simply on the number of Māori candidates in list and general electorate seats in the past two elections. Granted, Māori members of Parliament have increased their proportion of list and general electorate seats in the last two years. However, Joseph provides absolutely no reason to suggest this trend will continue. Analysing all four of the MMP elections rather than just the last two reveals little support for such a trend.

After the 1996 election Māori held 9.5 per cent of the general electorate and list seats in Parliament.[86] At the time Māori represented 15 per cent of the national population so the representational deficit in the general electorate and list seats was 5.8 per cent.[87] However, after the 1999

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[80] Supra n2, at 11.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid, at 12.
[85] Ibid.
[86] Supra n76; Elections New Zealand 'General elections 1996-2005 – seats won by party', http://www.elections.org.nz/record/resultsdata/general-elections-1996-2005-seats-won-by-party.html accessed 1/8/08.
[87] Ibid.

election Māori only held 8.3 per cent of the general electorate and list seats in Parliament.[88] The national Māori population remained the same as in 1996 so the representational deficit increased to 6.67 per cent.[89] Accordingly, although the representational deficit did decrease between 2002 and 2005, it increased between 1996 and 1999.

Therefore, the evidence that at the next election Māori will achieve representation in the list and general electorate seats proportional to their numbers in the population is equivocal at best. What we do know is that proportional representation of Māori has not yet been achieved without the use of reserved seats.[90]

Joseph also argues that abolishing the Māori seats is justified because the nature of MMP means that it would have no adverse effect on Māori representation.[91] He supports his claim by citing the finding of the 1986 Royal Commission. The Commission found that under an MMP system, with a common roll, parties would be encouraged to place Māori candidates high on party lists or in constituency seats in order to gain votes from those previously registered on the Māori roll.[92]

However, the Royal Commission made its recommendation for the abolition of the seats alongside another recommendation. The Commission also recommended that parties representing primarily Māori interests should be exempt from the four per cent threshold for entry to Parliament.[93] The Commission believed that if the threshold was waived for parties representing predominantly Māori interests then such parties would have a real chance of competing for list seats. This prospect would then encourage the major parties to compete for the Māori vote.[94] Thus, the Commission argued that it was the combination of the waiver of the threshold, and the MMP electoral system, that would encourage parties to ensure fair representation of Māori, not the MMP system alone.

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[88] Ibid.
[89] Ibid.
[90] D. O'Sullivan, *Beyond Biculturalism: The Politics of an Indigenous Minority* (2007, Wellington, Huia) at 159.
[91] Supra n2, at 12.
[92] Supra n2, at 12, citing supra n42, at 81.
[93] Supra n42, at101.
[94] Ibid.

Despite the recommendation of the Royal Commission, the Māori seats were not abolished when MMP was introduced and the threshold was not waived for parties primarily representing Māori interests.[95] However, Claudia Geiringer has pointed out that the provision of the separate seats in the current system may serve a similar function to the waiver on the threshold envisaged by the Royal Commission.[96] As entry into Parliament may be achieved by reaching the 5 per cent threshold, or winning a constituency seat, the Māori seats effectively provide a way for parties representing Māori interests to circumvent the threshold.[97]

Moreover, on the Commission's reasoning, the mere prospect of parties representing Māori interests circumventing the threshold would encourage major parties to compete more fiercely for votes from Māori. Thus, under the current electoral arrangement in New Zealand, it is the combination of the MMP system, and the provision of separate seats, that has allowed Māori to become represented in Parliament in rough proportion to their numbers in the general population.

Accordingly, abolishing the Māori seats would be to remove one of the two major incentives for parties to ensure fair representation of Māori, which may well result in a decrease in Māori representation. In these circumstances it is unlikely the abolition of the seats would be consistent with Treaty principles unless the seats were replaced with an alternative system that ensured proportional representation of Māori. One option would be to implement the Royal Commission's suggestion of abolishing the Māori seats and instituting a waiver on the threshold for parties predominantly representing Māori interests. However, determining who should decide, and what standard should be applied to decide, whether a party represents predominantly Māori interests is an extremely difficult question.[98] Under the status quo the difficulties of this question are avoided.[99]

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[95] See supra n15 and accompanying text for the reasons for the decision not to follow the recommendation of the Royal Commission.
[96] Supra n10, at 241.
[97] Ibid.
[98] Ibid.
[99] Ibid.

Accordingly, despite the advent of MMP, there does remain a case for the retention of the Māori seats based on Article 3 of the Treaty. It remains to be seen whether representation of Māori in general electorate and list seats will increase to a level that matches the proportion of Māori in the national population. Moreover, roughly proportional representation of Māori has been produced by the incentives produced by a combination of the MMP system and the separate seats, not by the MMP system alone. These two factors mean that it is premature to argue that the seats no longer fulfil Treaty obligations. Accordingly, the abolition of the seats without providing another mechanism to ensure proportional representation of Māori would be inconsistent with Treaty principles.

D. The relationship between Article 2 of the Treaty and the Māori seats

Like Article 3 of the Treaty, Article 2 presents an interpretative problem in determining its relation to the Māori seats. As has been seen, the English version of the Treaty guarantees to Māori title over their land and other customary property such as forestry and fisheries.[100] However, the Māori version guarantees to Māori *rangatiratanga*, which has a considerably wider meaning than customary property.[101] Although no exact definition of *rangatiratanga* can be given, and much controversy exists over its meaning, it is widely argued to encompass a right to self-determination.[102] This is a right for Māori to participate in decision-making on the basis of their position as the indigenous people of New Zealand, rather than being treated the same as other minorities.[103]

Joseph seizes on the English version of Article 2 to argue that it guarantees "Māori customary property rights, not electoral rights" and therefore cannot guarantee the Māori seats.[104] However, this focus on the English version of Article 2 is out of step with the approach of the courts and the Waitangi Tribunal. The courts have certainly not limited

[100] Supra n22 and accompanying text.
[101] Supra n23-supra n24 and accompanying text.
[102] See M. Durie, 'Tino Rangatiratanga' in supra n17 (Belgrave, Kawharu and Williams) at 3-19 for commentary on this debate.
[103] Ibid, at 14-15.
[104] Supra n2, at 11.

their interpretation of Article 2 to customary property rights. The Māori version of the article protects *taonga.*[105] This term translates to "treasures", and the courts have recognised that it protects more than physical possessions.[106] The Privy Council recognised in *New Zealand Maori Council v Attorney-General (*the *Broadcasting Assets* case) that the Māori language is protected under Article 2.[107] In *Bleakley v Environmental Risk Management Authority*[108] the High Court held that the article extended to the protection of intangible spiritual beliefs.[109] In the *Ngai Tahu Sea Fisheries Report*[110] the Waitangi Tribunal found that retention of *rangatiratanga* qualifies the cession of sovereignty under article one of the Treaty.[111] Accordingly, in determining the relationship of Article 2 of the Treaty to the Māori seats, it is necessary to consider whether the seats are encompassed by the guarantee of *rangatiratanga.*

The Māori seats are frequently argued to encompass an aspect of *rangatiratanga* through their ability to give direct representation to Māori.[112] Whereas under MMP Māori form one of many interest groups that must be balanced against others in setting party lists and policy, separate representation allows for representatives that are accountable directly and solely to Māori.[113] The importance of direct accountability to *rangatiratanga* was made clear in the *Te Whanau o Waipereira Report,*[114] which described *rangatiratanga* as "a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them and enjoying their support."[115]

This special form of representation provided by the Māori seats is then consistent with the special position of Māori under the Treaty as a

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[105] Supra n19.
[106] Supra n20.
[107] Supra n26, at 513.
[108] [2001] 3 NZLR 213.
[109] Ibid, at [76]-[83] per McGechan J.
[110] Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (1992, Wellington, Brooker and Friend).
[111] Ibid,at 269-271.
[112] Supra n86; supra n4, at 365-366.
[113] Ibid.
[114] Waitangi Tribunal, *Te Whanau o Waipereira Report* (1992,Wellington, Brooker and Friend).
[115] Ibid, at xxv.

partner of the Crown.[116] In this way the seats have come to be seen by many Māori as an important symbol of *rangatiratanga*. The 1986 Royal Commission pointed out that many Māori regarded the seats as 'their last vestige of a lost autonomy".[117] Similarly, Justice McGechan in the *Taiaroa* litigation stated that the ability of the seats to give Māori a "voice in the running of the new nation" have led to them becoming a "[T]reaty icon" for Māori.[118]

Despite recognising the symbolic importance of the seats, the 1986 Royal Commission raised doubts over their efficacy, questioning whether they really were an appropriate expression of *rangatiratanga.*[119] The 1986 Royal Commission pointed out that separate representation under the FPP electoral system meant that each group was only responsible to those that elected it rather than the nation as a whole.[120] This meant that the views of Māori MPs in the House were easily ignored and that there was little incentive for those in general electorates to seek the votes of Māori on the Māori roll.[121] Rather than leading to self-determination, this led to the marginalisation of the Māori voice by the non-Māori majority.[122]

Moreover, Catherine Iorns Magallanes has argued that the seats may be inappropriate as a form of *rangatiratanga* as they rely totally on the structures of Parliament, a non-Māori institution.[123] She goes on to argue that it is difficult to justify the seats on the basis of Treaty principles when the process of selecting representatives does little to take a Māori view of societal organisation into account.[124]

Finally, it may be argued that *rangatiratanga* need not extend to the provision of separate seats. The Crown in the *Taiaroa* litigation submitted that Article 2 did not confer upon Māori any authority in the

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[116] Supra n4, at 365-366.
[117] Supra n42, at 93.
[118] Supra n 47, at 69. When the Waitangi Tribunal held the hearing for the *Electoral Option Report* it heard only incomplete submissions on the relevance of *rangatiratanga* to the Māori seats so expressed no concluded view on the matter. Supra n52, at 14-15.
[119] Supra n42, at 93.
[120] Ibid, at 90-91.
[121] Ibid.
[122] Ibid.
[123] Supra n79.
[124] Ibid.

organs of central government. Such an argument may be supported by placing emphasis on article one of the Treaty. This cedes to the Crown "*kawanatanga*" according to the Māori version and sovereignty according to the English version.[125] Both concepts are tied to ideas of central government.

Moreover, it could be argued that forms of separate Māori representation outside of Parliament make parliamentary representation unnecessary. In recent years there has been an effort by the government to tailor government services to Māori needs and increase iwi authority through social policies such as '*Tu Tangata*' and 'Closing the gaps'.[126]

However, the criticisms of *rangatiratanga* outlined above are overstated. Firstly, the criticism that separate representation may be harmful has much less force in an MMP environment.[127] Because Parliament is much more fractured under MMP, and the party vote is the most important, parties can no longer afford to ignore the wishes both of Māori MPs and voters.[128] The current MMP system gives Māori the best of both worlds. MMP provides Māori with much more effective representation in the general electorates and in Parliament as a whole while separate representation provides directly accountable Māori representatives.

Furthermore, given their reliance on Parliament and the electoral system, the Māori seats are open to criticism as a full realisation of *rangatiratanga*. However, they still form a very important part of self-determination for Māori. A key Treaty principle is the notion of a partnership between Māori and the Crown. This concept is very compatible with the idea that Māori should have dedicated seats in the most powerful political and lawmaking body in the nation. Although this does require reliance on some non-Māori governance concepts, it is

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[125] See supra n19 and accompanying text.
[126] The '*Tu Tangata'* policy aimed to redefine the delivery of government services to Māori by transferring government service and programmes to local Māori authorities. The 'Closing the Gaps' policy aimed to improve Māori social and economic opportunities by improving Māori health, education, employment and housing. See Maaka and Fleras, *The Politics of Indigeneity,* (2005, Dunedin, University of Otago Press) at 125-128, 135-138.
[127] Supra n4, at 360-361.
[128] Ibid.

simply unavoidable. Moreover, the overwhelming support for the retention of the seats amongst Māori suggests that despite their reliance on non-Māori concepts they are still viewed by Māori as an effective form of societal organisation for the purposes of achieving self-determination.[129]

Indeed reliance on the structures of Parliament in some ways strengthens the current system of separate seats as a form of self-determination. As has been discussed earlier, the Electoral Act provides for the seats in such a way that they are entirely consistent with the principle of democratic equality, provided one takes a substantive view of equality.[130] This means that the seats can be seen as equally legitimate to the other seats in Parliament. This makes them equally worthy of being allowed full participation in the legislature.[131] Of course, the corollary of the point is that it would be much harder to justify separate seats in the national legislative body if they had a different structure to those in the general electorates.

It follows that developments at the local level, while important, should not be over-emphasised either. 'Tu Tangata' and 'Closing the Gaps' were designed with the goal of improving social disparity between Māori and Pākehā by removing discrimination, rather than focussing on redefining the constitutional relationship between Māori and the Crown and securing *rangatiratanga*.[132] Moreover, *rangatiratanga* is a right to both local and national authority.[133] Therefore, even to the debatable extent that the programmes were successful in promoting local autonomy, they cannot compensate for the loss of separate representation at the national level.

The Māori seats provide Māori with an important symbolic and practical aspect of *rangatiratanga*. Their abolition would be clear breach of Article 2 of the Treaty. With this in mind the entrenchment of the

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[129] Supra n4, at 361.
[130] See supra n65-supra n67 and accompanying text.
[131] Ibid, at 361-365. As Geddis shows, any equality concerns about the seats are based not on a violation of the principle of democratic equality but on a concern that giving an ethnic group special status through Parliament is inconsistent with the concept of the neutral state.
[132] Supra n122, at 137-140.
[133] Supra n111. at 4-6.

current provisions of the Electoral Act relating to the Māori roll is desirable. The provisions are particularly important to a minority and vulnerable to repeal by a majority. In the *Broadcasting Assets* case the Privy Council held that if a *taonga* is in a vulnerable state the Crown is required to take "especially vigorous action for its protection."[134] Entrenching the Māori seats would be consistent with this obligation.

Moreover, entrenchment of the current provisions would be consistent with the principle of options. This principle was explained in the *Ngai Tahu Sea Fisheries Report.*[135] The Tribunal stated that the Treaty envisaged Māori having the option of retaining *iwi* authority and self-management of resources under Article 2 or taking up the privileges of British subjects as contemplated in Article 3. The Tribunal added that Māori should also be free to pursue a combination of these options in appropriate circumstances.[136]

As discussed earlier, because subscription to the Māori roll is voluntary its exercise each year represents a referendum of Māori on whether the Māori seats are still desirable.[137] In this way Māori have a choice over whether they retain the seats. If Māori became dissatisfied with the seats they could effectively repeal them by switching to the general roll. However, entrenchment would stop repeal by a majority that opposed the interests of the Māori minority.

Conclusion

The abolition of the Māori seats would be inconsistent with the obligations of the Crown under the Treaty of Waitangi. Article 3 is a guarantee of substantive equality. It places an obligation on the Crown to ensure that Māori are represented in Parliament in proportion to their numbers in the national population. Despite the greatly improved representation of Māori under MMP it is still too early to conclude that the advent of MMP means that the Māori seats should be abolished. Māori have not yet achieved proportional representation in the list and general electorate seats. Moreover, as the provision of the Māori seats alongside the MMP system enhances the incentives provided by MMP

[134] Supra n28, at 517 per Lord Woolf.
[135] Supra n118, at 274.
[136] Ibid.
[137] See supra n10 and accompanying text.

for parties to ensure adequate representation of Māori, the abolition of the seats is likely to reduce Māori representation in Parliament. Accordingly, the status quo, which ensures roughly proportional representation of Māori, ought to be retained.

The seats are also guaranteed by Article 2 of the Treaty through its protection of *rangatiratanga*. The Māori seats provide representatives that are solely and directly accountable to Māori in the most powerful political and lawmaking institution in the country. They are therefore an important symbolic and practical aspect of *rangatiratanga* that should be entrenched in order to give effect to the Treaty.

THE PROBLEM OF PARENTAL CONTROL

CAROLINE HORNIBROOK*

Introduction

On 22 June 2007 Section 59 of the Crimes Act 1961 was amended by the Crimes (Substituted Section 59) Amendment Act (the Amendment) to remove the defence of reasonable force for the purposes of disciplining children. According to Sue Bradford, the MP behind the change, the removal of the defence was aimed "to make better provision for children to live in a state free from violence by abolishing the use of parental force for the purposes of correction."[1] The original Bill was also about bringing children's human rights to bodily integrity[2] and equality under the law in line with other members of society.[3]
Under the old law, a parent, or person in the place of a parent, was justified in using force by way of correction towards a child if the force used was reasonable in the circumstances.[4] The Amendment removed the justification for using force against children in circumstances where the force is used for the purposes of correction[5], however it created a fresh justification for parents to use force on children in other specified circumstances.[6]

In its initial stages, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (the Bill), or as it came to be known,

* BSc/LLB, University of Otago. Candidate for LLM/PGradDipChAd, University of Otago. The author would like to acknowledge Professor Kevin Dawkins and Professor Mark Henaghan, University of Otago, for their insights and critique of this paper.
[1] Justice and Electoral Select Committee, "Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (271-272) and petition of Barry Thomas and 20,750 others" [2006], 2.
[2] Equal human rights for children is advocated by the United Nations Convention on the Rights of the Child 1989. See p. 3.
[3] While equal rights were a major incentive for the reformers, the success of the Bill required the case to be argued in the context of a right to protection: Wood, B., Hassall, I., Hook., G, 'Unreasonable Force. New Zealand's journey towards banning the physical punishment of children'*, Save the Children New Zealand*, 2008, p. 57.
[4] Section 59 'Domestic Discipline', Crimes Act 1961, prior to the 2007 amendment.
[5] Section 59(2) Crimes Act 1961 as substituted by s 5 Crimes (Substituted Section 59) Amendment Act.
[6] Current s59(1)(a)-(d) Crimes Act 1961.

the "anti-smacking bill", proposed to simply remove the s59 defence to assault from the Crimes Act 1961.[7] By the time it reached its third reading however, the Bill had been amended to represent a political compromise, in the wake of intense debate and public concern.

This paper will demonstrate that the amendments made to the Bill have compromised its original purpose by replacing one form of justification for the use of force against children with another. The amendments were drafted to placate resistance to the Bill, however they failed to address the issue that the public was most concerned about, which was 'smacking.' Instead, in an attempt to fill the gap in an already unproblematic area of the law, the amendments have created ambiguities and loopholes that could potentially disguise the use of force for the purposes of correction. The purpose behind the Bill would have been better achieved if s59 had simply been repealed. Ironically, the law would be clearer if it was silent on the use of force against children, and children would have maintained an equal status with adults with respect to bodily integrity.

A Section 59 of the Crimes Act: Parental Control

Part 3 of the Crimes Act 1961 sets out the situations that qualify as 'matters of justification or excuse'. The Amendment has transformed the justification for the use of force in s59 from "Domestic discipline" to "Parental Control", essentially removing the powers of parents to physically chastise their children and replacing them with powers to use force in other specified circumstances:

> **59 Parental Control**
>
> (1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—
>
> (a) preventing or minimising harm to the child or another person; or
>
> (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

[7] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1.

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

The removal of the defence of reasonable force for the purposes of correction was a step towards equal rights for children, bringing them on par with adults in the context of bodily integrity. However, the creation of a new defence of reasonable force has arguably put children in their place again, as citizens with lesser rights.

New Zealand's ratification of the United Nations Convention on the Rights of the Child[8] (the Convention) in 1993 was a significant step towards the recognition of children as bearers of human rights. While the Convention does not necessarily advocate full autonomy for children, the various articles set out fundamental rights which State Parties are required to promote, and where necessary, amend domestic law to accommodate.[9] The Convention supports the premise that the right to bodily integrity, or more specifically, the right not to be hit, is a fundamental human right[10]. This right is innate in every human,[11] and

[8] Adopted by the United Nations General Assembly on the 20th of November 1989.
[9] Article 4 of the Convention requires that state parties "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."
[10] Specifically, Article 19 requires that state parties "protect the child from all forms of physical or mental violence, injury or abuse, neglect or neglectful treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child." Article 37 requires that state parties ensure

does not require capacity to be exercised. Dependency and capacity are often regraded as the necessary elements that disqualify children from being treated as fully autonomous. Freeman remarks that the convention has not done enough to reduce the idea that being 'dependent' means being deprived of basic rights.[12] Children should not be denied basic human rights or 'dignity-based' rights by virtue of their incapacity. These rights recognise their status as individual persons. Dignity-based rights are different from 'needs-based' rights which recognise that children are different from adults, and require protection and nurture.[13]

The United Nations Committee on the Rights of the Child (the Committee) has expressly disapproved of the legal use of corporal punishment[14] as it disregards a child's right to be free from violence[15] and the right to physical integrity and basic human dignity.[16] The Committee defines "corporal" or "physical" punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc.[17]

New Zealand's attempt to abolish corporal punishment has answered the Committee's concerns in one respect, however the defence of reasonable force that replaced the domestic discipline section has not properly addressed the child's right to physical integrity, human dignity,

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that "no child shall be subjected to cruel, inhuman or degrading treatment or punishment." While the words of these articles do not specify corporal punishment, the Committee has expressly denounced it in its definition of physical punishment. See n. 14.

[11] Judge von Dadelszen comments that the Care of Children Act 2004 was built on the premise that children are legitimate citizens, therefore they deserve the same protection from assault as adults. He remarks that the existence of the right of parents to use corporal punishment is inconsistent with this: Von Dadelszen, P., 'Judicial Reforms in the Family Court of New Zealand' (2007) *New Zealand Family Law Journal* 267

[12] Freeman, M., *The Sociology of Childhood,* The International Journal of Children's Rights, 6, 1998, page 440.

[13] Woodhouse, B., 'Re-visioning Rights for Children' in *Rethinking Childhood,* Pufall et al, eds. Rutgers Press 2004, p. 234.

[14] *General Comment No. 8*, United Nations 2006, page 4, accessed 17 April 2008 from http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.8.En?OpenDocument.

[15] Ibid., p 3.

[16] Ibid., p 7.

[17] Ibid., p 4.

or equality before the law. The Committee clearly states that the child's right to human dignity and bodily integrity in the Convention was built upon principles in international human rights law, which state that these rights belong to *everyone*: [18]

> Before the adoption of the Convention on the Rights of the Child, the International Bill of Human Rights - the Universal Declaration and the two International Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights - upheld "everyone's" right to respect for his/her human dignity and physical integrity and to equal protection under the law. In asserting States' obligation to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment, the Committee notes that the Convention on the Rights of the Child builds on this foundation. The dignity of each and every individual is the fundamental guiding principle of international human rights law.

The effect of codifying the circumstances where parents can use force has on one hand reassured parents that they can still legally use force on their children. On the other hand it has once again set children apart from other groups in society as the group who can still be legally assaulted. Although it would be impractical to assert that parents should not have the ability to use force against their children in emergency situations, the fact that it has been spelt out in the criminal code, where it was never needed before, says something about the way we view children as rights bearers. It tends to show that as a society, while we *liked* the idea of bringing a child's right to bodily integrity to the level of an adult, we were not ready to give children complete equality under the law, preferring a "compromise" instead. Leaving the law silent on this issue would not have prevented parents being justified in using force against their children to protect them. The common law already protects the use of force against adults in similar situations.
The codifying of the parental control justification was unnecessary for several reasons:

1. The non-existence of the defence prior to June 2007

Before the Amendment, parents could be found guilty of assaulting their children in two ways. Firstly, if the force used for the purpose of

[18] Ibid., para 16.

correction was considered *not* to be reasonable in the circumstances[19] and secondly if the force used was not for the purposes of correction.[20] The Amendment has removed the first situation, and has tried to clear up the second by codifying it.

Where there is no statutory justification for the use of force, an action technically amounts to assault under The Crimes Act 1961.[21] Section 2 defines assault as:

> the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and to assault has a corresponding meaning.

Before the Amendment, s59 provided a defence for parents to use reasonable force for the purposes of *correction* only:

> **59 Domestic discipline**
>
> (1) Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.
>
> (2) The reasonableness of the force used is a question of fact.
>
> [(3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.]

This does not include for the purposes of changing a nappy for example or other normal parenting tasks. Technically, before the law change parents could legally smack their children for the purposes of

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[19] *Y v Y* Unreported, High Court Auckland, HC 122/97, 27 February 1998, Baragwanath J.

[20] *Ausage v Ausage* [1998] NZFLR 72, 80. See also, Ahdar, R. and Allen, J., 'Taking Smacking Seriously: The case for Retaining the Legality of Parental Smacking in New Zealand' [2001] *New Zealand Law Review* 1, p. 3

[21] Section 196. An assault provision specific to children and male assaults female exists under s194.

correction, but uses of force for other purposes, e.g. holding a child down to change a nappy, could have amounted to assault.

The Crimes Act itself does not include a definition of correction. The relevant definitions from the Shorter Oxford English Dictionary are:[22]

> (1) The action of putting right or indicating errors
> (2) Reproof of a person for a fault of character or conduct
> (3) Chastisement, disciplinary punishment; esp. corporal punishment…

The Justice and Electoral Committee in recommending the amendments to Sue Bradford's Bill stated that the provisions under the new Parental Control defence would address the gap in the law: [23]

> The new section 59 clarifies that reasonable force may be used for other purposes such as protecting a child from harm, providing normal daily care, and preventing the child doing harm to others. We consider that this amendment provides for interventions that are not for the purpose of correction by parents and every person in the place of a parent. Additionally it will address a gap in the law, as under the current wording of section 59 the application of force from any motivation other than correction may amount to an offence.

However, in attempting to legislate for parental uses of force in situations that would technically amount to assault, the amendments to the original bid for a full repeal have undermined one of the crucial purposes, to give children equal protection from assault under the law.[24] Sue Bradford's Bill intended for children to be equal citizens in the eyes of the law with equal rights to bodily integrity.[25] The inclusion of a new defence of reasonable force has not achieved this. While the removal of corporal punishment brought children's rights in line with adults', the defence of Parental Control has set them apart again

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[22] Brown (ed) *Shorter Oxford English Dictionary* (5th Edition, Oxford University Press, 2002) Volume 1, 523.
[23] Supra No. 1, page 2.
[24] In the explanatory note to Sue Bradford's Members Bill (Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1) it states that the effect of the amendment is that parents and guardians will be "in the same position as everyone else so far as the use of force against children is concerned."
[25] In the first reading of the Bill, Sue Bradford said about its purpose, "It is about giving children and young people the same legal protection from physical assault that adults have. I do not understand at all why it is illegal in New Zealand to beat my spouse, another adult, a policeman, or even an animal harshly with a horse crop or a piece of wood, but it can be legal to do the same thing to my child." (2005) 627 NZPD 22086.

because has explicitly singled out children in an area of law where there is no statutory adult equivalent.

Prior to 2007, the "gap in the law" did not present a problem. The absence of this defence in the past never caused any ridiculous outcomes, because checks and balances already existed in common law[26] and the ability of police to exercise prosecutorial discretion.
In recommending the changes to the original Bill, the Justice and Electoral committee conceded that the purpose of the amendments is clarity in the wake of widespread misunderstanding, rather than a genuine need to have the gap in the law filled: [27]

> We consider that there is widespread misunderstanding about the purpose and possible results of the bill as introduced. We do not consider that the repeal of section 59 will lead to the prosecution of large numbers of parents and persons in the place of parents in New Zealand. Nevertheless, for the sake of clarity, we have recommended amendments to the bill to clarify that parents may use reasonable force in some circumstances, but not for the purpose of correction. We note that there are several potential offences directly related to the care of children that are rarely prosecuted. Such an example is if a caregiver sends a child to its room against its will, this technically constitutes kidnapping under section 209 of the Crimes Act. However, the police are not regularly prosecuting parents for this. We consider that logic dictates the police will adopt a similar approach to parents who use minor physical discipline following the changes to section 59.

However, in attempting to achieve clarity, the amendments to the Bill have caused two main problems. Firstly, children's rights to bodily integrity and equality under the law, the original purpose behind seeking repeal of s59, have been compromised, because children have once again been set apart from adults. Secondly, over-legislating the point has created new ambiguities and loopholes by framing legitimate uses of force very widely,[28] and fails to cover a circumstance involving force that parents were perhaps most concerned about.[29]

The Committee acknowledges that there are everyday occurrences in

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[26] See below at page 413, "The availability of alternative defences."
[27] Supra No. 1, page 7.
[28] See below at page 415, "the prescriptive quality of the parental control defence."
[29] See below at page 426, "putting a child on the naughty step."

child rearing that technically amount to an offence, however the reality of the situation means that parents will not get prosecuted. They illustrate this point with the kidnapping example above. By the same token, a parent doing any of things contemplated by s59(1)(a)(d) would be unlikely to be prosecuted if the statutory defence did not exist, because the current police guidelines recommend that there should be public interest in proceeding with a prosecution.[30] Arguably, there is little public interest in prosecuting a parent for the use of force against a child intended to protect them from harm, or holding a child down while changing a nappy.

2. The availability of alternative defences

The lack of statutory defence for a particular action does not leave a "gap in the law" if an existing common law defence adequately covers it. Peter McKenzie QC points out that the defence of necessity would have potentially covered some of the situations in s59(1), making their codification somewhat unnecessary.

The Law Commission, in para.8 of its report, expressed the view that the non- disciplinary interventions which parents are permitted to make under subclause (1) cover a gap in the law that needed to be addressed, "because, on the wording of section 59, the application of force from any motivation other than correction *is an offence currently*" (Law Commission emphasis). I doubt that the gap is as wide as the Law Commission suggests. The common law defence of necessity which is preserved by s.20 of the Crimes Act is likely to cover interventions which are needed in order to prevent harm to the child or prevent the child from engaging in criminal activity or disruptive behaviour. In my opinion, the defence of necessity would under the present law cover interventions such as restraining a child from walking in front of traffic and removing an offensive weapon or seriously harmful drugs from a child.

The Courts have recognised in cases such as *Kapi v. Ministry of Transport* (1991) 8 CRNZ 49 (CA) and *Police v. Kawiti* [2000] 1 NZLR 117 that the defence of necessity may be available not only if there are grounds of imminent peril of death or serious injury to the accused, but also

[30] Prosecution Guidelines, Crown Law Office, March 1992, para 3.3.1.

danger to another person where "necessity of circumstances" justifies the accused breaking the law. [31]

In addition to the defence of necessity for the actions described above, the Crimes Act 1961 already provides justification for the use of force to prevent suicide or certain offences in s41:

> **41. Prevention of suicide or certain offences**
>
> Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.

Arguably, this defence would have been sufficient to cover the sorts of situations contemplated in s59(1)(b). However, it is strange that the words "criminal offence" were used rather than "crime", which is defined in s2 of the Crimes Act 1961.[32]

Adams on Criminal Law points out that s59(1)(a) is unnecessary because it closely resembles self defence: [33]

> Subsection 1(a) is self-explanatory and largely replicates self-defence/defence of another [s48] …However it confers a somewhat narrower defence than s48 insofar as the accused's belief in the circumstances justifying their actions falls to be tested by an objective standard.

While it would be difficult to establish that children impliedly *consent* to everyday uses of force upon their bodies, Lord Justice Goff in *Collins v*

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[31] McKenzie, P. *Crimes (Abolition of Force as a justification for Child Discipline) Amendment Bill-Effect on Parental Corrective Action*, legal opinion prepared for Gordon Copeland MP, 21 March 2007, page 5. Reference to Law Commission report to the Justice and Electoral Committee: *Section 59 Amendment: Options for Consideration,* 8 November 2006. See below at footnote 60.

[32] Adams suggests that the word "criminal" is unhelpful, and that the power conferred on parents in s59(1)(b) extends to the prevention of *any* offence by virtue of the fact it is not restricted to "crime" only. Adams on Criminal Law, para CA 59.03, accessed 6 March 2008

[33] Ibid.

Wilcock[34] suggests that the common law might excuse "all physical contact which is generally acceptable in the ordinary conduct of daily life". This might include parental uses of force that have always been generally accepted in New Zealand before we felt the need to codify them.

Finally, judges have the power to discharge without conviction[35] where the indirect consequences of a conviction would be out of proportion to the gravity of the offence.[36] This would be one more safeguard against parents being prosecuted for uses of force that technically amount to assault, in the absence of the unnecessary parental control provision. *R v Hende*[37] illustrates this point, where a crèche worker was discharged without conviction for smacking a child on the bottom: [38]

> There was no justification for treating the incident as involving anything more than a pat on the bottom. Although technically assault, it did not merit the stigma of a conviction…

Arguably, a similar case involving a parent would not have had the same result under the new Parental Control provision, because the use of force for the purposes of correction is explicitly prohibited. If, as Sue Bradford's original Bill intended, the s59 defence of Domestic Discipline had simply been repealed, the trivial uses of force for *any* purpose would have been caught by the safeguards that we already have in our law, as demonstrated above.

B. The prescriptive quality of the parental control defence

The amended s59 has three purposes. Firstly, it removes the justification for the use of corporal punishment. Secondly, it affirms the police discretion not to prosecute cases that are not in the public interest or are inconsequential. Thirdly, it sets out the circumstances where parents or persons in the place of a parent *can* invade a child's bodily integrity, in what amounts to a fresh defence of reasonable force.

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[34] [1984] 1 W.L.R. 1173. In this case it was held that everyday jostling does not constitute assault.
[35] Sentencing Act 2002 s106.
[36] Sentencing Act 2002 s107.
[37] [1996] 1 NZLR 153.
[38] At 158.

Section 59(1)(a)-(d) is intended to fill the gap in the law, to provide a statutory defence for parents in situations where technically their use of force would amount to assault. However, by setting out all of the situations in which a child's bodily integrity can be legitimately invaded, the amended s59 has developed a prescriptive quality. In essence, by listing all of the circumstances where children do *not* have the right to bodily integrity, it demonstrates that children are not equal citizens deserving of equal rights. Before the amendment, children enjoyed the same right to bodily integrity as adults in the Crimes Act, except of course when the force used on them was for the purposes of correction. Now that the correction defence has been removed, it would be logical to think that children would be *completely* equal to adults, however the amendments have prevented that from happening. What we are left with is an exhaustive, unnecessary and largely ambiguous list of ways parents can use force against their children.

For example, subsection (1)(c) allows parents to use force to prevent the child from engaging in offensive or disruptive behaviour. Woods, Hassell and Hook suggest that this provision seeks to cover the situation of a child having a tantrum in a supermarket, to allow a parent to remove or restrain the child, as opposed to smacking to stop the anti-social behaviour.[39] However, there is no requirement in s59(1)(c) that the behaviour be public, or that any person needs to be disturbed or offended by it.[40] The term is deliberately vague to cover a whole host of situations, but the sorts of situations contemplated by this provision would probably be such minor instances of assault, there would be no public interest in prosecuting them anyway,[41] rendering the section redundant and unnecessary.

The justification of parental force in s59(1) has presumably been drafted in such a way as to maximise the cover for potential situations where parents use force. However, the lack of specificity, and failure to define terms has perhaps blurred the boundary between force used to *correct* a child and the listed 'legitimate' uses of force.[42] The difference between legitimate uses of force in s59(1)(a)-(d) and the uses of force

[39] Supra n. 3, p. 85.
[40] Supra n. 32.
[41] Supra n. 30, para 3.3.
[42] Supra n. 32.

for the purposes of correction lies in the motive of the parent, and this may often be difficult to establish. The section is so vague that it would be relatively easy to reclassify a corrective use of force within one of the four situations set out in s59(1).[43]

The terms "child",[44] "person in the place of a parent", "reasonable force" and "correction" have still not been defined by this Amendment, which is strange considering the Justice and Electoral Committee was trying to clear up the law in this area. The Police Practice Guide highlights the lack of formal definitions, and consequently there is an attempt to fill the gap, which in itself is problematic. For example, the guideline for "force used is reasonable in the circumstances" reads: [45]

> No definitions are offered about what constitutes reasonable force. In using force parents must act in good faith and have a reasonable belief in a state of facts which will justify the use of force. The use of force must be both subjectively and objectively reasonable.
>
> Any force used must not be for the purposes of correction or punishment; it may only be for the purposes of restraint (s 59(1)(a) to (c)) or, by way of example, to ensure compliance (s 59(1)(d)).

This definition reads into s59(1)(d) the legitimate use of force *to ensure compliance*. Arguably, the definitions of 'ensuring compliance' and 'correction' are interchangeable, and in some cases it would be difficult to assess whether the force used was to ensure compliance, or whether it was for the purposes of correction. Too much responsibility is left with the prosecutor to distinguish the purpose behind the use of force, that in some circumstances may be indistinguishable.[46] This problem

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[43] See below at page 418, for a hypothetical application of s59(1) in a situation where parental force is used in reaction to a child talking back.

[44] "Child" means a person 17 years of age or under in the Care of Children Act 2004, but means a person of 14 years of age or under in the Children, Young Persons and Their Families Act 1989. The practice guide suggests that the age of the child will impact on the reasonableness of the force used. The older the child gets, the less justifiable the uses of reasonable force listed in s59(1) will become.

[44] *Police Practice Guide for new Section 59*, 19 June 2007, accessed 6 March 2008 at http://www.police.govt.nz/news/release/3149.html, page 2.

[45] Ibid., p. 3.

[46] Supra No. 31, page 8. Peter McKenzie QC expressed a concern for the amount of discretional responsibility entrusted in the police. He felt that there was a danger in

would not exist if s59 had simply been repealed, because the police would not have had to assess the motive behind each use of force, in addition to its inconsequentiality.

This lack of clarification in an Amendment which is meant to provide clarity means that the justifications in s59(1) could potentially be used as a 'loophole' to evade the prohibition of force for the purposes of correction in s59(2). The above example of the police definition illustrates this point, as does the situation where a child is talking back to his parent at home. If the parent picks the child up and puts him in his room as punishment for his behaviour, there has technically been an assault[47] however, a parent could reasonably justify the action under s59(1) as preventing the child from continuing to engage in offensive or disruptive behaviour. This justification does not require the behaviour to be public, nor for it to be established that anyone was actually offended or disturbed. By the same token, if the parent gave the child a small smack on the hand instead of taking him to his room, the same justification could be raised, and it makes a difficult task for the prosecutor to establish the motive behind the force. Of course, this kind of situation is so inconsequential that it would be very unlikely to be prosecuted, however it demonstrates that the amendments have not sufficiently clarified matters to a degree that warrants their existence in the first place.

The Law Commission highlights the fact that the requirement that motive is established may cloud the issue: [48]

> We need to emphasise that, in any given case, the parental motive will be a question of fact that varies in the circumstances of each case. This means that it is impossible for us to provide a blanket reassurance that prosecution will never be appropriate when force has been used to achieve "time out". It will be a matter for prosecutorial discretion and, ultimately (if the discretion is taken to prosecute) the decision of a jury.
>
> However, in this regard, there is a very important point to note. The "Solicitor-General's Prosecution Guidelines" require prosecutors, in the exercise of their discretion, to assess the likelihood of achieving a

leaving the police with too much discretion, because invariably the outcomes would be inconsistent.

[47] See below at p. 426 "Putting the child on the naughty step."

[48] Palmer., G., , *Crimes (Substituted Section 59) Amendment Bill: Opinion of Peter McKenzie QC,* Law Commission, tabled in Parliament on 13 March 2007, (2007) 637 NZPD 7871.

> conviction. We suggest that, in the vast majority of "time out" cases, parents will be prompted by a mix of motives, which may include prohibited correctional purposes, but in all likelihood will also include other permitted purposes. It is thus questionable whether in such cases a jury could ever properly convict a parent beyond reasonable doubt, which in turn may tell against the likelihood of prosecution.

In other words, the differentiation between the use of force for the purpose of correction and the legitimate use of force is often difficult, and might preclude prosecution in contentious cases. It is therefore difficult to see how the amendments to the Bill added further clarity or how they have helped to achieve successful abolition of all uses of force for the purposes of correction.

C. The effect of affirming police discretion

Section 59(4) affirms the police discretion not to prosecute certain offences:

> (4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

The inclusion of this affirmation was to further address public and political anxieties about the Bill.[49] It was the work of Prime Minister, Helen Clark, and former Prime Minister, Geoffrey Palmer, who then gained the approval of the Bill's creator, MP Sue Bradford. The Amendment was also approved by the leader of the opposition, in a political about-turn to support the Bill. Affirmation of the police discretion, while it did nothing to change the current practical situation, seemed to be the magical cure for the major discord in the House of Representatives. Following an historic press conference where the Prime Minister and leader of the opposition formed a united front, the House voted overwhelmingly in favour of the Amendment. There were speeches applauding the cooperation of people who worked to resolve the "impasse".[50] It appeared that a simple recognition of something

[49]Supra n. 3, p. 183.
[50]Ibid., pp. 183-184.

that already existed was enough to reassure those who feared a change in the law would bring the worst.

However, the inclusion of an affirmation that the police have discretion not to prosecute inconsequential offences is unusual and unnecessary.[51] The purpose of its inclusion was to ensure that the Bill made it through its final reading, by calming the nerves of those who feared the prosecution of parents was going to be widespread and out of control. In that sense, its inclusion is more of a political tool than a necessary element of the parental control provision. While it was successful in getting the law passed, its overall effect is perhaps the most damaging to our perception of children in New Zealand and their status as equal rights bearing citizens. The motivation for including an additional point to a piece of legislation should never be getting it passed into law, rather it should be because it is necessary to achieve the original purpose. In this case, the inclusion of an affirmation of police discretion actually does more damage than good, because it seriously compromises the entire purpose and essence of the Bill. Furthermore, the damage is not confined to children's rights. The affirmation of police discretion dilutes the perception of children as equal rights bearers, but its inclusion in statute might also be problematic for judicial review of police discretion.[52]

1. Police discretion already exists

The existing prosecuting guidelines assist the police with the decision of whether or not to prosecute an offence. Two major factors must be taken into account when making the decision to prosecute or not to prosecute. The first is evidential sufficiency, which requires the prosecutor to ask whether there is sufficient reliable and admissible evidence that an offence has been committed by a particular person, and additionally whether a properly directed jury could find the person guilty beyond reasonable doubt. The second factor to be taken into account is the public interest in proceeding with prosecution. The guidelines set out 16 additional factors to be considered when assessing the public interest in prosecution. Some of the more relevant factors in

[51] Supra n. 11. Judge Paul von Dadelszen remarks that the addition of the affirmation of police discretion is "a little superfluous, as the Police have this discretion in any case."
[52] See below at page 424, "Integrity of the Crimes Act and Immunity From Review".

a child assault decision might be: [53]

a) the seriousness or, conversely, the triviality of the alleged offence; i.e. whether the conduct really warrants the intervention of the law;
b) all mitigating and aggravating circumstances;
e) the degree of culpability of the alleged offender;
f) the effect of a decision not to prosecute on public opinion;
i) the availability of proper alternatives to prosecution;
j) the prevalence of the alleged offence and the need for deterrence;
k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
n) the likely length and expense of the trial;
p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

The fact that this discretion already exists was considered by the Justice and Electoral committee when they recommended the amendments to the original Bill: [54]

> As with any other offence, the prosecution of parents and every person in the place of a parent for the use of force against children for the purpose of correction will be a matter for police discretion, although private prosecutions remain a possibility. We were advised that all prosecution decisions are guided by the Solicitor-General's Prosecution Guidelines. The guidelines state that police must decide whether a prosecution is required in the public interest. They also state that ordinarily a prosecution will not be in the public interest unless it is more likely than not that it will result in a conviction… There are safeguards in the criminal justice system to minimise the likelihood of parents and every person in the place of a parent being prosecuted for minor acts of physical punishment. Various options other than formal prosecution are available to police, including warnings and cautions. Under the Solicitor-General's Prosecution Guidelines, a prosecution should proceed only where it is in the public interest and there is sufficient evidence.

This recognition of existing police discretion supported their belief that a change in law would not lead to a significant increase in prosecutions. The Justice and Electoral Committee did not recommend an affirmation of police discretion within the words of the Act, and remarked, "We do not believe that the changes we have proposed to

[53] Supra n. 30, para 3.
[54] Supra n. 1, p. 5.

s59 of the Act will lead to a large increase in convictions or the removal of children from their families for the use of minor physical discipline."[55]

2. How s59(4) effects the underlying message of the provision

Repealing s59 was intended to put children's right to bodily integrity on an equal footing with adults. In the second stage of the Bill the Justice and Electoral committee deviated from that purpose by creating amendments that would legitimise certain forms of force used against children but not adults. At least however, in the second stage, the message was very clear about the use of force for the purposes of correction. Subsection 2 specifically prohibits this use of force, and subsection 3 reinforces the importance of this message by making it prevail over anything in subsection 1. Unfortunately, by the third stage of the Bill, even the message about the use of corrective force is weakened, by the inclusion of an affirmation of police discretion. John Key, in explaining his support for the addition of subsection 4, effectively hit the nail on the head when he stated that the purpose of the affirmation was to[56]

> give parents confidence that they will not be criminalised for lightly smacking their children. It makes it clear that police have the discretion not to prosecute complaints against a parent where the offence is considered to be 'so inconsequential' that there is no public interest in the prosecution going ahead.

Mr Key succinctly implied that the intention of s59(4) is to undermine the whole purpose of the act, which is to abolish the use of parental force for the purposes of correction.[57] He has affirmed that smacking is acceptable, so long as it is not more than inconsequential.

Inclusion of an affirmation of police discretion changes the very essence of s59. It has the effect of diluting the message that it is no longer acceptable to use force against children. Instead, it implies that

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[55] Ibid., p. 7.
[56] Key, John, Some sense on smacking - at last! *Newsletter: Keynotes No 9*, http://johnkey.co.nz/index.php?/archives/101-NEWSLETTER-KeyNotes-No-9.html, May 2 2007.
[57] Section 4 Crimes (Substituted Section 59 Act) Amendment Act 2007.

the use of force against children is only important if it meets a certain threshold, i.e. more than inconsequential. If this was the *actual* intention of the Bill, then the integrity of the Act would have been better served by being clear about its purpose.[58] Even though this discretion exists for every offence, the fact that it is reiterated *only* in s59 weakens the strength of the purpose of that section.

To make a comparison, s219 of the Crimes Act 1961, 'Theft or Stealing' does not affirm the police discretion not to prosecute inconsequential cases within the words of the section. The message about theft is clear, that it is wrong to steal. If this section were the *only* section in the whole of the Crimes Act to include an affirmation of police discretion, the message would become compromised. The message might instead be that it is wrong to steal in general, but minor thefts are not so bad. This is not ideal. The criminal code of a country should be able to be relied upon to tell the people what is expected of them, without vague qualifications. In the context of children's rights, s59 does not properly convey that children have the right to bodily integrity, or even that they are completely deserving to be free of the use of force for the purposes of discipline.

The underlying message of the Bill was originally intended to be that 'children are the same as adults with respect to bodily integrity and assault'. The amendments and the unnecessary inclusion of the affirmation of police discretion have transformed this message into, 'Here are the ways children are not equal to others and their bodily integrity can be invaded. Do not use force against them for the purposes of correction, but if you do, make sure it is sufficiently inconsequential so as to avoid prosecution'.

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[58] The Law Commission actually reviewed two options for the Justice and Electoral Committee, one being the narrowing of the scope of 'reasonable force', put forward by Chester Burrows MP. This option would resemble the s59 equivalent in England, by providing a non-exhaustive list of conduct which is to be considered unreasonable (e.g. use of a weapon or tool; causes injury that is more than transient or trifling), rather than abolishing corporal punishment altogether. This is obviously not the option the Committee chose: Palmer, G., 'Section 59 Amendment: Options for Consideration', Report of the Law Commission for the Justice and Electoral Committee, 8 November 2006.

3. Integrity of the Crimes Act and immunity from review

The police discretion not to prosecute is affirmed in only one section of the entire Crimes Act, s59. In practice, police have discretion not to prosecute *any* of the offences if they do not have sufficient evidence or if it would not be in the public interest. The fact that this discretion is affirmed in only one section of the statute not only undermines that section, it undermines the Act as a whole.

Having the discretion affirmed in only one section implies that that section is somehow different from the others. It implies that this section really only has face value, or that perhaps police have *extra* discretion in these cases because the discretion has not been affirmed anywhere else. While this was probably not the intention of the legislature, the absence of the affirmation in any other section implies that it is somehow more relevant in s59.

This could potentially cause problems if a police decision not to prosecute an offence is challenged. Traditionally, the courts have been reluctant to review the exercise of discretion,[59] however it is debatable whether the inclusion of the discretion in statute brings its application within the judicial realm. In *Polynesian Spa Ltd v Osborne*[60] it was held that while review of discretion can not be completely ruled out, "it will only be in rare cases",[61] that is "if it were established that the prosecuting authority acted in bad faith or brought the prosecution for collateral purposes".[62] The judge in the case found that the decision *not* to prosecute is also amenable to review: [63]

> *Hallett*[64] is authority for the proposition that judicial review is only likely to be obtained in such a case where there has been a failure to exercise discretion, such as by the adoption of a general policy that in certain classes of cases, prosecutions will not be brought. There may be other grounds but it is likely only to be in exceptional cases that a court would intervene where a decision has been taken not to prosecute in a specific case not affected by factors such as the adoption of a general policy.

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[59] *Fox v Attorney General* [2002] 3 NZLR 62.
[60] [2005] NZAR 408.
[61] Ibid., at para 62.
[62] Ibid., at para 64.
[63] *Polynesian Spa v Osborne* at para 69.
[64] *Hallett v Attorney-General (No.2)* [1989] 2 NZLR 96, 100.

It is possible the courts will remain reluctant to review the exercise of discretion, except in cases of bad faith, despite it now being affirmed within the Act.[65] Before the discretion was included in statute, it was difficult yet possible to challenge it by way of judicial review. However now that it has been codified to form a substantial part of s59 it could potentially be open to more direct review in a criminal prosecution. Nevertheless, it is difficult to predict whether the legislative reference to police discretion will allow the courts will find *more* legitimacy in reviewing it in s59 cases. Some theorists believe that the affirmation will not further fetter the discretion to prosecute or not, because the statute itself does not confer the discretion, but merely recognises it.[66] Regardless, the inclusion of the affirmation in the section has permitted people to feel entitled to a fair and *transparent* exercise of discretion,[67] which was not the purpose of the Bill. The criminal code should set society's minimum standard of behaviour, without qualification.[68] The practical application of the code should be kept quite separate.

To avoid the implication that police have extra discretion in s59 cases, or that s59 is not to be taken overly seriously, the affirmation should either have been left out altogether, or made a general provision, applicable to the whole Act. The words of s59(4) are clear about the purpose of its inclusion, which is 'to avoid doubt'. This purpose could have been achieved by affirming a *general* police discretion not to prosecute, without setting s59 apart. By making the affirmation a general provision of the Crimes Act, the underlying message in s59 and the consistency of the statute would not have been compromised.

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[65] Knight, Dean, 'Crimes (Substituted Section 59) Amendment Bill', *Laws 179 Elephants in the Law*, http://www.laws179.co.nz/2007/06/crimes-substituted-section-59-amendment.html, June 20 2007.

[66] Ibid para 5. Knight points out that the court has existing power to control prosecutions to prevent abuse, and to discharge without conviction. He concludes that prosecutorial discretion is irrelevant in the eyes of the court.

[67] See 'Smacking Crimes "Inconsequential"- Yet Police Still Prosecuted', *Press Release: Society for the Promotion of Community Standards*, 7 May 2007, http://www.scoop.co.nz/stories/PO0705/S00121.htm for an example of how people will expect the application of the "inconsequential" standard to be transparent. It shows a sense of entitlement to be free from prosecution for uses "benign" corrective force after John Key's promise that the inclusion of subsection 4 protects parents from criminalisation for light smacking.

[68] Supra n. 3, p. 87.

D. Putting a child on the 'naughty step'[69]

The purpose of amending s59 was to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purposes of correction.[70] Parents today are being discouraged from raising their children in a context of discipline and punishment, and instead are persuaded to use positive encouragement techniques and child guidance.[71] The introduction of the Crimes (Substituted Section 59) Amendment Act meant that parents in New Zealand could no longer resort to the use of physical force for the purposes of correction and would have to learn new ways of dealing with problem behaviour. The task of explaining the new law and assisting parents to find alternatives to physical discipline has, at this point, been left with non-governmental organizations (NGO's).[72] The Families Commission website[73] recommends several positive reinforcement techniques, and provides links to other NGO's with advice on alternatives to smacking. The use of 'time-out" is recommended by "Littlies",[74] specifically, the picking up and removing a child to a room, corner, or step for bad behaviour.
In a legal opinion for Gordon Copeland MP, Peter McKenzie QC concludes that the application of force to carry a child to a "naughty mat" or another room for the purposes of "time-out" amounts to use of force for the purposes of correction, and therefore constitutes assault. [75]

> The "justifications" for parental intervention set out in s.59(1) which is proposed to be inserted into the Crimes Act by clause 4 of the Crimes

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[69] The 'naughty step' was an alternative to smacking advocated by Supernanny, TV2's popular parenting show. Supernanny, Jo Frost, recommended physically putting misbehaving children on the naughty step or naughty mat as a form of time-out: The Naughty Mat, accessed 5 April 2008 from <http://www.supernanny.co.uk/Advice/-/Parenting-Skills/-/Discipline-and-Reward/The-Naughty-Mat.aspx>

[70] Crimes (Substituted Section 59) Amendment Act 2007, s4.

[71] 'Child discipline and the law', *Barnados Information Sheet No.61*, July 2007; 'Choose to Hug, not to Smack'*, Office of the Commissioner of Children and EPOCH*, 2001.

[72] Supra n. 3, p. 87.

[73] 'Positive Discipline', accessed 5 April 2008 from <http://www.nzfamilies.org.nz/parenting/positive-discipline.php>

[74]Littlies for Practical Parenting, 'Time Out', accessed 5 April 2008 from <http://www.littlies.co.nz/page.asp?id=246&level=3>

[75] Supra n. 31, p. 9.

> (Abolition of Force as a Justification for Child Discipline) Amendment Bill, do not provide any justification for parental intervention for the purpose of correction. Any use of force for the purpose of correction is expressly excluded by reason of clause 3 and the proposed s.59(2) and (3). In my opinion, the carrying of a child against the child's will to a "naughty mat" or another room in order to provide correction or discipline to the child cannot be justified under the proposed Bill and would, therefore, come within the meaning of an assault under the Crimes Act.

The definition of assault in the Crimes Act 1961 does not provide for varying degrees of force used, or the motivation behind the application of force. Arguably, the force used to put a child in time out would be considered inconsequential, and therefore would be unlikely to be prosecuted. However it raises the question, if a gap in the law still exists, what then was the point in making the amendments?

1. Is this another "gap in the law"?

The media fuelled public hysteria and concern around the repeal of s59 was focused on *physical punishment,*[76] not on non-disciplinary uses of force.[77] When the amendments were made by the justice and electoral committee after considering over 1700 submissions, the uses of force for non-disciplinary reasons was legitimised, but the non-violent uses of force for the purposes of correction, such as picking a child up for time out were not. People and politicians[78] seemed to be reassured that this

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[76] In an analysis of the submission made to the Justice and Electoral Committee on the Bill, it was found that "in general those submitters who advocated physical punishment would oppose the Bill and those who supported the Bill would oppose the use of physical punishment… none who opposed the Bill opposed physical punishment and only five who supported the Bill clearly stated that they also supported physical punishment." Debski, S., Buckley, S., Russell, M., *Just who do we think children are? An analysis of submissions to the Justice and Electoral Committee* (2007) Health Services Research Centre, University of Victoria.

[77] The Family First petition for a referendum had, at 29 April 2008, gathered approximately 269,500 signatures. One of the questions they aim to have a referendum on is, "Should a smack as part of good parental correction be a criminal offence in New Zealand?" Clearly, the focus is still on the use of force for the purposes of correction, not on other uses of force: Watkins, T., 'Smacking petition falls short',*The Dominion Post* accessed 29 April 2008 from <http://stuff.co.nz/print/4501944a19715.html >

[78] See above at n. 27. The Justice and Electoral Committee state that they have drafted the amendments to achieve clarity amongst widespread confusion about the purpose and possible results of a law change. Implicit in this is also the attempt to reassure those who misunderstand the Bill, by legislating further protections for them.

gave them further protection, but in reality *it changed nothing*. People felt further relieved when the police discretion not to prosecute was affirmed,[79] but again, in reality, *it changed nothing*. People wanted to be reassured that they were not going to be made criminals for disciplining their children, but the focus on 'smacking' meant that less attention was paid to the fact that *any* use of force for the purposes of correction amounts to assault, not just hitting or smacking.

2. What was the point in the amendments? Why not just repeal s59?

The Justice and Electoral Committee felt there was a gap in the law that needed to be addressed, and there was widespread misunderstanding about the effect of the Bill that would be cleared up by spelling out the law regarding the use of force against children.[80] However, there is still a gap, and it is the one that people were concerned about. It is the gap concerning physical punishment.[81]

When Sue Bradford introduced her Bill, it quickly became known as the "anti-smacking bill" despite the fact that Bill sought to abolish *all* uses of force against children for the purposes of correction, not just smacking. Wood, Hassell and Hook suggest that this label originated from opponents of the Bill, who wanted to alarm the public with the notion that good parents would be made criminals for light smacking.[82] As result, the public's attention turned toward smacking, despite the fact that the concern for this issue stemmed from the successful application of the s59 defence in cases where the force used was far more severe than smacking. The amendments were introduced, especially in the final stages, to create enough reassurance that there would not be widespread criminalisation in an effort to get the law passed. It was meant to be a compromise, a less severe form of Sue

[79] The Police Guidelines specifically refer to time out situations, classifying them under either s59(b)(c) and (d). This lends further support for the notion that the use of force for the purposes of discipline can easily be reinterpreted to fit within the four legitimate uses of force in s59.
[79] Supra No. 46, p. 4.
[80] See above at n. 27.
[81] Supra n. 50. The Law Commission suggests that to legislate for the 'timeout' scenario would have created a loophole in the law for parents to use force for the purposes of discipline.
[82] Supra n.3, p. 140.

Bradford's original bid, but all the amendment did was to answer a completely different issue.

The issue of the use of force was split in two by the Bill time reached its third reading:

> Issue 1. Physical force for the purposes of correction.
> Issue 2. Physical force for purposes other than correction.

The amendments made to the Bill answered the second issue, but this was not what was concerning the New Zealand public. The proposed law change was still as severe as Sue Bradford's original Bill in the context of physical force for the purposes of correction, therefore there was no reason for people to feel reassured by the amendments. The addition of the affirmation of the police discretion was meant to further reassure people, but again, it did nothing to change the current reality, because police discretion has always existed. We would be in a better, clearer position if we had simply repealed s59 and simply left it at that. The fact that a defence has been legislated to appease the concerns for something completely different is illogical, especially when it does nothing to change the current reality.

Conclusion

The decision to amend s59 of the Crimes Act 1961 rather than simply repeal it was motivated by a desire to fill an existing gap in the law and to reassure an uneasy nation that there would not be widespread criminal prosecutions of parents for touching their children. However, the amendments have caused problems in their own right, by adding ambiguity and loopholes rather than clarity. The amendments were drafted in an attempt to damper resistance to the Bill, however they did not address the central concern of people opposing it. Additionally, the creation of a fresh defence of reasonable force has not served the original purpose of the Bill, which was to recognise children as equal citizens under the law, deserving of the same rights to bodily integrity as everyone else. Instead, it has unnecessarily codified a set of circumstances that already exist, and in the process has set children apart as a group in society not deserving of basic human rights.

THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS: WHAT ARE NEW ZEALAND TRADERS MISSING OUT ON?

KELLIE EWING*

Introduction

Contracts for the international sale of goods have long been problematic. Issues such as conflict of laws, cultural difference, and wide-ranging divergences in judicial interpretation have made litigation arising out of contracts for the international sale of goods exceedingly complex. These difficulties have led to much uncertainty about what the outcome will be if something goes wrong and the contract ends up before the courts.[1]

The United Nations Convention on Contracts for the International Sale of Goods (CISG) was entered into in 1980 as a way of making international transactions more certain by providing a set of universal principles that harmonise the law on contracts for the sale of goods at an international level. The CISG has been heralded as one of the greatest legal achievements in international commercial law because of its ability to harmonise the law and reduce the uncertainties that existed in the laws on international sales contracts that existed prior to CISG.[2]

In many jurisdictions both lawyers and the courts are using the CISG to simplify international sales contracts and are therefore reaping the benefits that the convention has to offer.[3] New Zealand, however, has been reluctant to follow this example and traders are rarely utilising the CISG in contracts for the international sale of goods. This has left

* BSoc/LLB(Hons), University of Waikato. Candidate for LLM(Hons), University of Waikato. The author would like to acknowledge Professor Nan Seuffert of the University of Waikato and thank family and friends for their continuing support.

[1] Koppenol-Laforce, M. (ed.) *International Contracts: Aspects of Jurisdiction, Arbitration and Private International Law* (London: Sweet and Maxwell, 1996), 141.

[2] Butler, P. "Celebrating Anniversaries" (2005) 36 VUWLR 775, 775.

[3] Schlechtriem, P. "Requirements of Application and Sphere of Applicability of the CISG" (2005) 36 VUWLR 781, 782.

many commentators asking why New Zealand traders are excluding the CISG from operation when *prima facie* it appears to offer significant benefits.

This paper will critically evaluate the approach of New Zealand traders to the CISG by answering the question: "Why are New Zealand traders failing to take advantage of the protection offered by the United Nations Convention on Contracts for the International Sale of Goods"? The paper will explore what could be done to improve the use of the CISG in New Zealand international sales contracts if New Zealand traders really are missing out.

A. History

As international trade increased throughout the 1900s it became increasingly clear that steps needed to be taken to introduce some type of uniform law on contracts for the sale of goods to deal with the complex issues of international trade and increase certainty in international sales contracts.[4] In 1964 two conventions were enacted with the aim of creating uniformity, the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on Formation of Contracts for the International Sale of Goods (ULF). However, these agreements were largely unsuccessful, with each only receiving a small number of ratifications.[5]

The need for some type of uniformity continued until the 1980 Vienna Convention. The Convention provided a significant breakthrough in this area with United Nations countries agreeing on a collection of rules that would reform international law on the sale of goods and create a uniform set of principles to be used in the interpretation of such contracts.[6] This agreement became known as the United Nations Convention on Contracts for the International Sale of Goods (CISG).

The CISG came into force in 1988, and currently there are 71 state

[4] Lutz, H. "The CISG and the Common Law Courts: Is There a Problem?" (2004) 35 VUWLR 711, 712-714.
[5] Bridge, M. *The International Sale of Goods: Law and Practice* (Oxford: Oxford University Press, 1999), 38.
[6] Ibid 40-42.

parties[7], making it the most well received agreement of its kind.[8] The purpose of the CISG is to reform previous international agreements, and to harmonise the law governing the international sale of goods. It aims to resolve issues that contracting parties have had in the past with determining which country's laws should apply to their contracts.[9] The CISG is a significant development in international commercial law on contracts for the sale of goods because it ties together elements of both common and civil law, in a manner which makes it useful on an international scale. This has encouraged participation from a much wider range of countries than has been achieved in any previous attempts to create uniformity in contract law.[10]

Parties to the convention include Australia, Canada, and the United States. However, the United Kingdom has not yet ratified.[11] New Zealand ratified the CISG in 1992 and has incorporated it into domestic law by virtue of the Sale of Goods (United Nations Convention) Act 1994. Under section 5 of the Act the CISG is to be used as a code for determining issues arising out of contracts for the international sale of goods and:[12]

> [S]hall, in relation to contracts to which it applies, have effect in place of any other law of New Zealand relating to contracts of sale of goods

This means that, provided the parties do not contract out of the CISG, New Zealand's domestic law on international sales will not be of application to contracts for the international sale of goods entered into in New Zealand.

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[7] Institute of International Commercial Law, *CISG: Table of Contracting States* available online at http://cisgw3.law.pace.edu/cisg/countries/cntries.html (last accessed 21 July 2008).
[8] Lando, O. "CISG and its Followers: A Proposal to Adopt Some International Principles of Contract Law" (2005) 53 AM. J. Comp. L. 379, 381.
[9] Ibid, 380.
[10] Carr, I. *International Trade Law (3rd ed.)* (London: Cavendish Publishing, 2005), 61.
[11] Institute of International Commercial Law, *CISG: Table of Contracting States* available online at http://cisgw3.law.pace.edu/cisg/countries/cntries.html (last accessed 21 July 2008).
[12] Sale of Goods (United Nations Convention) Act 1994.

B. Scope and application of the CISG

The CISG will apply to contracts for the international sale of goods entered into after the date that country ratified.[13] When it applies, and the parties have not contracted out, it will replace both the choice of laws rules and any domestic law on the international sale of goods.[14] As explained in *Attorney General & NZ Rail Corporation v Dreux Holdings Ltd,* this means that because New Zealand has ratified effort should be made to interpret New Zealand law in a manner that is consistent with the convention:[15]

> It should not go unnoticed that the United Nations Convention on Contracts for the International Sale of Goods, known as the Vienna Sales Convention, is now, by virtue of the Sale of Goods (United Nations Convention) Act 1994, part of New Zealand law…There is something to be said for the idea that New Zealand domestic law should be generally consistent with best international practice.

However, the CISG does not apply to all contracts between parties, but only to contracts for the sale of goods internationally.[16] "Sale" and "goods" are not defined in the CISG.[17] However, in most cases it will only apply to commercial sales of goods and not to "goods brought for personal, family, or household use"; contracts for services will also be excluded.[18] There are also some other elements of contract law, such as validity of contract and consideration which CISG does not address and which must continue to be dealt with under domestic law.[19] It is important to note, therefore, that the CISG will not be applicable to every international contract. It is to be determined on the facts of each case as to whether or not the CISG applies.

There are three important factors that must be present for the CISG to apply to a contract for the sale of goods. Firstly, under Article 1(1)(a) the parties to the contract must be based in different countries.

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[13] Mo, J. *International Commercial Law (3rd ed.)* (NSW: LexisNexis Butterworths, 2003), 78.
[14] Bridge, above n 5, 37.
[15] *Attorney General & NZ Rail Corporation v Dreux Holdings Ltd* (1996) 7 TCLR 617 (CA), 627.
[16] Mo, above n 13, 78.
[17] Bridge, above n 5, 45.
[18] Schlechtriem, above n 3, 786.
[19] Carr, above n 10, 67.

Secondly, the countries where the parties trade from must have ratified the CISG, and thirdly, the goods must be capable of fitting within the goods accepted by the CISG.[20] Article 6 provides an exception which allows people in member states to opt out of the CISG. It is also possible for parties in non-member states to opt in and agree that the CISG will apply to their contract.[21]

Where parties to an international sales contract choose to use Article 6 to opt out, they must expressly state their intention to exclude the CISG from operation. It will not be enough to say that the laws of New Zealand will apply to the contract. The CISG is part of New Zealand law and if express words are not used then CISG may be applicable despite the parties' intention that it is to be excluded.[22]

C. Benefits of the CISG

One of the significant benefits that commentators argue New Zealand traders are missing out on by failing to use the CISG is the uniformity of law and judicial interpretation that the convention has to offer.[23] In its 1992 report into whether New Zealand should ratify CISG the New Zealand Law Commission summarised the benefits of the CISG as follows: [24]

> When it applies, it avoids the often complex problems of first ascertaining the applicable law in accordance with conflict of law doctrines, and second determining what is required by the applicable foreign law once it has been ascertained.

Because of the many different countries that New Zealand traders do business with there are often conflicts between the laws of New Zealand and those of the other parties to international sales contracts. This can lead to complex disputes as to which states laws should apply. It is argued that the CISG helps to simplify contracts for the

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[20] Mo, above n 13, 78.
[21] Schlechtriem, above n 3, 784-785.
[22] Ziegel, J. "The Future of an International Sales Convention from a Common Law Perspective" (2000) 6 NZBLQ 336, 339.
[23] Butler, above n 2, 776.
[24] Law Commission "The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance" (Wellington: New Zealand Law Commission, 1992), 10.

international sale of goods because it introduces one clear set of laws that are applicable to transactions between New Zealand and most of its major trading partners. This means that when disputes arise it is clear exactly what law will apply.[25] This is advantageous to the parties as it prevents them having to negotiate complex conflict of laws clauses when they enter into agreements for the international sale of goods. Therefore the application of the CISG would be likely to significantly reduce the costs for New Zealand traders as it would reduce the need to engage the help of experts, such interpreters and paralegals.[26] It also has the potential to save time as it provides a compromise when parties cannot agree. Therefore, they should not have to spend so much time trying to reach an agreement as to whose laws should apply.[27] There should also be decreased legal costs as it is less likely that parties will have to pay lawyers to undertake research into different legal systems every time they want to enter into a contract.[28]

Another argument in favour of the uniformity of principles that the CISG has to offer is that it makes judicial outcomes more certain if something goes wrong and the contract ends up before the courts.[29] Article 7 requires that all judges interpret the CISG in a way that provides for its international nature. This implies that domestic law should not be used to interpret unless there are gaps that the CISG itself does not cover; and that there should be a uniform interpretation in the courts of all member states.[30] The intention of this Article is to facilitate the development of an international body of CISG case law, which will in turn provide uniform precedents that can be applied to contracts for the sale of goods irrespective of which parties' courts decide the issue.[31]

Rajeev Sharma argues that because the CISG provides for uniformity of interpretation across the globe universal precedents will be developed on how each Article is to be interpreted.[32] It is argued that

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[25] Carr, above n 10, 57.
[26] Schlechtriem, above n 3, 794.
[27] Bridge, above n 5, 37-38.
[28] Schlechtriem, above n 3, 794.
[29] Sharma, R. "The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience" (2005) 36 VUWLR 847, 856.
[30] Koppenol-Laforce, above n 1, 196.
[31] Bridge, see above n 5, 57-58.
[32] Sharma, above n 29, 856-857.

this will help to make international transactions more certain as parties can be sure of what principles will be applied to the contract if something does go wrong and will know what the likely outcome will be if the issue ends up in the courts.[33] Because the CISG, and its body of resulting case law, do make potential outcomes clearer there will be less reason for parties to enter into litigious disputes over contracts for the international sale of goods as they will be able to predict the legal outcome.[34] However, as will be discussed in more detail in Part VI, uniform interpretation has been slow to emerge and has made lawyers in some CISG parties reluctant to apply it to contracts that they draft.

It has also been argued that one of the advantages of having the CISG apply is that it provides a neutral set of laws. This places both parties in an equal position and provides a more equitable situation for the parties as neither party will have a home advantage, but both parties should have equal access to information and legal advice.[35] In their 1992 report the Law Commission cited this as one of the potentially significant benefits to New Zealand traders. Prior to the CISG, the generally smaller size of New Zealand traders meant that they had significantly less bargaining power to be able to negotiate for New Zealand law to apply to international sales contracts.[36]

Nottage argues that without the CISG New Zealand traders may be unable to avoid having to use a foreign set of laws to negotiate and litigate an international sales contract.[37] In many cases, large traders in countries like the USA will not enter into an agreement unless it is their law that applies.[38] This has often meant that New Zealand traders have had to work with unfamiliar legislation from overseas which is often not well suited to New Zealand trading conditions. It also means that New Zealand traders have experienced excessive costs in obtaining advice on the law of foreign states.[39] By providing a uniform set of laws that applies to both parties the CISG removes the advantages that

[33] Ibid, 856.
[34] Schlechtriem, above n 3, 794.
[35] Butler, above n 2, 777.
[36] Law Commission, above n 24, 56.
[37] Nottage, L. "Whose Afraid of the Vienna Sales Convention (CISG)? A New Zealander's View From Australia and Japan" (2005) 36 VUWLR 815, 836.
[38] Ibid, 836.
[39] Law Commission, above n 24, 56.

larger trading partners have had over New Zealand traders, at least with respect to negotiating conflict of laws clauses. New Zealand traders are in a position where they have much more bargaining power than they would without the CISG.[40]

One of the other significant advantages for traders in particular, is that the CISG is drafted in a relatively simple manner which is well suited to the nature of international trading agreements. Therefore it makes these types of transactions easier to understand for the parties involved.[41] Luke Nottage argues that because the structure of the CISG is "logical, coherent, and comprehensive" and describes complex legal issues in a manner that is understandable to people with little knowledge of international sales law. Thus, it can be more useful to traders than domestic contract law which uses language unfamiliar to many people without a legal background.[42] The simple drafting of the CISG is helpful for traders as it means that they are able to understand the provisions themselves without having to get extensive legal advice.[43] If they wish, parties can easily look up the provisions of the CISG themselves to clarify advice given to them or to learn about what the implications will be if they take certain actions.[44]

One of the final benefits of the CISG is that it is modelled on common business practices of international traders.[45] It is therefore more suitable for contracts for the international sale of goods than domestic law is, as domestic contract law is made to apply to a wide range of contracts; whereas the CISG is specific to international sales contracts. Using CISG should simplify issues by keeping reference to domestic law to a minimum.[46]

D. New Zealand's approach to the CISG

In many member states the CISG has been warmly embraced. Traders and lawyers alike are "as familiar with the convention as they are with

[40] Ibid, 56.
[41] Nottage, above n 37, 827.
[42] Ibid.
[43] Ziegel, above n 22, 339.
[44] Nottage, above n 37, 827.
[45] Butler, above n 2, 779.
[46] Law Commission, above n 24, 38.

their domestic law."[47] However, in many common law countries, including New Zealand, traders have not been so quick to utilise the CISG in contracts for the international sale of goods.[48] There has been a notable lack of use in New Zealand with few cases even citing CISG. This has led to the CISG being described as the "sleeping beauty of New Zealand's statute book."[49]

The New Zealand Law Commission was initially enthusiastic about how the CISG would be received in New Zealand.[50] However, despite the significant benefits that the CISG appears to offer New Zealand traders, many New Zealand traders are choosing to use Article 6 to opt out of the application of the CISG.[51] In 2005, Petra Butler pointed out that CISG is excluded from standard form contracts in most law firms and has appeared before the courts on even fewer instances.[52] Only nine New Zealand cases mentioning the CISG appearing on the Pace University CISG case law database.[53] This lack of use raises questions about why New Zealand traders are failing to use the CISG in international contracts when *prima facie* there appear to be significant advantages if the CISG is applied.[54]

Some argue that the lack of case law does not necessarily mean that the CISG is not being used, but may suggest that its use is resulting in successful contracts and therefore very little litigation.[55] However, the more popular view amongst commentators is that the CISG is being excluded from contracts because traders and their legal advisers are either ignorant of, or unfamiliar with, the CISG and therefore are reluctant to use it.[56]

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[47] Schlechtriem, above n 3, 782.
[48] Ziegel, above n 22, 337.
[49] Butler, above n 2, 776.
[50] Law Commission, above n 24, 10.
[51] Butler, above n 2, 776.
[52] Ibid.
[53] As at 27 July 2008. For an up to date list of New Zealand CISG cases see http://cisgw3.law.pace.edu/cisg/text/casecit.html#newzealand.
[54] Nottage, above n 37, 817.
[55] Lewis, M. "Comments on Luke Nottage's Paper" 36 VUWLR 859, 861.
[56] Lutz, above n 4, 731; Murray, J. "The Neglect of CISG: A Workable Solution" (1998) 17 JLC 365 372-373.

E. Why are New Zealand traders not embracing the CISG?

There are two main arguments as to why New Zealand traders are not embracing the CISG, both related to the types of legal advice they are receiving from their lawyers. Firstly, it has been argued that many lawyers in New Zealand are ignorant about what the CISG is, and the potential benefits it has. Therefore they are not advising their clients of its uses either because they do not know it exists or because they feel more secure using domestic laws which are more familiar.[57] Secondly, some argue that lawyers are advising clients against using the CISG because lack of uniform interpretation has led to uncertainty in how it will be interpreted in the courts.[58] These arguments are discussed in detail below.

1. Ignorance?

Arguably one of the main reasons the CISG is not being used in New Zealand is that New Zealand lawyers do not know enough about the CISG to advise their clients as to its use and application.[59] Lawyers may be clinging to the common law rules of contract because it is familiar to them.[60] Some lawyers therefore choose to draft contracts for the international sale of goods in accordance with domestic law because they think that it is likely to provide a more desirable outcome for their clients.[61]

One of the reasons for this is that CISG is rarely addressed as part of the New Zealand legal education, especially at undergraduate level. Consequently, few lawyers have been exposed to the CISG during their education.[62] It is possible that one of the reasons the CISG is being excluded is because New Zealand lawyers do not know it exists.

Australia has had a similar experience with lack of knowledge about the CISG. The lack of knowledge in Australia was illustrated in the case of *Perry Engineering v Bernold* where neither party's lawyers knew that the

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[57] Lutz, above n 4, 731.
[58] Murray, above n 56, 372.
[59] Lutz, above n 4, 732.
[60] Nottage, above n 37, 830.
[61] Murray, above n 56, 372-373.
[62] Ziegel, above n 22, 344.

CISG applied to their client's contracts, or even existed.[63] There has been no New Zealand case law to date which suggests similar incidents. However, the lack of CISG case law in New Zealand could be used to infer a similar lack of understanding in this country.[64]

2. Risk?

One of the arguments put forward as to why lawyers are reluctant to advise clients to use the CISG is that there is too much uncertainty as to how issues will be resolved in the courts, due to a general lack of understanding of CISG issues by judges and lawyers.[65] This lack of understanding about how the CISG should be interpreted and its gaps filled has meant that there has not been uniform interpretation of the CISG in the courts. This leads to serious concerns for legal advisers as to whether there will be an effective remedy for their clients if the relationship between the parties deteriorates.[66]

(a) Is the risk argument justified?

Given that one of the main goals of the CISG was to increase certainty in contracts for the international sale of goods, it is essential to evaluate whether the arguments that lack of certainty under the CISG in causing lawyers to avoid applying CISG when drafting international sales contracts are justified.

(i) Gaps

One of the major reasons lawyers fear that the CISG will not provide the best outcomes for their clients is that there are many gaps in the CISG where important questions are left unanswered. This means that domestic law will still need to be referred to and conflicts of laws will still need to be negotiated. Therefore it may be easier for lawyers to draft contracts in accordance with one set of laws rather than having to jump back and forwards between the CISG and domestic legislation.[67] In other situations, it is argued, that while the CISG deals with certain

[63] *Perry Engineering v Bernold* [2001] SASC 15.
[64] Butler, above n 2, 776.
[65] Nottage, above n 37, 776.
[66] Murray, above n 56, 372-373.
[67] Schlechtriem, above n 3, 784.

issues, they are dealt with inadequately and so do not provide appropriate remedies for the client. For example, under Article 78 a successful party may claim interest on judgment. However, the CISG does not state at what rate the interest is to be calculated.[68] Article 78 is one of the most heavily litigated sections of the Convention.[69] This shows that there is significant uncertainty at least in some provisions of CISG.

Lawyers in common law jurisdictions may rightfully be nervous about accepting the CISG as, in trying to take a route which is useful for both common law and civil jurisdictions, it has failed to include some of the most important elements of common law contract law.[70] For example, consideration[71], passing of property, and validity of contract are all-important concepts to common law contracts.[72] While these gaps are able to be filled by reference to domestic law, and may be considered necessary so that the CISG can have universal application,[73] it means that lawyers may be correct to conclude that the outcomes may be all to risky if something goes wrong. In the 1992 Law Commission Report Sir Kenneth Keith identified the risks of potentially having to fill the gaps in the CISG with unfamiliar foreign law:[74]

> The uncertainties and potential costs associated with transacting business under unfamiliar laws increase the risks of international commerce and are likely to reduce [CISG's] efficiency.

However, as discussed in Part IV it is arguable that there will be more uncertainty if the CISG were not applied and New Zealand traders are required to negotiate and litigate an entire contract under a foreign set of laws.[75] In addition, to state that uniform law does not exist is not entirely true as, as courts are becoming more familiar with the CISG, a uniform set of principles is beginning to emerge.[76]

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[68] Ziegel, above n 22, 346.
[69] Bridge, above n 5, 61.
[70] Lutz, above n 4, 718.
[71] Ibid, 721.
[72] Carr, above n 10, 61.
[73] Whittington, N. "Comment on Professor Schwenzer's Paper" (2005) 36 VUWLR 809, 809.
[74] Law Commission, above n 24, 13.
[75] Carr, above n 10, 57.
[76] Butler, above n 2, 780.

Others argue that definitional gaps in the CISG also make its application confusing. While the CISG states that it "applies to contracts of sale of goods, the CISG defines neither 'sale' nor goods' nor 'contract of sale of goods'."[77] However, Indira Carr suggests that this argument is unfounded as what is included in these definitions becomes clear on reading the articles of the convention dealing with the obligations of buyers and sellers.[78] For example, under Article 30 of the CISG a seller "must deliver the goods, hand over any documents relating to them and transfer the property in the goods."[79] Under Article 53 a buyer is required to "pay the price for the goods and take delivery of them."[80] In my view, any person who is involved in the international sale of goods or in the drafting of contracts for the international sale of goods is unlikely to be in any doubt as to what these words mean and the obligations that they place on a contract party.

Because the gaps in the CISG make its interpretation uncertain, there appears to be some justification for the reluctance by many lawyers to use the CISG. However, it is arguable that the gaps in the CISG do not make it any more uncertain than domestic regimes as there are often gaps in domestic law which need to be filled by common law principles. This suggests, perhaps, that lawyers are not doing enough to weigh up the costs and benefits between the two alternatives but are rather clinging to the principles that they are familiar with.[81]

(ii) Lack of uniformity

One of the arguments made by those who chose to exclude the CISG is that it has not resulted in a uniform interpretation and therefore does not provide the certainty which those who argue in favour of CISG cite as being its major success. Uniform application is more difficult to achieve than the CISG suggests as there are vastly different methods of interpretation between different jurisdictions and also between civil and common law countries. This has led to a lack of uniform interpretation

[77] Bridge, above n 5, 45.
[78] Carr, above n 10, 62.
[79] United Nations Convention on the International Sale of Goods 1980.
[80] Ibid.
[81] Nottage, above n 37, 830.

and has introduced uncertainties into how the CISG will be applied.[82]

While Article 7 provides that courts in member states must interpret the CISG in a uniform manner; the CISG has not provided any mechanisms to ensure this occurs.[83] There is no superior court to ensure that a uniform body of case law develops.[84] Because there is no real guidance as to how uniformity will be achieved, most domestic courts, reluctant to move away from their own principles of contract law, have interpreted CISG principles with reference to domestic law rather than considering the principles of the CISG on its own as required in Article 7.[85] This has led to the development of a body of contradictory case law whereby different judges, reluctant to refer to the decisions of other jurisdictions, have interpreted articles in vastly different manners.[86] Opponents argue that this reason alone provides justification for excluding the CISG as it lacks certainty. Therefore, it is preferable to apply domestic law because domestic laws usually provide a developed set of principles to guide parties as to what outcomes will be. It has been suggested, by Ziegel, that rather than having to negotiate all of the inadequacies of the CISG many lawyers will find it preferable to choose a country's domestic law to govern the contract. The reasoning for such a decision is that it is likely to create greater certainty.[87]

Some opponents of the CISG have argued that where the parties to an international trading arrangement wish to have the terms of their agreement governed by a uniform set of rules it is preferable to use the United Kingdom Sale of Goods Act.[88] This is because the United Kingdom statute already has a developed body of case law and a much more comprehensive set of principles. Therefore, it will be more likely to provide certainty of outcomes for the parties. It is also argued that the parties will not have to experience the excess costs of having to be the first to litigate an issue under the CISG. However, others argue that

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[82] Ferrari, F. "Uniform Interpretation of the 1980 Uniform Sales Law" (1994-95) 24 Georgia Journal of International and Comparative Law 183, 204-208.
[83] Kilian, M. "CISG and the Problem with Common Law Jurisdictions" (2001) 10 Journal of Transitional Law and Policy 217, 227.
[84] Butler, above n 2, 780.
[85] Whittington, above n 73, 811.
[86] Ibid, 810.
[87] Ziegel, above n 22, 346.
[88] Carr, above n 10, 58.

using the United Kingdom Act as an alternative to CISG does not provide any significant advantages. It is suggested that even the United Kingdom Sale of Goods Act does not provide a comprehensive code. It requires that principles are adapted into agreements, from the common law, in order to cover issues that are excluded from the statute.[89] Nottage argues that even a long established set of principles, such as is found in the United Kingdom law, is only helpful to those who have an understanding of that law. He is skeptical as to whether this argument is justification for excluding the CISG as the benefits will only be received by those who have knowledge of the United Kingdom Act. Those who do not will still have exactly the same difficulty of having to research the law as those who choose to use the CISG.[90] Therefore it is arguable that using the United Kingdom Sale of Goods Act provides little or no benefits above the CISG.

While there may be some advantages in applying the United Kingdom law because it is already established, I am of the view that overall CISG is better suited to contracts for the international sale of goods because it is designed for universal application and with the needs of international traders in mind. It is, therefore, more likely to meet the needs of people trading on an international level.

3. Costs?

One of the reasons that have been put forward as to why the CISG will benefit New Zealand traders is the decreases in costs that will be experienced with having a uniform law.[91] Critics of the CISG, however, argue that there can still be significant costs arising out of negotiation and litigation surrounding the CISG. Bridge points out that because there has been a lack of interpretation of many of the Articles of the CISG parties may face being the first to litigate on a particular section. This will lead to significant costs for litigants as it is necessary to conduct extensive research in order to prove that the interpretation a party wishes to take is the correct interpretation.[92] This may be one of the reasons why there is a lack of CISG jurisprudence as parties are unwilling to be the first to litigate an issue, not only because of the

[89] Nottage, above n 37, 829.
[90] Ibid.
[91] Law Commission, above n 24, 56.
[92] Bridge, above n 5, 38.

uncertainties but also because of the significant cost.[93]

In addition, Bridge argues that decreased costs as a result of reduced levels of negotiation on conflict of laws is a fallacy and cannot be included as one of the advantages of the CISG. Bridge argues that there remains a need for the parties to negotiate about whose domestic law should be used to cover gaps in the CISG. In many instances it will also be necessary for the parties to negotiate as to whether or not the CISG should be applied to their contract.[94]

In my opinion this argument is not entirely justified. An array of CISG precedents are starting to emerge as evidenced by the ever expanding number of cases recorded internationally.[95] Therefore traders that use the CISG are no longer likely to be faced with being the first to litigate on a particular article. In any case, as discussed earlier, it is likely that greater costs would arise if parties need to resolve a conflict of laws dispute. Therefore CISG is likely to make conflicts over sale of goods less costly for parties that utilise it.[96]

F. What changes could be made to further the use of the CISG?

As discussed, one of the major reasons that the CISG is not being used is a lack of knowledge by lawyers as to its existence and usage. One of the ways that knowledge could be improved is by including a segment on the CISG as part of the New Zealand legal education. Evidence suggests that the CISG is rarely discussed in New Zealand law schools at undergraduate level and in many cases only gets a brief mention even at postgraduate level. In contrast, in countries where the CISG is being more widely used it has been covered in courses at law school.[97] It has also been suggested that continuing education seminars conducted by the New Zealand Law Society, to educate existing practitioners on how the CISG can be used. This would further increase understanding of the CISG and incentivise its use in contracts for the international sale of goods.[98]

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[93] Ibid.
[94] Ibid, 38.
[95] Butler, above n 2, 780.
[96] Schlechtriem, above n 3, 794.
[97] Nottage, above n 37, 842-843.
[98] Ibid, 830.

Another possible way to increase the use of the CISG in New Zealand would be to make its application to contracts for the international sale of goods compulsory. Kilian argues that allowing parties to contract out of the CISG reduces its effectiveness and leads to uncertainties, which the CISG was meant to prevent.[99] By making the CISG a compulsory consideration its effectiveness would be likely to be increased and many of the identified issues surrounding its lack of use reduced.[100] However, freedom to contract is one of the foundational principles of the CISG, and contract law in general.[101] Forcing parties to a contract use the CISG would go against the long established principle of freedom of contract. Thus, this suggested reform is unlikely to gain any widespread acceptance.

The issue of lack of uniform interpretation must also be dealt with to help make the outcomes of decisions under the CISG more certain. Nicholas Whittington has argued that one way that this could be achieved would be to encourage judges to refer to precedents from other countries when applying CISG to contracts.[102] However, as Whittington points out, language barriers can present a problem with relying on overseas precedents.[103] Education of judges could play an important role in this respect. However, in my opinion, what is required first and foremost is the development of an international law reporting system for CISG cases. Such a database would need to be translated into a variety of different languages so that CISG parties would be able to use precedents set in other countries. I am of the view that by making CISG jurisprudence more readily accessible international precedents are more likely to emerge.

Conclusion

The United Nations Convention on Contracts for the International Sale of Goods has the potential to be a highly useful instrument in contracts between New Zealand and international traders. However, New Zealand traders have been reluctant to embrace the CISG in contracts

[99] Kilian, above n 83, 226-227.
[100] Ibid, 225.
[101] Lando, above n 8, 387-388.
[102] Whittington, above n 73, 812.
[103] Ibid.

for the international sale of goods.

Prima facie the lack of use by New Zealand traders appears strange given the range of benefits often attributed to CISG; including uniformity of law, decreased transaction costs, and increased bargaining power. However, it can be seen from a deeper analysis of the issues that the CISG is not the all encompassing regime that had been expected. To certain degree the effectiveness of the CISG has suffered as a result.

In New Zealand, and some of the other common law countries, the lack of certainty and uniformity that has become apparent has resulted in lawyers advising their clients against using the CISG. In many cases this is why traders are excluding the CISG from their contracts. Whether this position is justified is highly debated. Yet, while the CISG does have concerns that may need to be addressed, there remain significant advantages to its use that New Zealand traders are currently missing put on. These advantages appear to outweigh the reasons, given by critics of CISG, as to why the Convention should be excluded. These advantages indicate that there is a need in New Zealand for knowledge of the CISG to be expanded within the legal profession, so that lawyers and traders are able to embrace the CISG and make use of its principles in contracts for the international sale of goods.

MATERIALITY: AN OBSTACLE TO ENFORCEMENT OF INSIDER TRADING LAW

SOPHIE CUNLIFFE*

Introduction

Materiality is a murky concept.[1] It has been labelled a "workhorse" to be mastered by the practitioner and is commonly known as an "ulcerating experience".[2] It has also been labelled a "gotcha" standard because it is often seen to be determinable only ex post facto.[3] Materiality is an important gatekeeper in the area of financial disclosure[4] and insider trading. Unfortunately despite its importance in sorting legitimate trading from insider trading it is an unobservable threshold that relies entirely on the hindsight of the courts.

The recent Australian litigation involving Citigroup Global Markets highlighted the difficulty of materiality determinations in a market fairness insider trading regime. In *Citigroup*[5] Mr Manchee, an employee of Citigroup's "public side", bought and sold shares in a company ("Patrick") that was the target of a takeover attempt. Unknown to Manchee, Citigroup's "private side" was advising Toll (the acquirer).

At the time of Manchee's sale, the market had already moved the share price to a level that reflected "the substantial likelihood" of a takeover. The further non-public information that Manchee held, that Citigroup was acting for the bidder, was not material. But the Court analysed the materiality of other information held by senior Citigroup officers: knowledge of the timing of the announcement of the takeover bid. The

* BCom/LLB(Hons), University of Otago. The author would like to acknowledge Shelley Griffiths, Faculty of Law, University of Otago.

[1] Glenn F Miller, 'Comment, Staff Accounting Bulletin No. 99: Another Ill-Advised Foray into the Murky World of Qualitative Materiality' (2000) 361 *Northwestern University Law Review* 389 at 363.

[2] Yvonne Ching Ling Lee, 'The Elusive Concept of Materiality under U.S. Federal Securities Laws' (2004) 40 *Willamette Law Review* 661 at 664.

[3] Ibid.

[4] Miller, above n 1, at 368.

[5] *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* (ACN 113 114832) (No. 4) [2007] FCA 963.

Court's materiality analysis of this information reflected a pure "market impact test". Before the start of trading on Monday, the takeover was announced to the market. The Court decided knowledge of the timing of the release was material because the Patrick shares opened the day of the announcement at $7.19, 10.9% higher than the closing price the Friday before.

The price movement between the close of trading on the Friday and the open of trading on Monday after the announcement could have been attributed to a number of factors. Perhaps the speculation in the market that existed on Friday had convinced investors over the weekend to buy shares at the open of trading on Monday. Or perhaps the 10.9% rise was in part the market's response to the announcement itself, not purely knowledge of the timing of the announcement. On Sunday, none of the insiders could have known the exact extent of the reaction of the market. Knowledge of the timing of the announcement is of little value to an inside trader without the accompanying knowledge of the likely direction and extent of the reaction of the market.

This article will look at the new definition of material information and investigate how the change in the underlying rationale for regulating insider trading might affect this element of insider trading. An attempt will be made to elucidate the threshold for materiality based on the decided cases in New Zealand, Australia, and the United States (US). It will also consider whether the adoption of the concept of materiality as the threshold test for defining 'inside' information is a barrier to enforcement rather than serving to facilitate the enforcement of insider trading prohibitions

A. The change from a fiduciary rationale to a market fairness rationale

The explanatory note to the Securities Legislation Bill 2006 ("the Bill") proposed that the Bill would strengthen the law relating to insider trading by adopting a regime that is based on upholding market integrity and confidence of the investing public as opposed to one based on a breach of a duty owed to the company.[6] The Securities

[6] Explanatory Note, *Securities Legislation Bill* (2006).

Markets Amendment Act 2006 "SMAA" removes the requirement that an insider is connected to the company.[7] An insider is defined solely by possession of inside information. In the absence of a connection to the company, the material and non public qualities assume increased significance.

Under the SMAA there are 5 elements to insider trading:

1. There needs to be some material information;[8]
2. The information must not be generally available;[9]
3. A person must have possession of the information;[10]
4. A person must know, or ought to reasonably know,[11] that the information is material and not generally available.

Once these elements have been satisfied the person is an "information insider" of the public issuer[12] who possesses "inside information"[13] and must not: trade in the shares of the issuer;[14] disclose the information to anyone where they might act on the information;[15] or advise or discourage trading in the shares of the issuer.[16]

Information is not defined under the SMAA. A definition is important because an assessment of materiality can ultimately depend on the substantive content of the information.[17] In Australia, information can be as broad as an "un-communicated supposition"[18] and need not be

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[7] Section 3 Securities Markets Act 1988 (SMA) defines an insider as:
a) the public issuer; or
b) a principle officer, employee or company secretary who has information by virtue of their position; or
c) a tippee who receives information in confidence from a principle officer, employee or company secretary; or
d) a tippee of the first tippee.
[8] SMAA section 8A(1)(a).
[9] SMAA section 8A(1)(a).
[10] SMAA section 8A(1.
[11] SMAA section 8A(1)(b)(c).
[12] SMAA section 8A.
[13] SMAA section 8B.
[14] SMAA section 8C.
[15] SMAA section 8D.
[16] SMAA section 8E.
[17] *Hannes v Director of Public Prosecutions* (Cth) (No.2) [2006] NSWCCA 373.
[18] *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* (ACN 113 114832) (No. 4) [2007] FCA 963, at paragraph 542.

specific.[19] Courts in New Zealand and Australia do not explicitly categorise different types of information like the US courts.[20] The different types of information (hard, soft, forward looking, and backward looking) complicate materiality assessments.

Reliability is one of the main factors an investor takes into account when deciding whether to act on information.[21] Hard information is information about the past or present. It can be verified by objective facts in the past or present, therefore it has a high degree of reliability.[22] Conversely, soft information is defined by the fact it cannot be verified by objective facts.[23] It may contain an element of opinion or judgement, or may be information about something unquantifiable.[24] Soft information contains a much lower degree of verifiability, and therefore reliability.

Although it may be less reliable, forward looking predictive information probably holds the most utility for investors.[25] For a person looking for a sound investment, predictions about the future profitability and opportunities for the company are more relevant than past performance[26] (therefore more likely to be material than backwards looking information). This reveals the second important feature of

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[19] Corporations Act 2001 section 1042A; *Ampolex Ltd v Perpetual Trustee Trading Co (Canberra) Ltd* (1996) 20 ACSR 649 at 658; *Hannes v Director of Public Prosecutions* (Cth) (No.2) [2006] NSWCCA 373; Cf the UK approach, Alexander F Loke, 'From the Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the U.K., Australia and Singapore' (2006) 54 *American Journal of Comparative Law* 123 at 147-148.

[20] *Basic Inc v Levinson* (1988) 485 US 224 at 984.

[21] *Regina v Rivkin* [2004] NSWCCA 7 at paragraph 51- 52, paragraph 73 "if he (McGowan) had been the source it was relatively authoritative and would have been taken more seriously."

[22] *Re Bank of New Zealand: Kincaid v Capital Market Equities Limited* (1995) 7 NZCLC 260,718.

[23] Ahal Besorai, 'The Insider and Tentative Information' in Barry Alexander K. Rider and Michael. Ashe (eds), *The Fiduciary, the Insider, and the Conflict: a Compendium of Essays* (1995) at 244.

[24] Jude Sullivan, 'Materiality of Predictive Information after Basic: A Proposed Two-Part Test of Materiality' (1990) *University of Illinois Law Review* 207 at 207; Victor Brudney, 'A Note on Materiality and Soft Information under the Federal Securities Laws' (1989) 75 *Virginia Law Review* 723 at 723-724; Besorai, above n 27, at 244.

[25] Besorai, above n 23, at 245; Brudney, above n 24 at 723.

[26] Besorai, above n 23, at 245; Bodie, Zvi, Kane, Alex and Marcus, Alan J, *Investments* (Sixth edition, 2005) at 607.

information that contributes to materiality: significance.[27] From this analysis, two features of information may affect materiality; its reliability and its significance.

B. Material information under the new market fairness regime

Material information is defined in the SMAA as information that:

1. A reasonable person would expect, if it were generally available to the market, to have a material effect on the price of listed securities of the public issuer;[28] and
2. Relates to particular securities, a particular public issuer, or particular public issuers, rather than to securities generally or public issuers generally.[29]

1. A material effect on the price of securities?

Many insider trading regimes contain a requirement that the inside information in question is material.[30] Where information is clearly not generally available, materiality will be the sole concept to sort illegal insider trading from legal trading.[31] Three tests can be identified: the reasonable investor test, the probability/magnitude test, and the market impact test.[32]

(a) The market impact test

The market impact test measures materiality by the information's impact on the share price.[33] This raises the question whether any impact however insignificant can qualify as material under the market impact test? If this proposition is accepted then virtually any factor

[27] Emerging Markets Committee of the International Organisation of Securities Commissions, *Insider Trading: How Jurisdictions Regulate It* (2003) at 3.
[28] SMAA section 3(a).
[29] SMAA section 3(b).
[30] Ministry of Economic Development, *Reform of Securities Trading Law: Volume One Insider Trading, Discussion Document,* (May 2002) at 39; Emerging Markets Committee of the International Organisation of Securities Commissions, above n 27 at 2.
[31] Joan MacLeod Heminway, 'Materiality Guidance in the Context of Insider Trading: a Call for Action' (Annual 2004) 52 *American University Law Review* 1131 at 1148.
[32] Ministry of Economic Development, above n 30 at 39**;** Gordon Walker, Brent Fisse, and Ian Ramsay, (eds), *Securities Regulation in Australia and New Zealand* (1998) at 606;
[33] Ministry of Economic Development, above n 30 at 40.

influencing a person to buy or sell could qualify as "material" because almost all large trades will influence a share price slightly.[34] This does not sit well with the wording of the SMAA. The section reads "a reasonable person would expect, if it were generally available to the market, to have a *material* effect on the price of listed securities".[35] If the test for materiality was any change in price "material" in the above definition would be superfluous.[36] A minimum threshold must be found.

(b) The reasonable investor test

This test measures materiality of information by the importance a reasonable investor would assign it.[37] The US test for materiality, established in the case of *TSC Industries v Northway Inc*[38] (the "TSC test"), is: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[39] Under the *TSC* test the information need not actually change the decision of the shareholder when voting[40] it is enough the information "assumed actual significance in the deliberations of the reasonable shareholder".[41]

It has been suggested this test is wider than the other materiality tests.[42] What becomes crucial is deciding what level of influence the information must have on the shareholder or investor. Voting and buying or selling shares are distinct actions and imply different levels of materiality. Also the decision of whether to buy or sell could vary depending on the investor's style. In *Leadenhall*[43] a distinction was made between short and medium term investors, and long term investors.

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[34] Bodie, Kane, and Marcus, above n 26, this phenomenon is called price impact.
[35] SMAA section 3(a), emphasis added.
[36] Emerging Markets Committee of the International Organisation of Securities Commissions, above n 27 at 4.
[37] Walker, Fisse, and Ramsay, above n 32, at 606; Ministry of Economic Development, above n 30 at 39.
[38] *TSC Industries v Northway Inc* (1976) 426 US 438,449 at 2132.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Emerging Markets Committee of the International Organisation of Securities Commissions, above n 27 at 4.
[43] *Leadenhall Australia Ltd v Peptech Ltd* (1999) 33 ACSR 301.

This is because short and medium term investors would find it significant that a large portion of shares were coming out of escrow in the near future. They would be likely to wait until that had occurred to measure the effect on the share price. However for long term investors the evidence of materiality was more equivocal.[44] If this test is to be used the courts should make explicit the required effect on the investor.

(c) The probability/magnitude test

The probability/magnitude test balances the probability an event will occur with the magnitude of the event for the company if it does occur.[45] In *Texas Gulf Sulphur*[46] the test was laid out: "In each case, then, whether facts are material ... will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."[47] This test is particularly useful for measuring soft, predictive information because it takes account of the uncertainty in the information (by looking at the probability something will eventuate), and the significance of the information (by looking at its magnitude).

The tests have two features in common: they seek to evaluate the significance of the information and the reliability of the information. These two features are relevant to an assessment of all types of information whether it is hard (objectively verifiable or measurable), soft (subjective or impossible to objectively measure), backward, or forward looking. Its "significance" covers:

1. Would it be enough to enter an investor's considerations when voting or deciding to buy or sell under the reasonable investor test?
2. A minimum level of movement in the share price under the market impact test.
3. The magnitude under the probability/magnitude test.

The "reliability" of information covers:

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[44] Ibid.
[45] Walker, Fisse, and Ramsay, above n 32, at 606; Ministry of Economic Development, above n 30 at 39; *Basic Inc v Levinson* (1988) 485 US 224.
[46] *SEC v. Texas Gulf Sulpher Co* 401 F.2d 833 (2d. Cir.1968).
[47] Ibid. at 849.

1. Would a shareholder or investor act, or dismiss it as mere rumour, under the reasonable investor test?
2. The "probability" side of the probability magnitude test.

When the different tests are simplified in this way it is much easier to see the importance of setting a threshold for both the reliability and significance of information to establish a clearer materiality test.

C. The approach to materiality in a fiduciary regime

Coleman was the first case to expressly adopt a test for materiality in New Zealand, and in *Coleman* it is clear that fiduciary duty underpins the definition of materiality. *Coleman* adopts the *TSC* [48] test for materiality and displays a true "reasonable investor test".

Cooke J stated the test as "those considerations which can reasonably be said, in a particular case, to be likely materially to affect the mind of a vendor or purchaser".[49] The *TSC* test[50] was expressly adopted in support. It is clear a high level of disclosure was required. The inherent nature of the fiduciary duty required the utmost candour.[51] Cooke J rejected that the mind of the purchaser had to be dominated by the vendor (the directors).[52]

Because *Coleman* did not involve transactions on an anonymous exchange evidence of a share price movement was irrelevant. The focus was on the deliberative process of the reasonable shareholder. It seems the CA accepted, in accordance with *TSC*, that to be material, the information need not actually changes the mind of the shareholder, vendor or purchaser.

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[48] *TSC Industries v Northway Inc* (1976) 426 US 438,449.
[49] *Coleman v Myers* [1977] 2 NZLR 225 at 334; *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641.
[50] Above n 48 at 2132.
[51] *Tufton v Sperni* [1952] 2 TLR 516 at 520.
[52] Above n 49 at 332

1. "Materiality" in the US

(a) The TSC test

TSC was an action brought by a shareholder (Northway) claiming that TSC's proxy statement was materially misleading in violation of the Securities Exchange Act section 14(a).[53] Northway argued that the statement was incomplete, therefore misleading because it failed to state that this prior transfer of interests in TSC had resulted in a change of control.

On materiality, the Court stated that it is "universally agreed"[54] the question is one involving the significance of an omitted or misrepresented fact to a reasonable investor. The Court also recognised that "variations in the formulation of a general test....occur in the articulation of just how significant a fact must be or, put another way, how certain it must be that the fact would affect a reasonable investor's judgment."[55]

The Court settled on the following test: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[56] The proxy statement contained some information about the control of TSC, for example it was "prominently displayed" that National owned 34% of the shares and that 5 out of 10 TSC directors were National nominees. In these circumstances it could not be said that the omission of a statement expressly identifying the chairman of the board, or the omission of a statement explaining that National "may be deemed a parent of TSC" was a material omission as a matter of law.[57]

Despite being predominantly a "reasonable investor" test, *TSC* combines elements the market impact test. The Court stated further that a fact would be material if it altered the total mix: [58]

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[53] *TSC Industries v Northway Inc* (1976) 426 US 438,449 at page 2128.
[54] Ibid at 2130.
[55] *TSC Industries v Northway Inc* (1976) 426 US 438,449 at 2130; *TSC Industries v Northway Inc* (1976) 426 US 438,449 at 2132.
[56] Above n 53 at 2132
[57] Above n 53 at 2138.
[58] *TSC Industries v Northway Inc* (1976) 426 US 438,449 2132.

> Under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information.

To determine whether the total mix has been significantly altered, courts have frequently resorted to evidence of price movements to ascertain the significance of the information.[59] Therefore *TSC* leaves room for the application of market impact factors to supplement an argument that the information was material.

(i) The distinction between merger negotiations and other soft, forward looking information

US courts and commentators treat information about mergers differently to other types of predictive information and therefore use a different materiality test. Commentators have distinguished this type of information from other types of soft information on the basis that the existence of the possibility of a takeover or merger can be so significant that regardless of its probability it is a hard fact representing a present state of affairs.[60] Brudney distinguishes information about possible mergers and takeovers from the previous information due to the fact the information does not itself contain any especially knowledgeable estimates of the likelihood that the contingent events will occur.[61] Brudney suggests this information is analytically like many other forms of information, for example statement of expenditures made on research and development. This information expresses corporate estimates of contingent events but does not embody "express inferences about intermediate components of, or ultimate effect on, price."[62] The information simply "informs about the possibility that is likely to be of importance to an investor".[63]

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[59] Lee, above n 2, at 655.
[60] Sullivan, above n 24, at 221.
[61] Brudney, above n 24, at 723.
[62] Ibid.
[63] Ibid.

Basic Inc v Levinson[64] adopted the *TSC* test in a case of insider trading leading up to a merger. Sellers of stock during the period prior to the formal announcement of a merger alleged that material misrepresentations had been made because Basic had denied the existence of merger negotiations prior to this official announcement. Following this it was revealed that the company had been approached and the following day the board endorsed Combustion's offer of $46 per share.

The Court in *Basic* rejected that information about mergers should not have to be disclosed until an agreement as to price and structure had been made.[65] The Court expressly adopted the *TSC* test. The Court also cites the probability/magnitude test set out in *Texas*. The Court emphasised that, the existence of merger negotiations could be so important in a small corporation that information to this effect becomes material at an earlier stage than other types of transactions. To determine the probability element, the Court suggested the following will be relevant: signs of interest in the transaction in the highest corporate levels[66] such as board resolutions, instructions to investment bankers and actual negotiations between principals. To determine the magnitude of the transaction factors such as the size of the two corporate entities, and the potential premiums over market value will be relevant.[67] However no particular event or factor is necessary by itself to render information material.[68] In conclusion the Court stated "as we clarify today, materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information",[69] thus enforcing that the "reasonable investor" standard is still the dominant test.

The US materiality standard contains no requirement the information would actually make the insider trade. Also, the US standard includes qualitative information that would not necessarily affect the company's share price. The US courts seem to distinguish merger information from other types. In the context of mergers the high significance of the

[64] *Basic Inc v Levinson* (1988) 485 US 224.
[65] Ibid at 984.
[66] Ibid at 987.
[67] Ibid.
[68] Ibid at 987.
[69] Ibid at 988.

existence of negotiations overrides the reliability element. The *TSC* test is still accepted as the relevant legal standard to judge materiality.[70]

2. How was the fiduciary rationale expressed in the SMA?

Under the SMA there was no express requirement for a fiduciary relationship to be established between the insider and the person with whom he or she trades.[71] However, the influence of the fiduciary theory is clear from the requirement the offender must be an "insider"[72] and receive the information by reason of his or her position as an insider.[73] By requiring that a person is a true "insider" of the company, and has the information by reason of his or her position, the Act deems a fiduciary-like relationship to exist between the insiders and the person with whom they trade.[74]

Because of the strong influence of the fiduciary theory on the SMA and the fact the US materiality test had been adopted in *Coleman*, it was predicted at the outset the court's approach to materiality under the SMA would be closely aligned to the US test.

3. Materiality under the SMA

The Commission's Report to the Minister of Justice did not recommend the use of the word "material" to define inside information.[75] The Report described the approach to inside information in the following way: [76]

> It is a difficult question to decide whether any particular item of information has affected prices or is likely to affect them. Those are matters of opinion. They are, we think, proper questions for resolution on the evidence of experts familiar with the market. If the evidence becomes disclosed to the market, evidence of a market reaction should be admissible and would, we believe, have a strong effect upon the result of a disputed

[70] "SEC Staff Accounting Bulletin 99", August 12 1999, 17 CFR Part 211.
[71] Ratner, P and Quinn, C, *Insider Trading, New Zealand Law Society Seminar* (1990), at 1.
[72] SMA section 3.
[73] SMA sections 3(b), (d) and (f).
[74] Securities Commission, *Insider Trading: Report to the Minister of Justice* (1987) at paragraph 1.4.
[75] Securities Commission, above n 74 at 38.
[76] Securities Commission, above n 74 at 8.

> case. If the information does not become disclosed to the market, the likelihood of a price reaction if the market had known is debatable. That likelihood should be assessed by applying robust common sense aided by expert evidence. Powerful considerations would be the nature of the information, the lapse of time, and intermediate announcements and price movements.

However, subsequently the word "material" was included in the SMA in the definition of "inside information".[77] Although little trace of the underlying fiduciary basis can be found in the Commission's suggestions above, it must be remembered this proposed test, (an analysis of the nature time and intermediate and subsequent price movements) is to apply where a link to the company has been established. The fiduciary theory has already done work by ensuring the person is an insider, and that they received the information by virtue of that position.

It was clear under the SMA there was no requirement for a prosecutor to "establish affirmatively" any state of mind on the part of an insider.[78] Therefore in *Wilson Neill* the fact the company directors had not analysed the material containing the inside information was irrelevant to liability.

The courts have been willing to look at the potential for price movement or actual subsequent price movements, utilising the market impact test. In *Kincaid*[79] Henry J focussed on the likelihood the information would impact the share price, rather than focusing on the influence on the reasonable investor.[80] The level of impact on the share price necessary to meet the material threshold is not clear from this judgment. However the Commission's report into the dealing said "on any measure a 55 million net influence is material."[81] Henry J concluded the information was probably material despite a number of

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[77] SMA section 2.

[78] Securities Commission, above n 74 at 37, 4.9.5(b); *Re Wilson Neill Ltd; Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152.

[79] *Re Bank of New Zealand: Kincaid v Capital Market Equities Limited* (1995) 7 NZCLC 260,718.

[80] Ibid. at 23.

[81] Securities Commission, *Report of an Enquiry into Arrangements Entered Into By Bank of New Zealand in March 1988* (May 1993) paragraph 23.40(c); *Re Bank of New Zealand: Kincaid v Capital Market Equities Limited* (1995) 7 NZCLC 260,718 at 23.

experts giving evidence to the contrary. The experts argued that since the users of the accounts would be able to see the general trend in the company's performance (the company had recovered slightly from 1989 position) the fact this recovery was overstated would not be significant. This approach stressed the effect on the users of the accounts, stating they would not be misled.[82] The approach was akin to the "reasonable investor" test however Henry J clearly favoured the market impact approach.

In *Wilson Neill* the CA clearly favoured a market impact test to establish materiality. The CA stressed "price sensitive" actually meant "price material".[83] The CA (preferring a "real or substantial risk"[84]) stated a "bare possibility" of a price movement did equate to "likely" but this did not clarify the significance of the price movement required.

The influence of a market impact test was also evident in the Commission's Regal Salmon Report.[85] In this report the news of a loss of $3.36 million "took the market by surprise"[86] and the share price dropped from 147 cents to 115 per share[87] (a movement of approximately 22%) and eventually traded as low as 72 cents. The Commission held there were material overstatements, according to accounting standards, in the financial reports prior to the report that caused the share price drop.[88] Despite this the Commission found Shagin, the director who had sold shares after the release of this materially overstated report, did not possess material information because he had not undertaken a skilled analysis of the data.

The market impact test was once again dominant in the Commission's

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[82] Above n 79 at 21:"He gave the opinion that users of the 1990 accounts would not be misled because they would see the results were still a long way less than the profits of 1987 and 1988, but with a recovery from the 1989 position."
[83] *Re Wilson Neill Ltd; Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152 at 161.
[84] Ibid.
[85] Securities Commission, *Report of an Enquiry into Aspects of the Affairs of Regal Salmon Limited Including Trading in Its Listed Securities* (July 1994).
[86] Ibid.
[87] Ibid.
[88] SSAP No 6 *Materiality in Financial Statements* (revised 1985) affirmed by the Accounting Standards Review Board in a release of 10 November 2000 (release of ASRB Release 7 *Accounting Standards that Still have Authoritative Support Within the Accounting Profession* (issued 11/00).

Fortex Report.[89] The Commission took account of the drop in the share price of 43 cents to 7 cents following the announcement of a 40 - 45 million dollar loss.[90] Amongst the information analysed was the fact of the appointment of an independent investigation accountant, Mr Stiassny. This had been communicated to Fortex's farmer suppliers. On this information the Commission commented, "We think that news of an appointment of such a person in such a position might also have acted as a signal to investors that all was not well with Fortex." The Commission only went as far as saying this was potentially price sensitive. It is unclear what "test" of materiality the Commission is using. However the reference of "signal to investors" perhaps indicates a reasonable investor standard. The Commission also looked at the fact the company had lost 16% market share, saying "a number of variables exist that leave unclear the question of how the market would react to this information. Was the loss of market share recoverable? How significant was the loss of market share given the supply of lambs in the season to date had been well below what Fortex had expected? How sensitive to market share did other share analysts consider Fortex's profit to be?"[91]

In *Haylock*[92] the market impact test was clearly influential although once again it is difficult to ascertain a threshold for the degree of impact necessary. When assessing the materiality of the information[93] Gault P stated "it will be difficult to contend that the information would not have been price-sensitive when the receipt of new licenses for un-investigated areas was seen as justifying an increase in the price offered for the shares".[94] Gault P accepted there are difficulties with respect to disclosure in the gas and exploration industries. He stated "that may bear heavily on aspects of the claim, for example any assessment of loss involving notional disclosure would need to take account of the reservations or qualifications that would be necessary to ensure only appropriate impact on share values. The lure of hindsight, often

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[89] Securities Commission, *Report on an Inquiry into Aspects of the Affairs of Fortex Group Limited (In Receivership and Liquidation) Including Trading in Its Listed Securities* (October 1995) at paragraph 12.19.
[90] Securities Commission, *Fortex Report,* above n 89, at 3.6.
[91] Securities Commission, *Fortex Report,* above n 89 at 12.21.
[92] *Southern Petroleum v Haylock* [2003] 3 NZLR 518.
[93] Ibid.
[94] *Southern Petroleum v Haylock* [2003] 3 NZLR 518 at paragraph 63.

attractive to claimants, must be resisted."[95] This indicated a clear willingness to look at share price impact to measure materiality and recognises that only the movement in share price attributable to the information itself should be taken into account.

In the Commission's Fletcher Challenge Report,[96] the information was a draft press release revealing "FCL management were considering options for a possible merger of FCL Paper with Fletcher Challenge Canada".[97] On materiality the Commission commented: "it seems clear that an announcement that a company is considering a major restructuring of one of its divisions is likely to materially affect the price of the shares of that division. This is so whether the release is known to be a draft document or a final news release, and whether there has been speculation in the market on these matters. An authoritative statement from within FCL on the subject would be an important event."[98] This analysis puts weight on the source of the information (the fact it was a draft from within the company) highlighting its increased reliability. The Commission also looked at the subsequent price movements of FCL shares.[99] After a halt on trading due to the leakage of the information, the share price peaked at 13% higher than when trading restarted, before dropping to a level 6% higher than at the start of the trading halt. The price then dropped sharply on 11 May at $1.68 (2.3% below the level before the trading halt). The Commission found this effect to be material. Clearly this was based on a market impact test.

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[95] *Southern Petroleum v Haylock* [2003] 3 NZLR 518 at paragraph 67.

[96] Securities Commission, *Report on Questions Arising from an Inquiry into Trading in the Shares of Fletcher Challenge Limited in May 1999,* Insider Trading Law and Practice (20 November 2000).

[97] Securities Commission, *Fletcher Challenge Report,* above n 96, at 19.

[98] Ibid.

[99] The week of 26 to 30 April saw FCL Paper share prices rise on very heavy trading from around $1.43 at the start of the week to close the week on $1.67 (a rise of around 17% in 5 days). The following week the price rose to $1.75 before falling back to around $1.72 at 2 pm on Friday 7 May. Ibid, at paragraph 56; after the release of the leaked page to stockbrokers at 2 pm on the Friday the price of these shares began to rise further. The price peaked at $1.94 at around 10 am on Monday 10 May (a rise of about 13% in a little over 2 trading hours) before dropping to close at $1.82 (up 6% on the 2 pm price for 7 May). The price continued to drop sharply on 11 May, closing at $1.68. Securities Commission, *Fletcher Challenge Report,* above n 96, at 58.

In *Midavia*[100] the Court displayed a clear preference for the market impact test stating "because much inside information, such as the issuer's results being unexpectedly better or worse than earlier publicly forecast- will rapidly become public and bring in its train an impact on the price of the issuer's securities".[101]

In *Wilson Neill*, and *Kincaid* the market impact test is clearly dominant and is preferred over evidence based on standards that are more akin to a "reasonable investor" analysis. This is further supported by the Commission's reports into Gulf Resources, Regal Salmon, Fortex. The more recent statement by the Commission in the Fletcher Challenge Report further enforces the dominance of market impact as they were able to conclude materiality on a temporary, equivocal, share price movement. The most recent New Zealand insider trading cases, *Haylock* and *Midavia*, provide little discussion of materiality however statements of the courts seem to take for granted the appropriate approach is "market impact". Regardless of the approach taken by the courts to materiality, the cases do little to resolve the two important thresholds that are common to all materiality tests, the significance threshold and the reliability threshold.

D. The approach to materiality in a market fairness regime

The market fairness approach represents the idea that all participants in a market should have equal access to information about a public issuer.[102] If investors feel the market is unfair the flow-on effect will be a decrease in the amount of money people will invest, therefore increasing the cost of capital.[103] "So long as insider trading serves as an indication of the character of the securities market, 'fairness' is likely to have economic consequences through the reaction of investors and must be taken into account in any attempt to predict or enhance the market's efficiency".[104]

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[100] *Securities Commission v Midavia Rail Investments BBVA* [2007] 2 NZLR 454.
[101] *Securities Commission v Midavia Rail Investments BBVA* Unreported, High Court, Auckland, CIV-2004-485-2174, 28/9/05, Williams J at paragraph 86.
[102] Securities Commission, above n 79 at 15; Michael Gething, 'Insider Trading Enforcement: Where Are We Now and Where do We Go From Here?' (1998) 16 *Company and Securities Law Journal* 607 at 608.
[103] R *v Doff* [2005] NSWCCA 119 at [56]; *Regina v Rivkin* [2004] NSWCCA 7.
[104] Phillip Anisman, *Insider Trading Legislation for Australia: An Outline of the Issues and Alternatives. An Issues Paper prepared for the Working Party on Insider Trading of the National*

The market fairness rationale is evident in the Australian legislation as there is no requirement that the insider is connected to company. The Australian section 1042D of the Corporations Act reads: [105]

> A reasonable person would be taken to expect information to have a material effect on the price or value of securities of...financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire...financial products in deciding whether or not to acquire or dispose of the first mentioned financial products.

Materiality under the market fairness rationale utilises a combination of the three tests: reasonable investor, market impact, and magnitude/probability. One recurring feature is the absence of any sensitivity to the different types of information that can arise. As a result the materiality analysis is much cruder than the analysis in the US. Also in a couple of instances the obvious choice of test (the probability/magnitude test where information is forward looking) is ignored and subsequent share price movements are used instead.

The reasonable investor approach is present in the background of all the cases due to the wording of the materiality definition. However, the courts do not seem content to rely on the reasonable investor test alone, using the market impact or magnitude/probability tests to supplement it. Many cases equate the reasonable investor test with "price sensitivity". This indicates the Australian courts' view the reasonable investor test as more restrictive than the wide approach of the US courts where qualitative information can be included. For example in *Ampolex,*[106] Rolfe J said "one must ask whether such a reasonable person would expect that the intention, being an intention of persons who hold a parcel of the convertible notes to so advise the ASX could or would be likely to influence the designated persons"[107] but then Rolfe J equated this requirement with "price sensitivity" returning to a market impact analysis.[108]

Companies and Securities Commission (1986) at 9.
[105] Corporations Act 2001, section 1042D.
[106] *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 20 ACSR 649 at 1523.
[107] Ibid.
[108] Ibid.

In *Evans v Doyle*[109] the material information was the test results of mineral exploration. Mt Kersey Mining NL held licenses to mine the land adjoining where test results had discovered a shoot of high-grade nickel sulphide.[110] The discovery was significant in the mineral grade, but was un-quantified. However, the discovery suggested the minerals extended onto the company's land. This information falls squarely within the category of soft predictive information. The outcome of the information on the fortune of the company was uncertain despite its potential to be significant. Evidence was admitted to illustrate the impact of the information on the price of the shares once the information was disseminated.[111] Surprisingly on facts broadly similar to *Texas Gulf* in the US,[112] there was no attempt to analyse the information in terms its probability/magnitude. The Court ignored the subtleties of the types of information that can occur in favour of market impact evidence.

Rivkin[113] was the first prosecution of an "outsider" under a market fairness regime and illustrated how "materiality" would operate where there was no connection to the company.[114] Mr Rivkin wished to sell his house, and instructed a real estate agent, Doff to act on his behalf. Mr McGowan, Executive Chairperson of Impulse Airlines was interested in purchasing the house. He approached Doff and eventually spoke to Rivkin in a phone conversation on 24 April 2001 in which he revealed information about his company's affairs. He explained to Rivkin he wished to make the purchase conditional as he was waiting to "merge" businesses with Qantas. Rivkin expressed disbelief that the company's would get the necessary regulatory approval, but was reassured by McGowan. Further McGowan warned Rivkin he could not now trade in the Qantas shares. Following the conversation Rivkin purchased 50 000 Qantas shares. On 1 May 2001 on Rivkin's instructions the shares were sold making a profit of $2664.94. Later that day the merger was announced and there was a significant rise in the price of Qantas shares.

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[109] *R v Evans & Doyle* [1999] VSC 488 (15 November 1999).
[110] Ibid.
[111] *R v Evans & Doyle* [1999] VSC 488 (15 November 1999) at 548.
[112] *SEC v. Texas Gulf Sulpher Co* 401 F.2d 833 (2d. Cir.1968).
[113] *Regina v Rivkin* [2004] NSWCCA 7; see also *R v Doff* [2005] NSWSC 50.
[114] Juliette Overland, 'The Future of Insider Trading in Australia: What Did Rene Rivkin Teach Us' (2005) 10 *Deakin Law Review* 708 at 709.

Rivkin established the source of information can be included in the information itself.[115] It was argued the information possessed was not the actual state of affairs conveyed but was the fact that Mr McGowan had stated that such a state of affairs existed. This was rejected because it was held a person need not believe the underlying state of affairs to be true (the essence of the argument against including this information). The Court considered a number of expert opinions that expressed the source of the information would be crucial to its reliability and therefore its materiality:[116] "It was also abundantly clear that the circumstance that Mr McGowan was the source was relevant to the question of the reliability of the information, and hence its materiality."[117]

In the US the question of the source of the information is distinct from materiality. For example, an outsider who receives the information from an insider is required to know that it is being disclosed in breach of confidence.[118] This requirement was expressly rejected in *Rivkin* as it was held there was nothing in the legislation to suggest such a requirement.[119] This creates a challenge for materiality determinations as there is now a third feature to analyse. Strangely the arguments to support this proposition were based on the idea that to allow such an argument would allow insiders to avoid the scheme where the source is reliable but a mere rumour was conveyed. It was acknowledged that the market "operated on matters of sentiment, rumour and tips"[120] therefore this type of situation should be covered by insider trading law. The main problem with such an assertion is that in most cases "sentiment and rumour" in the market contains only information that is generally available and therefore not material.

Petsas[121] involved merger negotiations; however, unlike the US approach a probability/magnitude test was not expressly addressed. The information was confirmation of the existence of confidential

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[115] *Regina v Rivkin* [2004] NSWCCA 7 at paragraph 131.
[116] Ibid. at paragraph 51 and paragraph 73.
[117] Ibid. at paragraph 137.
[118] *Chiarella v. United States* (1980) 445 U.S. 222.
[119] Above n 115 at paragraph 139.
[120] Above n 115 at paragraph 72.
[121] *ASIC v Petsas & Miot* [2005] FCA 88; [2005] 23 ACLC 269.

merger negotiations between BRL Hardy Ltd and Constellation Brands, and confirmation that ANZ had been engaged by BRL to perform work in relation to this merger. The Court recognised "because of their tentative nature the discussions were highly confidential". However this "soft" quality of the information did not factor into the Court's materiality analysis. The Court stated "Mr Petsas and Mr Miot knew that if the information about the merger discussions became public it would affect the price of BRL's shares as well as the price of the call options over those shares."[122] Under the US approach this information would have also been material because Constellation Brands Inc is one of the world's largest producers and suppliers of alcohol. Because of its relative size, the existence of negotiations would be a significant fact to a shareholder regardless of the level of probability that they would eventuate into a merger. The US Court would have reached this conclusion by looking at the information from the perspective of a reasonable investor. However the Court skipped an analysis of this kind. The strong evidence of market impact made it unnecessary to elaborate. When the information was released the stock price rose immediately by around 17% and continued to rise.

Hannes[123]demonstrated a mixed approach to materiality equating the reasonable investor test with the market impact test. The Court summarised its approach stating: [124]

> Materiality is concerned with investor conduct and, more particularly, with the question as to whether the particularised information would or would be likely to influence...(the reasonable investor). This might generally be said to be concerned with the capacity of information to influence investor behaviour which in turn, has a material effect on the price or value of securities. Accordingly, materiality is concerned with information which might be said to be price sensitive.

The information on which the information was based in the charge was "it was likely that shares in TNT Limited would be the subject of a takeover at a price in excess of $2 per share." specifying merely a floor price at which the offer would be made.

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[122] Ibid. at paragraph 7.
[123] *Hannes v Director of Public Prosecutions* (Cth) (No.2) [2006] NSWCCA 373.
[124] Ibid. at paragraph 384-385.

Because of the way the information was particularised there was considerable objection to the use of evidence of the share price movement of the announcement of a takeover at $2.45. It was argued that the evidence of what actually occurred on the day of the announcement was information of a "qualitatively different nature" than the information particularised (the "possibility of a takeover at a price above $2.01"). When evaluating whether the particularised information was generally available the Court found "there is a difference for example, between speculation as to a 'takeover valuation', on the one hand, and information as to the likelihood of a particular takeover, on the other. It was the combination of the information particularised which was significant in relation to the offence charged."[125] The Court held these differences did not mean the evidence of what actually happened was irrelevant to materiality.[126] The Court clearly favoured the evidence of share price movements over other evidence stating: [127]

> The possibility that other factors may have affected the market for a particular security at a particular time must always be borne in mind, but to reject information as to price movements out of hand on that basis is at least to risk inviting the jury to speculate, without the assistance of the only concrete evidence of which might be thought to provide some assistance in undertaking that evaluation.

So despite the Court's recognition that it was applying a reasonable investor test it relied heavily on market impact evidence.

Significantly, in *Hannes* the Court was directed to US authority[128] in an attempt to limit the influence of evidence of share price movements. However the Court felt there were two important points of distinction to be made. Firstly the US cases dealt with whether a failure to disclose was misleading (as opposed to an insider trading case) "an issue to which any increase in the value of the stock after disclosure was clearly not compelling".[129] Secondly the US cases only described the evidence as of "limited value" which is different from saying it has no probative

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[125] Above n 123 at paragraph 382.
[126] Above n 123 at paragraph 299.
[127] Above n 123 at paragraph 351.
[128] *Reiss v Pan American World Airways Inc* 711 F.2d 11 (2d Cir. 1983); *Securities and Exchange Commission v Texas Gulf Sulphur CO* 401 F.2d 833 (2d Cir. 1968) at 863.
[129] Above n 123 at paragraph 352.

value.[130] The Court commented, "it is readily apparent that the law in question in that case was a materially different form of insider trading prohibition to that with which the present charge is concerned, the reasoning nevertheless demonstrates that evidence of subsequent trading is treated in US law as potentially relevant to issues similar to that of "general availability" under Australian Law."[131]

In 2007, *Citigroup*[132] demonstrated the full dominance of the market impact test. The first insider trading claim failed because Manchee was not considered an "officer" of Citigroup and was not found to have made the supposition contended. It was argued that after the "cigarette conversation" in which his supervisor told him not to buy any more Patrick shares, Manchee formed an "un-communicated supposition" that the rumours about the takeover were true and that Citigroup was acting for Toll. The court went on to analyse the "price sensitivity" of this information. It was held that at the time of Manchee's sale, the market had already moved the share price to a level that reflected "the substantial likelihood" of a takeover. The further non-public information that Manchee held, that Citigroup was acting for the Bidder, was not material. The second insider trading claim failed because an effective Chinese wall was in place. However the materiality analysis undertaken by the court reflected a pure market impact test. The information was the knowledge that Citigroup was acting for the Bidder, and the timing of the announcement of the takeover bid. Before the start of trading on Monday, the takeover was announced to the market. The court found it was likely knowledge of the timing of the release was material because the Patrick shares opened the day of the announcement at $7.19, 10.9% higher than the closing price the Friday before. This price rise, and the subsequent price rise to $7.38 seemed to establish the materiality of the information. The information in question (for the second charge) was "knowledge of the timing" of the announcement of the takeover by Toll. This was in an environment where the market contained such a high degree of speculation that it knowledge of the "substantial likelihood" of a takeover was generally available. The only factor relied on to establish the materiality of the above information was a price rise between the close of trading on

[130] Ibid. at paragraph 352.
[131] Above n 123 at paragraph 354.
[132] Above n 5.

Friday and the opening price of the stock after the announcement had been made early Monday morning. This is clearly a market impact test.

The test adopted by the Australian courts seems to be predominantly market impact despite section1042D suggesting a reasonable investor test. From the heavy emphasis on the share price movements and the repeated references to price sensitivity, it seems that the information must be of a kind that would actually induce the reasonable investor to buy or sell shares thereby creating a price impact. The Australian courts do not address the possibility that information that would create an impact once released might not be recognised as such by a reasonable investor prior to its release.

Surprisingly the courts do not differentiate between hard, soft, or predictive information, particularly information about mergers. This could be due to the heavy reliance on a price impact analysis, where, regardless of its nature before the announcement a price impact indicates its materiality after its release. The subtleties of information seem to have more relevance when analysing the deliberative process of the investor or shareholder under the US test.

Clearly, there is no way to determine a threshold for the level of significance or reliability required for information to be material. This criticism is not isolated to the Australian approach as the US and New Zealand approaches were also incapable of setting such a threshold.

E. A comparison of the approaches.

1. Does the underlying rationale affect materiality?

Firstly, the threshold for materiality in Australia under a market fairness approach is more demanding than in the US because of the requirement the information would be viewed by the reasonable investor as likely to affect the share price.[133] At first it might be expected that in essence both tests are the reasonable investor test, therefore materiality should be the same. However the inclusion of the words "effect on price" in the Australian section (and consequently SMAA) is significant. It has led to the approach being closely aligned to

[133] Corporations Act 2001 section 1002(1)(2).

a "market impact" analysis, as the courts have viewed evidence of share price movements as highly relevant and sometimes determinative. The US test focuses more on the deliberative process of the investor. It does not demand that the information would have induced the investor to buy or sell but requires that it "assume actual significance" in the investor's deliberations.[134] Because the second limb of the *TSC* test refers to the "total mix" of information available, evidence of share price movements are admissible in the US but not determinative.[135] It has also been suggested by Cox that there is little difference in practice between the tests, but without evidence of more "hard cases" being determined by the courts in this area it is impossible to know.[136]

Secondly, one clear difference between the versions of the reasonable investor test is the inclusion or exclusion of qualitative information. The fact the US test potentially encompasses both qualitative and quantitative information means it is much wider than the Australian approach.

Thirdly, under the market fairness approach the source of the information blends into its materiality. It has been illustrated that the tests employed by the courts search for a threshold level of significance and reliability. Very significant information can be material despite a low level of reliability (for example the existence of merger discussions). Alternatively, very reliable information, with a low level of significance may well be material (for example a financial reporting error of 3%). The two features together determine materiality. However *Rivkin* adds a third element into the Australian analysis: reliability of the source of the information.

The importance of the source of the information is recognised in both fiduciary and market fairness regimes.[137] However under a fiduciary approach the "reliability" of the source of information is much more easily established. This is because the US cases all involve information

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[134] James D Cox, 'An Outsider's Perspective of Insider Trading Regulation in Australia' (1989-1990) 12 *Sydney Law Review* 455 at 470; *TSC Industries v Northway Inc* (1976) 426 US 438,449 at 449.

[135] *U.S.v. Bilzerian* (1991) Fed. Sec. L.R. 98283, 98290-98291.

[136] Cox, above n 134, at 470.

[137] Richard C Sauer, 'The Erosion of the Materiality Standard in the Enforcement of the Federal Securities Laws' (2007) 62(2) *Business Lawyer* 317(41) at 322.

that was sourced (albeit sometimes indirectly) from the company. The source of the information forms part of the threshold question of whether a duty exists: the trader needs to know that the information was received in breach of confidence to the owner of the information. This is particularly important in tippee liability. Because an insider knows they are already "inside" the company, and information that comes their way is probably reliable, it sends a clear signal to the insider to analyse the significance and reliability of the content of the information carefully. The materiality question is engaged after this initial determination of the source is made. As a consequence the "reliability" element in the US focuses on the actual measurable probability of the information occurring and its verifiability.

On the other hand under market fairness approach the reliability aspect of the information is more difficult to deal with. *Rivkin* demonstrates the "source of the information" is included in the information itself. Under the market fairness approach information's significance is largely dealt with using a market impact method, by resorting to evidence of the likelihood of price movements and their magnitude as opposed to asking whether a shareholder would consider it important. Taking such an approach means an inclusion of the source of the information in the market fairness approach substitutes for the "connection"[138] under a fiduciary approach. Because under a market impact approach there is a much wider range of circumstances that information may be imparted to an investor the reliability aspect takes on a new dimension: it must also analyse the circumstances in which the information arose. This makes finding a threshold even harder.

If the source of the information is included there is a possibility information insiders may elevate themselves to tippers where the bare information would not have been material. The facts of *Citigroup*[139] demonstrate this risk. An employee of a large investment bank speculates (forms an uncommunicated supposition) that his investment bank is working on a merger of two companies. There is already a large amount of speculation in the market that the two companies will merge to the point the market is relatively certain the event will take place in the near future. The identity of an advising firm would not by itself

[138] Alexander F Loke, above n 19.
[139] Above n 5.

provide any additional significant information to the market because, by itself, it does not confirm the firms will in fact merge only reasserts what is generally available that it is likely the firms will merge (and with that it is certain they will both have a firm acting for them). However if the employee conveys this supposition to someone, the fact it is information from within the advising firm elevates his speculation about the identity of the advising firm to a material fact and therefore is guilty of tipping. His own possession of that information would probably be unlikely to tip the balance of information in the market. Under a fiduciary regime the fact it came from within the firm would establish it was a breach of confidence, then the focus would be on whether or not the confirmation that that particular firm was acting for one of the parties was sufficiently significant to alter the total mix. However under a market fairness regime the source and the information are combined. The fact that it is from an "inside source" appears to concrete the reliability of the information and therefore makes it more likely the information will be material.

2. The interaction with the "generally available" limb of inside information

The source of the information is often an indication of whether the information is generally available. Under a fiduciary approach the source would relate to whether the tippee knows that the information is being communicated in circumstances that constitute a breach of duty. If the source and circumstances of receiving the information does not go to the availability of the information how can this be determined? Overland gives the example of three examples of information: [140]

1. A press release addressed to the ASX and signed by the company secretary of ABC Ltd which states that ABC Ltd is about to launch a takeover bid for XYZ Ltd.
2. A statement from a trusted stockbroker that he has heard that ABC Ltd is about to launch a takeover bid for XYZ Ltd.
3. A statement overheard whilst walking in the street that a passer-by's brother has heard that ABC Ltd is about to launch a take-over bid for XYZ Ltd.

Overland argues if you imagine a person overhearing the above

[140] Overland, above n 114, at 716.

information it becomes clear that the source of each piece of information forms a vital part of the information itself.[141] Without the inclusion of the source, each piece of information seems identical. However an alternative approach would be to look at the information as identical, but at different stages of availability: the first being clearly not generally available and the third probably common knowledge.

Overland commends the development in *Rivkin*. She argues speculation and rumour can have an impact on the price of securities and so people acting on rumour or speculation should also be caught by the regime.[142] However the real damage caused by rumour or speculation arises from an insider in breach of his or her duty to the company. Where, for reasons of commercial sensitivity, the information has been kept confidential such a tip could cause damage to the company's plans and therefore its current shareholders. However, sometimes rumour or speculation in the market (and trading on it) can be a good thing. If extensive enough to have an impact on the share price, speculation is usually "generally available", particularly where it has not originated from the company. In a number of cases "rumour" in the market has been admitted as evidence of what information was generally available.[143] Trading on such information often improves the accuracy of the share price meaning that official announcements often have a smaller impact on the share price than if there had been no leakage of the information. This reduces the opportunity for "real" insiders to take advantage of the information. Often rumours are the result of market analysts piecing together industry factors with the specific circumstance to accurately predict what might occur. *Citigroup* is a clear example of this as a high degree of speculation and rumour created by a number of objectively observable circumstances moved the share price.

New Zealand's poor record of insider trading enforcement[144] does not

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[141] Ibid.

[142] Ibid.

[143] *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* (ACN 113 114832) (No. 4) [2007] FCA 963.

[144] In Australia from 1985 to 2005 only 14 people have been tried for insider trading in Australia, of whom 10 were found not guilty (*R v Martin* (Unreported, District Court, WA, 1 August 2003; *R v Kruse* (Unreported, District Court, NSW, 2 December, 1999, O'Rielly J, 98/11/0908); *R v Firns* (Unreported, District Court, NSW, 4 Nov 1999, 98/11/0895); (2001) 51 NSWLR 548; [2001] NSWCCA 191 (convicted at trial but overturned on appeal); *R v Evans & Doyle* [1999] VSC 488.

necessarily indicate a low level of insider trading: it can only be speculated to what extent the regime is actually complied with. Materiality prevents a more rigorous enforcement of the regime and also an obstacle to compliance with the regime. The New Zealand Business Round Table ("NZBRT") stated in its submission on the Bill: "If businesses are expected to pay for clarifying rulings or interpretations, some may be commercially driven to fly blind and risk technical non-compliance."[145] As a result the purpose of the insider trading law is frustrated.

F. Materiality as an obstacle to compliance

Underlying the Courts' reliance on the market impact test is the idea that the market is efficient.[146] Because the market is efficient, share price movements are an accurate measure of the significance (therefore materiality) of new information. Broadly put the Efficient Markets Hypothesis (EMH) means that share prices already reflect all available information about the value of that share. Therefore, because a share price already reflects all available information its price should only decrease or increase in response to the entrance of new information in the market.[147]

In many cases, courts rely on expert evidence to establish that the information would have had a material effect on the share price if it had been generally available. In cases where the information is disclosed, the courts also rely on the evidence of the actual share price movements. At first sight this suggests that it should be relatively easy to distinguish material information from immaterial information. However one author provides a clear indication that even with a high level of knowledge about the way the market reacts, this determination is not an easy, or even possible, one without the benefit of hindsight.

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[145] New Zealand Business Round Table, *Submission to the Ministry of Economic Development on the Reform of Securities Trading Law* (2002) http://www.nzbr.org.nz/documents/submissions/submissions-2002/insider_trading.pdf (at 16 September 2007) at 7.

[146] Walker, Fisse, and Ramsay, above n 32 at 607.

[147] Donald C Langevoort, "Taming the Animal Spirits of the Stock Markets: a Behavioural Approach to Securities Regulation" in John Armour and Joseph A McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (2006) 65 at 70.

Alister Alcock stated: [148]

> In my 11 years as a corporate financier working for a large broking house, the most common question I was asked before the announcement of a deal was "What will happen to the share price?" the truthful answer usually was "I don't know". Substantial purchases or sales could be seen as cheap or dear, as strengthening the company's prospects or weakening them, as making further share issues more or less likely. Prosecutors have the advantage of knowing the outcome.

If an experienced corporate financier is unable to predict what will happen on the disclosure of information, how then can the "reasonable person" be expected to do so? Even on the assumption that the sophisticated investor is the appropriate hypothetical person, it is clear that analysing materiality based on *ex post* share price movements provides no adequate guidance to insiders or outsiders who must decide whether to trade.

Another problem exists with the market impact test: it uses *ex post* price movements to establish the *ex ante* knowledge of the reasonable investor. However in *Citygoup*[149] there was an unwillingness to attribute the same "benefit of hindsight" to knowledge held by the market generally. When evaluating the expert evidence offered in *Citigroup* as to what information was held by the market generally, the Court held that the information available was "more persuasive after the event than it apparently was on 19 August 2005."[150] Further the Court stated: "Although Mr Harvey acknowledged that the absence of a report from Mr Smith may have triggered some of the activity in Patrick shares, this was a clue that was only available with the benefit of hindsight."[151] It seems extraordinarily inconsistent to give the market the benefit of the doubt as to whether the information was available, but to allow share price movements to be evidence of the "extra information" held by the insider.

The market impact test is unable to specify a minimum threshold of the

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[148] Alistair Alcock, 'Inside Information' in Barry Rider and Michael Ashe (eds), *The Fiduciary, the Insider, and the Conflict: a Compendium of Essays* (1995) at 89.
[149] *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Limited* (ACN 113 114832) (No. 4) [2007] FCA.
[150] Ibid. at 963, paragraph 557.
[151] Ibid. at 963 at paragraph 562.

level of price movement required to establish materiality. Even if the direction of the movement of the share price can be predicted, the courts have not provided a minimum threshold for the magnitude of the share price movement. In a relatively illiquid market such as New Zealand, a large trade can move the share price up or down through price impact.[152] If no minimum threshold is provided, an institutional trader's knowledge that it is about to purchase a large block of shares could, on the market impact test, be material information. The NZBRT submissions on the market manipulation regime support this proposition describing how it is common for brokers to break up large orders to avoid price impact.[153] The practice of managing large orders in this way is evidence that large orders can create price impact. Prosecution for insider trading on such facts is unlikely[154] but it highlights a serious flaw in the market impact test as it is currently applied. If a market impact test is to be applied a minimum threshold price movement must be specified.

The market impact approach relies heavily on a contestable concept in modern securities markets: efficiency. Langevoort explains an irrational market reaction in response to media attention. On Sunday 3 May 1998 an edition of the New York Times ran a story about Entremed, a Biotech company that held licensing rights to a medical breakthrough. As a result of the increased media attention caused by the article the share price rose dramatically.[155] Langevoort reveals this article contained no new information, everything had already been disclosed in previous Times articles and company releases. Therefore, the share price increase directly contradicts the EMH theory that share prices immediately impound all available information.[156]

Behavioural finance theory stems from the idea that market participants are influenced by psychological factors, not just fundamental values.[157]

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[152] Bodie, Kane, and Marcus, above n 26.
[153] New Zealand Business Round Table, *Submission to the Ministry of Economic Development on the Reform of Securities Trading Law* (2002) http://www.nzbr.org.nz/documents/submissions/submissions-2002/insider_trading.pdf (at 16 September 2007) at 11.
[154] SMAA section 9C.
[155] Langevoort, above n 147, at 70.
[156] Ibid.
[157] Donald C Langevoort, 'Theories, Assumptions and Securities Regulation: Market Efficiency Revisited' (1991) 140 *University of Pennsylvania Law Review* 851at 866.

Where investors play the game of second guessing what other investors will do, the traded share price can stray from its fundamental value. The problem this raises for materiality is that it is not clear whether the tests assume investors make decisions based on fundamental value or whether the tests allow room for this speculative element.[158]

Commentators have reflected this uncertainty without explicitly recognising the link to the behavioural finance theory. The market reaction to information has been labelled too crude to reflect a hypothetical reasonable investor's reaction: [159]

> Holders of a small amount of a company's securities may have different priorities than institutional investors and thus react differently to particular corporate developments. That holders of a small number of company's shares do not act in numbers sufficient to affect stock prices does not make their views unreasonable....Given that the great bulk of securities transactions are now made by institutional investors, to say otherwise would make the 'reasonable investor' synonymous with the well-funded money manager.

If all investors reacted in an economically rational way to information, sophisticated, unsophisticated, large, and small investors would react the same way but it is clear they do not. Richard Sauer highlights a well known bias that investors react disproportionately to a change in news:[160]

> Even when a company's disclosure is, clear, complete, and can be isolated from all background noise, market reaction may not provide a perfect measure of its materiality. The very event of a corrective disclosure of a previous misstatement, for example, may seem more significant to investors than the substance of the disclosure if the disclosure gives rise to investors' fears of civil or criminal liability or it is suspected to be the first instalment of what will likely be a series of escalating abd news items.[161]

Another example of behavioural finance at work is the phenomenon of price momentum.[162] Simplified this is the theory that good or bad

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[158] Ibid. at 866.
[159] Sauer, above n 137, at 325.
[160] Bodie, Kane, and Marcus, above n 26.
[161] Sauer, above n 137, at 325.
[162] Narasimhan Jegadeesh and Sheridan Titman, 'Returns to Buying Winners and Selling Losers: Implications for Stock Market Efficiency' (1993) 48 *Journal of Finance* 65.

recent performance of particular shares continues over time without any new information being released to the market. This defies the EMH claim that subsequent price movements are independent of their antecedents.[163] For example in the instance good news is released to the market, a slow upward trend in the share price following the announcement suggests the initial reaction was an under reaction and the price is slowly adjusting. An instant but excessive reaction leading to a downward trend suggests the initial response was an overreaction.[164] This is called the overreaction effect.[165] The overreaction effect has been evident in share price movements relied on in several instances to establish materiality. For example the Securities Commission, in its *Gulf Rescources Report,*[166] found evidence of a settling in the price of the shares after the initial announcement. The shares rose briefly from a 40-45 cent range up to a 48-50 cent range, and then fell to a 43-48 cent range two days after the announcement. Also, in its *Fletcher Challenge Report*[167], the Commission found that the leaked page had a material effect on the price of Fletcher Challenge shares even though the market initially overreacted. After the release of the leaked page to stockbrokers at 2 pm on the Friday the price of these shares began to rise. The price peaked at $1.94 at around 10am on Monday 10 May (a rise of about 13% in a little over 2 trading hours) before dropping to close at $1.82 (up 6% on the 2 pm price for 7 May). The price continued to drop sharply the next day, closing at $1.68. These reports show how, if overreaction factors are not taken into account when using a market impact test, potential exists for unfairness to an investor who cannot predict the severity of the market's reaction.

Citigroup[168] provides a good example of where reliance on EMH theory might lead to a flawed measure of the materiality. The 10.9% increase in the share price over the weekend could have been explained by a momentum effect of the information that was generally available on the Friday; that there was a "substantial likelihood" of a takeover. If so, the

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[163] Langevoort, above n 147, at 72.
[164] Ibid.
[165] Ibid.
[166] Securities Commission, *Report on Enquiry into Dealings in the Voting Securities of Gulf Resources Pacific Limited (Formerly City Realities Limited) During the Period November 1989 to January 1990* (June 1992).
[167] Securities Commission, *Fletcher Challenge Report*, above n 96.
[168] Above n 5.

price movement is unreliable evidence of the materiality of the knowledge of the timing of the announcement because it might be a result of this momentum effect not the release of the timing of the announcement.[169] In such circumstances it is difficult to define the extent to which the release of the information caused the further decline/increase in the shares value, as opposed to a general trend in the price due to the momentum effect.

An economically irrational overreaction could magnify the appearance of materiality to the extent even a seemingly insignificant piece of information may cross the (unknown) materiality threshold. This is an alarming possibility. For an insider to profit off such information, the insider would need to know the content and the exact time and date at which it the information would be eventually released. If information is good but insignificant news, the insider would need to buy shares on the knowledge that there would be an overreaction and he or she could sell in the period of the "bubble" in the price before it returned to its rational level. While this is a remote possibility, it is unclear how the reasonable person would be able to employ such a strategy.

Despite the increasing recognition of behavioural finance, the courts in Australia and New Zealand tend to ignore the other possible causes of share price movements when determining materiality.[170]Anomalies in the reaction of the market are not within the knowledge of the average investor. If the courts continue to use price movements to establish materiality of information they must begin to expressly recognise these anomalies and accommodate them. It is too much to ask that the average investor know of these anomalies therefore a strong case exists to limit the application of such a test to insiders who possess a higher degree of knowledge of the market.

F. Materiality: an obstacle to enforcement of insider trading

The cases do not display a clear threshold of the significance or reliability required for materiality. This is an obstacle to enforcing insider trading as regulatory bodies are only going to pursue clear cases.

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[169] *Re Wilson Neill Ltd; Colonial Mutual Life Assurance Society Ltd v Wilson Neill Ltd* [1994] 2 NZLR 152 at 153.

[170] *Securities Commission v Midavia Rail Investments BBVA* Unreported, High Court, Auckland, CIV-2004-485-2174, 28/9/05, Williams J at paragraph 86.

This is supported by Gething who suggests three main problems face ASIC in trying to prosecute insider trading.[171] These are: the difficulty of detection, the problem of proving knowledge, and the necessity to rely on expert evidence to prove materiality.[172] Similarly Tomasic lists the "materiality" issue as one of nine obstacles to enforcement of insider trading.[173]

Cox argues that the American prosecutions for insider trading have not been hindered by findings that the information was not material.[174] He argues that the essence of insider trading is the fact that the trader has in fact profited from the trading, and argues that no prosecution has been initiated against the bumbling insider trader.[175] Several commentators have related the success of insider trading enforcement in the US to its less technical anti fraud provision.[176]

G. How the fiduciary connection reduces obstacles to enforcement and compliance

A market fairness rationale creates an over inclusive insider trading regime that puts greater pressure on a materiality standard that is already difficult to apply and enforce. It forces materiality to assume a greater role in "sorting" illegal insider trades from legitimate trades. The Australian experience shows this is done for little gain. In Australia only one person who could be considered a true outsider has been convicted of insider trading.[177] Even in that case, Rene Rivkin was really an "insider" of the wider share market community in Australia.

The fiduciary connection reduces obstacles to enforcement and compliance by accommodating a lower materiality threshold. A lower threshold is acceptable in a fiduciary situation because the insiders have knowledge of their privileged position in terms of access to specially informed information. The insider has been given a signal about the

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[171] Gething, above n 102, at 618.
[172] Ibid.
[173] Roman Tomasic and Brendan Petony, *Casino Capitalism? Insider Trading in Australia* (1991) at 121.
[174] Cox, above n 131, at 470.
[175] Ibid.
[176] Tomasic, Roman, "Corporate Crime: Making the Law more Credible" (1990) 8 *Company and Securities Law Journal* 369.
[177] *Regina v Rivkin* [2004] NSWCCA 7.

potentially significant quality of any information obtained in this position. Because for an employee (insider) under the US "disclose or abstain rule" full disclosure of information is not a viable option, the rule amounts to the requirement the employee, completely abstain from trading. Langevoort stated: "that seems acceptable given that the position of the Court seems to be that classical insiders should not trade based on informational advantage gained as a result of their corporate positions."[178] This idea is equally applicable to New Zealand and justifies a more onerous restriction on insiders through a fiduciary approach.

Conversely, the market fairness approach increases obstacles to enforcement and compliance because it necessitates the use of a law that all market participants can follow and understand. For a materiality standard to be effective it must be accessible to even the most unsophisticated investor. There has been a complete refusal to adopt "bright line" rules on which people can base their trading decisions. It has been demonstrated that the unsophisticated investor has a limited ability to deal with the subtleties of price movements. It seems unfair to impose an ambiguous rule on the whole market for the sake of catching, in most cases, company insiders. A trade off must be made between adopting a stringent rule setting materiality at a low threshold for insiders under a fiduciary approach and allowing some outsiders to trade without consequences. Gething suggests the source of the information will usually be the company.[179] If this is correct, a prosecution under the market fairness approach should usually include at least one charge that would have been caught under the fiduciary regime anyway.[180]

It has also been demonstrated that the courts in one way or another, put a gloss on materiality: information is to be understood from the perspective of the sophisticated investor. Under a fiduciary regime such a gloss is more appropriate as the test's application is limited to insiders who are likely to have a greater understanding of the operation of financial markets.

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[178] Donald C Langevoort, 'The Muddled Duty to Disclose Under Rule 10b-5' (2004) 57 *Vanderbilt Law Review* 1639 at 1659.
[179] Gething, above n102, at 618.
[180] SMAA section 8D.

Materiality under a fiduciary regime can be more carefully measured because an analysis of the "source" is kept separate from materiality. A fiduciary regime removes the extra complication that a person must judge how reliable the reasonable person would view the source.

What is most important in an insider trading regime is boosting investor confidence. The perception that insiders are unjustly enriched by inside information has been labelled "corrosive".[181] The general public are not as offended by the idea that someone who stumbles across inside information by chance (for example the fax in the Fletcher Challenge Report) might make a profit. With this in mind the law should make it easier to enforce against those insiders not harder. As Stephen Franks suggested, instead of being extended the law should be more ruthlessly enforced.[182]

Conclusion: do insider trading laws matter?

There is a divergence in the underlying rationales for regulating insider trading in the US, Australia and New Zealand. It has been suggested that materiality is easier to establish in a legal setting under a fiduciary approach similar to the one taken in the US than the new approach adopted in the SMAA: a market fairness approach. This matters because where materiality can be easily established, it should follow that the whole insider trading regime is easier to enforce and comply with than where materiality is an unattainable standard.

This is important because the existence of insider trading laws does not matter unless they are enforced.[183] Evidence suggests that insider trading laws only have an effect on the cost of capital in a market (a good measure of confidence in the market) where they are enforced.[184] Also evidence exists suggesting that countries with more stringent insider trading laws have more dispersed equity ownership, more liquid

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[181] Saikrishna Prakash, 'Our Dysfunctional Insider Trading Regime' (1999) 99 *Columbia Law Review* 1491 at 1500.
[182] Stephen Franks, 'Parliament Must Tidy Up Primitive *New Zealand Herald*, 5 December 2000. Available at http://www.nzherald.co.nz/feature/index.cfm?c_id=729 (at 10 September 2007).
[183] Bhattacharya Utpal and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 *The Journal of Finance* 75.
[184] Ibid.

stock markets, and more informative stock prices.[185] However the stringency of the laws is irrelevant without enforcement. Therefore barriers to enforcement must be minimised to ensure insider trading laws reduce the cost of capital in New Zealand. If the law does not achieve this then the costs of compliance with this difficult standard will outweigh the benefits.

A fiduciary regime that requires a relationship to the company to be established and then adopts a low materiality threshold will be more effective than a market fairness approach. A carefully crafted safe harbour can be used to allow the insiders to trade when necessary. While this approach puts a heavy burden on insiders and severely limits their ability to trade it is a necessary consequence of holding a position that provides privileged access to information.

[185] Laura Nyantung Beny, 'Insider Trading Laws and Stock Markets around the World: An Empirical Contribution to the Theoretical Law and Economics Debate' (2006-2007) 32 *Journal of Corporation Law* 237 at 239.

ADOPTION LAW IN NEW ZEALAND: THE RIGHTS AND WELL- BEING OF THE CHILD

CATHERINE MOODY*

Introduction

The focus of this paper is on the rights and well-being of adopted children in New Zealand and how these can be advanced through reform of the Adoption Act 1955. The aspects focused on are those with significant effects on adopted children and those which are in need of reform to ensure consistency with other areas of law affecting children and to meet our international obligations. Only selected areas of adoption law will be addressed and this paper should not be viewed in isolation from other areas of the Act also requiring reform. The history of adoption legislation and changing social attitudes, values and norms will be discussed to illustrate how the 1955 Act is archaic in nature and is no longer meeting the diverse needs of those subject to its proceedings. A child centered approach will be used to examine the concept of the welfare and best interests of the child, the importance of preserving the child's self identity, the ability of the child to express their views, and the need to give children the opportunity to consent, refuse or abstain from consenting to their adoption, if they are deemed capable of doing so. The paper concludes by showing that reform is urgently required to bring this statute in line with current societal values, research and practice, and to secure the rights and best interests of children in New Zealand.

A. History of New Zealand adoption law

Adoption law historically dates back as far as 2800 BC where it was first used to secure succession rights in Roman times.[1] Many centuries later, a customary form of adoption known as 'Whangai adoption' was commonly used in New Zealand, and Europeans also practiced

* LLB, University of Otago. The author would like to acknowledge Nicola Taylor of the University of Otago Children's Issues Centre, her employer Morgan Coakle Lawyers & Professor Mark Henaghan, University of Otago, for his dedication to family law.

[1] K Griffith, *The Right to Know Who You Are* (K Kimbell, Canada, 1991) 2, 6.

informal adoption from the earliest days of settlement.[2] The Maori customary adoption system of caring for children occurs when the child is given to other members of the family to raise as their own through an informal 'customary practice'.[3] The principles that underpin Whangai adoption are those of openness; placement within the family; genealogy and the centrality of relationships to the Maori way of life.[4] In contrast to Pakeha adoption practices, Maori customary adoption does not involve secrecy and the child is aware of both sets of parents and maintains contact with them. "An Atawhai (Whangai) though not born of my womb, is born of my heart".[5]

In 1881 New Zealand became the first country in the commonwealth to enact adoption legislation, which arose directly from Maori customary adoption.[6] The Bill was introduced by George Waterhouse, who was deeply concerned with the social process and had personal experience of adoption. His reasons for introducing the Bill were to benefit children deprived of their natural parents who would otherwise be exposed to want and privation; and that adoption would confer full parent-child status at a time when illegitimate children were *nullius filius*. The social context at the time of the legislations enactment was that children were parental possessions, should be silent and obey adults, and that birthmothers of 'bastards' should be punished and banished.[7]

Following the introduction of the Act the pace of change to the practice of legal adoption was slow, as suspicion remained over legitimacy and property estate issues.[8] It was not until the early 1900s that legal adoption became more common than informal adoption.[9]

In the early 1900s statutory adoption was viewed by many as a means of lightening the burden on the state. Up until the 1940s many believed the fitting punishment for mothers who gave birth to an "illegitimate child" was keeping the child. This served as a warning to other women

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[2] K Griffith, *New Zealand Adoption Law, History and Practice,* (Wellington, 1997), 6.
[3] New Zealand Law Commission, *Maori Custom and Values in New Zealand Law* (2001) 64.
[4] Ibid.
[5] Ibid.
[6] Above n2, 5.
[7] Ibid.
[8] Above n2, 6.
[9] Ibid.

who might be tempted to stray. However the 1940s and 1950s saw a change in attitudes and keeping the child as a means of punishment was no longer seen as appropriate. Adoption was encouraged and the prevailing view was that children were best raised in two parent families.[10]

For a time adoption was seen as the end of a process. The birth parents were to no longer think of the child as born to them, and the birth mother bore both her unborn child and her shame in secrecy if possible.[11] In effect, this gave the adoptive parents the security of raising their new child without threat of interference by the birth parents.[12] Adoptees thus were seen as born to the adoptive parents and for all purposes "disappeared"[13] into the adoptive family. This created the complete break theory which is based on a legal fiction rather than reality.

At this time the status of a child was determined by the marital relationship of their parents. Prior to the 1900s illegitimacy was seen as a major threat to public morality, and almost all children who were adopted were born outside marriage. The common law attitude, as explained by Inglis QC, was that illegitimate children were "unlawful productions" and not to be encouraged.[14] This attitude stemmed from medieval land law so as to ensure that land was passed through families by marriage, and not by other means.[15]

The Status of Children Act 1969, section 3, abolished what was termed an 'illegitimate child' and social progress was then made to treat all children equally, no matter what the status of their birth. The Act created some controversy due to its anticipated deterrent effect on fathers who would then bear some obligation for the child. However, others believed that the Act would have the opposite effect by making people careless as to the importance of marriage since all children were

[10] Law Commission, *Adoption and its Alternatives, A Different Approach and a New Framework,* (Wellington, 2000) 15.
[11] Ibid.
[12] Above n1, 2, 9.
[13] Ibid 2, 10.
[14] *Kerv Tutors of Moriston* (1692) Mor Dict 1363.
[15] M Henaghan and B Atkin, *Family Law Policy in New Zealand,* (2nd Ed., LexisNexis Butterworths, Wellington, 2002) 29.

to be treated equally.[16] Significantly, this Act was seen as more consistent with Maori and Polynesian values which fail to distinguish between legitimate and illegitimate children.[17]

1. Complete break adoption theory

The complete break theory, primarily in use from 1950-1980, stemmed from the belief that the family environment could overcome heredity factors. Genetic determinism was the first theory to dominate adoption law. Since most adopted children were 'illegitimate', and were therefore considered to come from sinful families, it was believed that the sin would be passed on to the child. Genetic determination was believed to control behaviour and morality within the child.[18]

At the other extreme, was the theory that an adopted child, by being transplanted into the adopted family, would grow and develop as if born to them. It was believed that nurturing an adopted child within a family environment should be no different than rearing a natural child within that same environment.[19] This theory became an ideology by the late 1940's and replaced the heredity explanation since genetic factors were then believed to be overcome by environmental ones.

This environmental dominance was one of the foundations of the complete break theory.[20] Other contributing factors were the bonding theory - which provided security for adoptive parents so that bonding could take place, psychodynamic theory - which assumed that birth parents were likely to cause trouble for adoptive parents, and that good adoptees did not need to know about their origins.[21]

A complete break would allow the adoptive environment full reign to take over and shape the adoptee's life into the mould of the adoptive family.[22] Thus, secrecy provisions were inserted into the Adoption Act 1955 and became fundamental to the complete break theory. During

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[16] Above n14.
[17] Ibid.
[18] Above n2, 1.
[19] Above n2, 9.
[20] Ibid.
[21] Above n2, 10.
[22] Ibid.

this time, both adoptive practice and policy were directed at implementing the ideology of a clean break, and little attention was given to the founding principles of adoption such as openness, centrality of relationships and concern for the adopted person.

2. Secrecy in adoption

Secrecy has surrounded the formal adoption process as it was regarded as necessary to foster normal family relationships and to protect all those involved in the adoption triangle.[23] Concealing the origins of the adoptee was seen as the best option to enable a second chance for the usually illegitimate child. The secrecy surrounding the adoption was also justified because of the stigma which once attached to a woman who had a child out of wedlock.

It was the Adoption Act 1955 which first erected secrecy barriers, and incorporated both the secrecy and the clean break provisions as a foundation policy and practice.[24] This led to birth mothers being ill-informed about their rights, no passage of information between the birth and adoptive parents, and adopted children not being informed of their adoptive status.[25] Birth mothers were being hidden from friends and their own family, either from the outset of their pregnancy or once they began to 'show'.[26]

In New Zealand it was common practice for lawyers and professionals to cover up names when parties were signing consent documents, so as to not reveal the name of the other party.[27] It has also been reported that birth mothers, when signing the consent documents, were made to swear while holding the Bible that they would never attempt to identify or contact the child in the future.[28] The Adoption Regulations 1959 also allowed the identities of the adoptive parents to be kept secret by providing forms which identified the adoptive parents by a reference number if they so wished. Once a child was adopted, the birth record was sealed and a new birth certificate was issued. This certificate only

[23] Above n2, 314.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.

showed the names of the adoptive parents and their ages at the birth of the child. This obscuring of the factual history of the child's life further served to entrench the culture of secrecy but has now, however, been partially eroded by the Adult Adoption Information Act 1985. This provides a process by which birth parents can seek contact with their children and by which adopted children[29] can obtain their original birth certificates and make contact with their birth parents.[30]

Myths began to grow out of the complete break theory, with the secrecy and legal fictions preventing any critical analysis of these.[31] This philosophy of secrecy and clean break, embedded in the 1955 Act, has been subsequently questioned and challenged on many levels due to its detrimental impact on those affected by adoption.[32]

3. The demise of the clean break theory

The ideology of a clean break came under increasing pressure from ten sources[33] such as new psychological theory and practices, adoptees and birth mothers speaking out, and adoption law changes in England. Although professionals continued to defend the theory, the foundations were already beginning to collapse under them.[34]

The secrecy, anonymity, and mystique surrounding the traditional adoptions of the past have created numerous psychological problems for adoptees, birth parents, and adoptive parents.[35] A modern philosophical movement, stressing the importance of personal experience and the need for self identity, challenged the foundations of the clean break theory. This illustrated how any deception, fiction, secrecy, or suppression of personal information was not addressing the reality of people's lives, impeded personal growth and had dysfunctional consequences.[36]

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[29] From the age of 20 years.
[30] Unless a veto has been placed: see Adult Adoption Information Act 1985, sections 4 and 8.
[31] Above n2, 315.
[32] Above n2, 316-317.
[33] Above n2, 7.
[34] Above n2, 11.
[35] Above n1, 7, 1.
[36] Above n2, 11.

4. The decline in adoption

Since peaking in 1971 there has been a decline in the number of adoptions in New Zealand, stemming from several interrelated factors.[37] Firstly 'The Contraceptive Revolution' whereby it was an offence for those under 16 to procure a contraceptive, even though many illegitimate children were born (and subsequently adopted) as a result of this policy. Since 1976 contraceptive advice and devices have been more freely available and have led to fewer unplanned pregnancies, thus diminishing the number of children available for adoption.[38] Secondly abortion has been more readily available since 1976 and has meant some pregnancies have been terminated that might otherwise have led to adoption.[39] Thirdly, there has been a decreased stigma associated with illegitimacy which was affirmed by The Status of Children Act 1969 by removing illegitimacy and an increased acceptance of de facto marriages. Finally, the greater economic independence of solo mothers has also contributed to the decline in the number of adoptions. This is largely due to The Destitute Persons Act 1910 and the Domestic Proceedings Act 1968 which created a statutory means by which a woman could seek a maintenance order against the father of her children. Previously, an unmarried mother had to obtain an acknowledgement of paternity from the father or a declaration of paternity from the court in order to be entitled to seek maintenance. The Domestic Purposes Benefit (DPB), mitigated this and other difficulties by providing financial support for single mothers, irrespective of whether the father was contributing to maintenance payments. The introduction of the DPB was blamed for "creating a shortage of babies for adoption."[40]

A combination of these and other factors led to a decrease in the rate of adoption. Statistics show that total adoptions have decreased since their peak at 3967 in 1971, compared with only 540 total adoptions in 1996.[41]

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[37] Above n2, 13.
[38] Ibid.
[39] Ibid.
[40] C Hadfield "*Adoptions 1963 to 73"* (paper presented at Departmental Conference on Adoption, Department of Social Welfare, Wellington, 1973) 23, 30.
[41] Above n2.

5. The opening up of adoption

Secrecy has surrounded the adoption process since the middle of the 20th century. However, there has never been a prohibition on open adoptions in New Zealand legislation, and this has always been a matter of choice.[42] Social pressures in the past have meant open adoption was not the norm and any open adoption contract still has no secure standing in law. Judges are continuing to struggle in reconciling the practice of open adoption with the Act and legal recognition is required to remove the secrecy which surrounds adoption and to reflect the values and practices of adoption in New Zealand.

Section 7(6) of the Adoption Act 1955 provides that a parent or guardian of a child may give consent to an adoption without knowing the identity of the prospective adoptive parents. As mentioned previously, the Adult Adoption Information Act 1985 has somewhat eroded the secrecy surrounding adoptions as it provides processes for both birth parents and adoptees to seek information and contact.[43]

Over the last two decades, social workers have facilitated the practice of open, rather than closed adoption in New Zealand. Open adoption involves varying degrees of contact between the child, members of its adoptive family and members of its birth family. The degree and regularity of contact is decided upon by the parties involved and contact may involve communication by mail at periodic intervals, or regular visits. Although the statute presumes secrecy, it does not prohibit communication and contact between the parties.[44]

The growth in open adoption arrangements has been achieved through the promotion by social workers of the idea that open adoption is beneficial for all involved.[45] Over the past twenty years, research has been conducted into the consequences of open adoption[46] and at the

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[42] Above n2, 280.
[43] Although child or birth parent may place a veto upon access to information, section 3 and 7 Adult Adoption Information Act 1985.
[44] Above n15, 39.
[45] M Ryburn, *Open Adoption: Research, Theory and Practice* (Avebury, Sydney, 1994) [Open Adoption] 17, 84-86.
[46] HD Grotevant and RG McRoy, *Openness in Adoption: Exploring Family Connections* (Sage Publications, California, 1998) [Openness in Adoption].

centre of this practice are the best interests of the child. Studies have shown that openness helps to alleviate the disadvantages associated with closed adoption.[47] Birth mothers have found that contact with the adoptive family and the child assists them in alleviating their sense of loss and helps them come to terms with the adoption.[48] While the experience of adoptive parents has been that although they may be initially apprehensive, contact can improve their relationship with the child.[49] Evidence also suggests that adoptive children are more able to develop a successful attachment to their adoptive parents when there is contact with birth parents.[50]

In 1955, 67.6% of adoptions were by strangers and 32.4% by non-strangers. In1996 this had changed substantially with only 21.1% being adoptions by strangers and 78.9% by non-strangers.[51] Today most adoptions are made within a family or step family and this represents a significant shift in the reasons for adoption. Therefore there is no longer a need for secrecy in the majority of adoptions as the parties to the adoption know each other, and secrecy is therefore unnecessary, impractical, and is more likely to create disadvantages for all parties.

The continued focus on secrecy within the legislation governing adoption is now unrealistic.[52] The effect of the current legislation is that of a "statutory guillotine" as it legally chops off the child's genetic roots[53] and this is no longer plausible given the nature of the majority of adoptions currently taking place. The removal of secrecy barriers is still likely to benefit the small number of stranger adoptions taking place as the adoptee is more likely to establish a sense of identity,[54] birth mothers are likely to experience greater grief resolution and adoptive parents are more likely to feel secure in their role.[55] There is now an even greater need for legally opening up adoption both for birth and adoptive parents, and for the welfare of the child.

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[47] Ibid.
[48] Ibid.
[49] Above n45.
[50] Ibid.
[51] Above n15, 317.
[52] Ibid 41.
[53] Above n2, 60B.
[54] Law Commission Adoption: *Options for Reform: A Discussion Paper:* NZLC pp38 (Wellington, 1999) 15-16.
[55] Above n15, 40.

6. The current legislation

Once an adoption order has been made, the adopted child is deemed to be the child of the adoptive parent, and the adoptive parent is deemed to be the parent of the child, as if the child was born to that parent in lawful wedlock.[56] The adoption order must give the child a surname and a given name(s).[57]

After an adoption order has been made, a new birth certificate is issued with the adoptive parents entered in the place of birth parents. There is no indication on the face of the birth certificate that the child is adopted. The original birth registration of an adopted person is sealed until that child turns 20 and requests access under the Adult Adoption Information Act 1985. Access to identifying details on the birth certificate will be restricted if the adoption occurred prior to the commencement of the Adult Adoption Information Act and if the birth parent has placed a veto upon the disclosure of information. Once an adopted person reaches the age of 19, that person can request the Registrar-General to have the original birth certificate endorsed to the effect that they do not desire any contact with either a particular birth parent or both birth parents. This means that the Registrar-General is not empowered to release information that would identify the adopted person to the birth parent. In the case of adoptions for which no section 7 endorsement has been requested by the adopted person, and adoptions before the commencement of the Adult Adoption Information Act for which no veto has been placed, information that identifies an adult adopted person or a birth parent can be requested by either party.[58]

7. Adoption in 2008

The current reasons for adoption in New Zealand have changed from those as historically outlined. However, the legislation itself has not kept pace with the changing social context and is now well out of touch with current family values and practices in regard to adoption. There

[56] Adoption Act 1955, s.16(2)(a).
[57] Adoption Act 1955, s.16(1), (1A) and (1B).
[58] Ibid.

have been no less than six reviews of our adoption law since 1979, with each review recommending significant reform to the legislation.[59] The most comprehensive review so far was undertaken by the Law Commission in the year 2000, entitled 'Adoption and its alternatives: A different approach and a new framework'. Despite the continued recognition of the need for adoption law reform and the legislative blueprint provided by the Law Commission, unfortunately little progress has been made on this issue.[60]

B. Adoption law: A child rights and welfare approach

This section of the paper will examine four significant aspects of a child-centered approach to adoption law. The welfare and best interests of the child, the self identity of the child, the ability of the child to have a voice in proceedings, and whether the child should be able to consent to their own adoption will all be examined. This section is to be viewed in light of the history of adoption and the Adoption Act as it stands in 2008.

1. Welfare and best interests of the child: paramount or primary consideration?

The United Nations Convention on the Rights of the Child 1989 (UNCROC) provides a comprehensive framework of principles touching on every aspect of a child's life. New Zealand ratified this Convention in 1993 and is now bound to comply with its internationally recognised principles. Article 21, relating to adoption, states that:

> state parties…shall ensure that the best interests of the child shall be the paramount consideration…

The Adoption Act 1955, however, states that adoption must be "in the best interests of the child".[61] The Court of Appeal has made it clear that when a decision about adoption is made, the welfare and interests

[59] R Ludbrook *Adoption Law Revision Required,* (2006) <www.acya.org.nz> accessed 25/08/07.
[60] R Ludbrook, Copy of letter to Minister of Justice, published in *Adoption News and Views*, August 2007.
[61] Adoption Act 1955, s. 11.

of the child are the first and paramount consideration,[62] although this is not stipulated in the legislation. Mark Henaghan notes that the welfare and interests of the child have become focal points in adoption although this is still open to context within the legislation and priorities given will depend on the facts of the case and the values of the Judge.[63] Thus, although the provision is a primary consideration, it is not entrenched as the first and paramount consideration in the Act. To ensure children's rights are secure in each and every case, the welfare and best interests of the child must be the first and paramount consideration and this must be stipulated in the legislation.

The Law Commission in 2002 recommended that adoption law reform should be included in a Care of Children Bill which was to cover guardianship, custody and access as well as adoption.[64] A Care of Children Bill was introduced in 2003 and passed in 2004 which replaced the Guardianship Act 1968, but only made technical amendments to the Adoption Act. The purpose of what is now the Care of Children Act 2004 (COC Act) is to promote children's welfare and best interests and to facilitate their development by helping to ensure that appropriate arrangements are in place for their guardianship and care.[65] The terms welfare and best interests signifies that decisions must not only focus on immediate welfare concerns such as care and nurture, but also the long term interests such as giving effect to the mandatory principles found in section 5.[66]

Section 4(b) of the COC Act states that the welfare and best interests of the child must be the first and paramount consideration in all proceedings under the COC Act, but also in 'any other proceedings involving the guardianship of, day-to-day of, or contact with a child'. It is arguable[67] that the Adoption Act falls within 'any other proceedings' and is now coloured by this requirement and should be applied consistently with it. The courts are yet to address this issue, however proceedings under the Adoption Act can be argued to fall irrevocably

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[62] *Social Welfare v L* [1989] 2 NZLR 314 (CA).
[63] M Henaghan, *Welfare and Interests of the Child in Adoption Proceedings*, (1990) 2 Family Law Bulletin, 86.
[64] Above n59.
[65] Care of Children Act 2004, s.3(1)(a).
[66] Mark Henaghan, *Care of Children* (LexisNexis NZ Limited, Wellington, 2005*)* 5.
[67] R Ludbrook, personal communication, 6/9/07.

within this. The effect of this colouring can only have positive implications for children subject to proceedings under the Adoption Act until amendments to the Act are made. Due to the substantial delays and prolonging of amendments,[68] the courts could use this reading to protect the welfare and best interests of children in proceedings, by making this a mandatory consideration.

This reading is strengthened when read in light of section 5 which states the principles that are relevant to the child's welfare and best interests. In particular section 5(b) emphasises continuity in arrangements for the child's care, development and upbringing and stability in relationships and section 5(f) emphasises that the child's identity should be preserved and strengthened.

It is not clear whether the courts would be willing to interpret section 4(b) of the COC Act when applying the Adoption Act. The Children Young Person and Their Families Act 1989 (CYPF Act) also recognises the rights of children[69] and our obligations under article 21 of UNCROC support the view that the welfare and best interests of the child should be the first and paramount consideration in adoption law. These factors may sway the court to adopt section 4(b) of the COC Act when applying the Adoption Act prior to its reform.

2. Self identity of the child

Secrecy in adoption serves to create a legal fiction, whereby the child is transplanted into an adoptive family and is meant to grow up 'as if the child had born to the adopted parents in lawful wedlock'.[70] This legislation is based upon the assumption that the past should be concealed, that the birth mother would forget her ordeal and get on with her life, and that the new adoptive family unit would develop like any other.[71] However, the assumptions underlying this legislation have been shown to be flawed and some adoptees have reported problems in establishing a sense of identity as a result.[72]

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[68] Above n60.
[69] Children Young Person and their Families Act 1989, s.13.
[70] Adoption Act 1955, s.16(2)(a).
[71] Above n15, 36.
[72] Above n54, 15-16.

The ability to cope fully with different life situations or to enter relationships with others is largely dependent on the strength and quality of the individual's self identity.[73] Adoption legislation needs to set the framework for the adoptee to establish their identity should they desire to do so through family origins or the like. Most people gain background knowledge of their family as a part of their regular development, yet an adopted person can never experience this in an environment favouring secrecy.[74] A system of open adoption enables the adoptee to have contact with the birth parents and thus their genealogical roots are not severed. The adoptee is more likely to feel a closer attachment to their adoptive family in such situations.[75] Research shows that adoptees are better able to establish a sense of the self, come to terms with feelings of 'abandonment', and feel secure in their adoptive family environment when an open adoption is used.[76] Thus, the Adoption Act 1955 needs to be reformed to reflect the importance of the adoptee establishing their self identity.

3. Wishes or views of the child in adoption proceedings

Section 11(b) of the Adoption Act states that due consideration should be given to the 'wishes' of the child, having regard to the age and understanding of the child. Historically, the reasons for adoption were not child centered and took little or no account of the child's own views.

The COC Act now gives prominence to the views of the child[77] and has abandoned qualifiers such as 'age and maturity' and 'wishes' which were central to its predecessor, s23 of the Guardianship Act 1968. It is argued that 'wishes' as found in the Adoption Act, does not accord with child development theory as it is a future orientated aspiration rather than grounded in the current experiences and concerns of children. It is a one off inquiry and it gives the child the impression they need to make a choice between parents.[78] In contrast, the word 'views' implies that children are able to contribute what they regard as

[73] Above n1, 11, 3.
[74] Above n45.
[75] Above n45, 84-86.
[76] Above n45, 180.
[77] Care of Children Act 2004, s. 6.
[78] Above n2, 294.

important without having to make a choice about what they may prefer. Furthermore, 'having regard to the age and understanding of the child' although consistent with the qualifiers found in UNCROC, is also out of touch with developmental theories as it presumes that children progress along standard developmental lines. Another important aspect of the child expressing their views is the ability of adults to ascertain those views without arbitrary consideration of factors such as the child's age.

Within reform of the Adoption Act the words 'wishes' as currently found in section 11 should be replaced with the word 'views' and 'age and understanding' should also be removed. This wording would be consistent with the approach taken in the COC Act.

The COC Act elevates children's rights and requires that child's views always be taken into account in relevant proceedings under the Act.[79] This elevation of children's views is consistent with our international obligations under Articles 12 and 13 of UNCROC.
Article 12 of UNCROC 1989 states that:

> state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

The reason for obtaining the child's views is not to determine the outcome of the case. Rather, it is to listen to the child and to show respect to the person who the decision is in reference to.[80] Section 6(2) requires that "a child must be given reasonable opportunities to express views on matters affecting the child" and that "any views the child expresses (either directly or through a representative) must be taken into account". To ensure compliance with section 6 the Court must appoint a lawyer to act for a child unless the Court is satisfied the appointment would serve no useful purpose.[81]

A useful guide as to the role of lawyer for the child is found in section 7

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[79] *Brown v Argyll* [2006] NZFLR 705; (2006) 25 FRNZ 383 at paras [44] and [46].
[80] M Henaghan, *Case Note: Children's Views -Two Steps Forwards, One Step Backwards* (2006) 5 NZFLJ 154.
[81] Care of Children Act 2004, s.7.

of the COC Act. This is consistent with article 12.2 of UNCROC and equally applicable in adoption proceedings:[82]

> The lawyer must act for the child, obtain their views and act on those views. The lawyer must also ensure that the child's best interests are put before the court and in the rare case where conflict arises between these two roles then the lawyers is to ask for counsel to be appointed in order to assist the court.

For the rights of children to be effective, the Family Justice system has the correlative duty of providing a range of resources so that a child is offered reasonable opportunities, appropriate to them, to express their views and so that the Court is given the information required to ensure that any views the child chooses to express are understood from the child's perspective.[83] Judicial interviews with the child are now increasingly undertaken although problems[84] may still be associated with this.[85] Pauline Tapp has researched Judges interviewing children and has stated that the Judge should be the leader of a team with a plan in each case that "best suits the wishes and characteristics of the particular child concerned".[86]

The CYPF Act was the first major piece of legislation that moved towards a child focused approach in relation to children's participation in decision making.[87] Section 5(d) states that consideration "should be" given to the wishes of the child or young person, as far as those wishes can be reasonably ascertained, and accorded weight, as is appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person. Judge von Dadelszen has stated that it would be a "brave Judge" who did not interpret section 5(d) as a requirement to ensure that appropriate inquiry was made to ascertain the child's views.[88] The Court of Appeal has stated that a Judge is "obliged" to

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[82] Above n66, 9.
[83] P Tapp, *A Child's Right to Express Views: a Focus on Process, Outcome or a Balance?* (2006) 5 NZFLJ 209.
[84] For example, consistency in how Judges talk to children, lack of time and resources dedicated to children and the fact that usually the interviews are one off events.
[85] M Cochrane, *Children's Views and Participation in Decision Making,* (2006) 5 NZFLJ 183.
[86] P Tapp, *Examining Judicial Approaches to Interviewing Children*, Paper presented at the 4th Annual LexisNexis Child Law Conference, Langham Hotel, Auckland, 10 March 2005, 23.
[87] S Porteous, *Children and Consent to Adoptions,* (2006) 5 NZFLJ 107.
[88] *D-GSW v R* (1997) 16 FRNZ 357, 369-370.

give consideration to the wishes of the child, but how a Judge ascertains those wishes is a matter for his or her discretion.[89]

The extent to which a child's 'wishes' are ascertained under the Adoption Act 1955 is dependent upon the information before the court. This then raises issues as to how the child's wishes are ascertained, whether through a social worker, or via a judicial interview. Unlike other family law statutes there is currently no power in the Adoption Act to appoint a lawyer to represent the child, although counsel can be appointed to assist the court under its inherent jurisdiction. This is increasingly used by the courts to ascertain the child's wishes and advise the court of those wishes.[90] There is also inherent jurisdiction for a Family Court Judge to interview the child through R 54 of the Family Court Rules.[91]

It is crucial that information before the court is accurate and represents the child's true 'views'. Regrettably, the lack of processes and mechanisms for obtaining this information and placing it before the court threatens to jeopardise this. The child's views are unlikely to be central in adoption proceedings, nor is the child likely to feel their voice has been heard.

The UNCROC recognises that the level of a child's participation in decisions must be appropriate to their age and level of maturity. Some studies have shown a child's ability to form and express their opinion develops with age and that most adults will naturally give the views of teenagers greater weight than those of a preschooler, whether in family, legal, or administrative decisions.[92] However the ability to 'hear' the perspective of a child is constrained by a number of factors, particularly the inability of the system to understand that reality is socially constructed. Thus, age, culture, race, and gender will affect how people perceive a situation and will influence the aspects of the child's reality which the adult sees as relevant. However there should be no presumption that a child's wishes are irrelevant because of the child's

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[89] *B* (CA 204/97) v *Department of Social Welfare* (1998) 16 FRNZ 522 at 527 citing *M v Y* [1994] 1 NZLR 527, 537 (CA).
[90] Brookers Family Law-Child Law (Vol. 1, Wellington, Brookers) 2005, CC7, 09.
[91] Above n66, 10.
[92] *FACT SHEET: A Summary of the Rights Under the Convention on the Rights of the Child* <http://www.unicef.org/crc/files/Rights_overview.pdf,> accessed 20/08/07.

age, nor because of what a legal system defines as relevant.[93]

It is important that solutions are built with children, considering their perspective on the realities at issue and ensuring that they are empowered to form their own view. If the legal system does not listen to children it may miss information vital to finding a solution that fits with the child's reality and any decision which does not take into account the child's perspective is less likely to be effective.[94]

Canadian research has shown that by giving children the opportunity to express their views and be heard they are more likely to develop respect and trust in others in order to form meaningful bonds, and develop self esteem and a sense of belonging which will help them to cope with the challenges of adult life.[95] This is particularly important in regard to adoption as it has far reaching consequences for the child in that it affects their legal status, family relationships, and often their cultural identity.[96]

Given the archaic nature of the Adoption Act and the lack of reform, these other legal and social advancements with respect to children's views are yet to have a significant effect on adoption proceedings. Although Judges may now be more receptive to a child's views through recent experience with the COC Act and the CYPF Act, there is still no statutory right which authorities must adhere to when dealing with these issues under the Adoption Act.

An aspect of the 'paramountcy principle' found in section 4 of the COC Act requires that section 6 on the child's views is adhered to.[97] There is a need to ensure consistency between our obligations under UNCROC and between other legislation dealing with children.[98] Thus, if Adoption proceedings do fall within 'any other proceedings'[99] then

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[93] Smith, Taylor and Gollop, *Children's Voices,* Research, Policy and Practice, (Pearson Education Ltd, 2000) 96.
[94] Ibid 97.
[95] http://www.crin.org/docs/GDD_2006_Canadian_Child_Care_Federation.doc., accessed 20/08/07.
[96] Above n87, 110.
[97] See Care of Children Act 2004, s. 4(6).
[98] Such as the Care of Children Act 2004 and the Children Young Person and their Families Act 1989.
[99] Care of Children Act 2004, s. 4(1)(b) see above discussion.

there is a statutory duty requiring the child's views to be ascertained as one aspect of the inquiry found in section 4. Although not satisfactory in the long term, this interpretation may provide a blueprint for proceedings under the Adoption Act to ensure that the welfare and best interests of the child are the first and paramount consideration and that an aspect giving effect to this is participation by the child, and the right to express their views. This will make some inroads in the short term to ensure consistency between laws in regard to children and will also seek to meet our international obligations under UNCROC.

Reform is required in this area to bring the Adoption Act in line with current societal thinking, other areas of the law and UNCROC.[100] As previously discussed, 'any other proceedings' in section 4(b) of the COC Act can be read as inherently applying to the Adoption Act as it currently stands. Thus it can be argued that there is now statutory basis in adoption proceedings for applying both the 'paramountcy principle' of welfare and best interests of the child and also the right of the child to express his or her views and have these taken into account by the court.

This interpretation is consistent with other jurisdictions that also recognise the right of a child involved in adoption proceedings, to express their views. Under the Children (Scotland) Act 1995 section 6 places a duty on adoption agencies and courts to consider the views of the child in "any decision relating to the adoption." This covers all planning decisions by the adoption agency. No fixed age is set out in section 6 and the reference applies to all children. Agencies and courts need to consider the views of the child "so far as practicable…taking account of his age and maturity". However section 6(2) also states the presumption that a child of 12 years or over shall be presumed to have a view. The Adoption Act 2000 (New South Wales) places strong emphasis on participation of Children in adoption decision-making. Section 9 is to ensure a child is able to participate in any decision made under the Act that has a significant impact on the child's life. The section goes on to state information the decision maker is responsible for providing the child with which includes the opportunity to express his or her views freely according to his or her abilities

[100] See: ACYA, *Children and Youth in Aotearoa 2003* (ACYA, Wellington, 2003) 38.

4. Children and consent to their adoption

The Adoption Act 1955 does not require that children consent to their adoption. The NGO report to the United Nations on Children and Youth in Aotearoa[101] highlights the lack of opportunity under current legislation for anyone under 20 years old to have participation rights in proceedings under the Adoption Act. As outlined before, children should not be mere passive recipients of decisions which affect them and should be actively involved in the proceedings.

Currently only a minority of adoptions are 'stranger adoptions' where the birth parents do not know the adoptive parents. This is a significant change from earlier adoptions which because of secrecy meant 'stranger adoptions' were the norm and the child's consent to the adoption was less relevant, perhaps because of the child's age. There has been a shift in theory from regarding children as passive and voiceless victims towards regarding them as social actors with their own views and strategies.[102] By giving effect to this socio- cultural theory of development, children are thus seen as capable of contributing to the decision making process. Adoption within one's own family highlights different needs and different considerations which the authorities should be required to consider before making an order.

Currently an adoption order can be made in respect of a child under the age of twenty years without the child's consent and sometimes without his or her knowledge.[103] The Law Commission report in the year 2000,[104] took submissions on whether the consent of a child old enough to give consent to their adoption should be required. Forty one submitters said yes, three said no.[105] This illustrates clear support within New Zealand for reform of this aspect of the Adoption Act.

At common law in the leading case of *Gillick*[106] the House of Lords decided that the issue of consent is one of the child's capacity rather than the chronological age and a child who is capable of making a

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[101] Ibid.
[102] Above n2, 293 see also n93.
[103] *Re E*[1992] NZFLR 216; (1991) 7 FRNZ 530.
[104] Above n2.
[105] Above n2, 159.
[106] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 186.

decision should be able to make that decision. The main issue in this case was whether doctors would be acting lawfully if they gave contraceptive advice and treatment to fifteen-year-old young women without the young women's parents knowing about the advice and treatment. In this case, Lord Scarman took the most robust approach, and made it clear that once a child has sufficient understanding and maturity then the child has the capacity to make decisions of his or her own. He set out a stringent test whereby the child must not only understand the nature of what is decided, but also be able to assess its implications. Lord Frazer added another aspect to the test, advocating that the final decision must be in the best interests of the child[107]

Issue may arise as to whether the autonomy rights of the child are superseded by what the court views to be in the child's welfare and best interests if the two appear to be at odds with each other. However, if a child is deemed to be *Gillick* competent, is it then appropriate for the court to dispense with the child's consent on the basis of *their view* of the child's welfare and best interests?

Other jurisdictions have acknowledged the right of a child to consent to their adoption. For example, the New South Wales Adoption Act 2000, section 55, requires that older children give consent to their adoption. The court is not to make an adoption order in relation to a child who is 12 or more but less than 18 years of age and who is capable of giving consent unless satisfied that the child is in such a physical or mental condition as not to be capable of properly considering the question of whether he or she should give consent.[108] The court can also make an adoption order in relation to a child who is incapable of giving consent 'if the court is satisfied that the circumstances are exceptional and that it would be in the best interests of the child to make the order'.[109]

The NSW test is a mixture of both a *Gillick* competency test and a fixed age of 12 years. However, setting an age limit as to when a child can even be considered whether they are *Gillick* competent or not only adds an arbitrary element to the decision at hand and does not reflect a child

[107] Ibid, at 174.
[108] Adoption Act 2000 (NSW), s. 69.
[109] Adoption Act 2000 (NSW), s. 55.

rights centered approach. Any child, regardless of chronological age, should be given an opportunity to be considered for whether or not they are *Gillick* competent. A child of 11 years may be just as competent as a child of 12 years. However if a chronological age is fixed at 12 years before *Gillick* competency will be considered, then the 11 year old is not even given the opportunity to establish their competence.

The Adoption Act in its current form is parental based, with children's rights given little or no prominence. Reform needs to ensure that children's rights are at the forefront within the legislation and a crucial aspect of this is the right of the child to consent to their adoption if they are deemed capable of doing so. There are no fixed limits where nature knows only a continuous process of growth and maturity[110] and thus it is difficult to establish a fixed age at which a child becomes competent to give or refuse their consent.

To avoid problems associated with fixing an arbitrary age limit, the courts could solely employ a *Gillick* competency test when dealing with consent of the child. As established before, reform of the Adoption Act should incorporate a mandatory duty to ascertain the views of the child and for these to be taken into account. Furthermore, each child should be considered on a case by case basis as to whether they are *Gillick* competent, and able to understand both the legal and personal consequences of their decision.[111]

If a child is deemed *Gillick* competent they should then be able to consent, refuse to consent, or abstain from consenting to their adoption. Each of these options must then be considered against what the court deems to be in the welfare and best interests of the child. Thus, the overriding factor will always be a mandatory consideration of the welfare and best interests of the child, but consideration must be also be given to the views of the child and any consent or refusal of consent they may express.

The COC Act 2004 has chosen not to address the *Gillick* competent child with regard to consent to medical procedures. Under the Act a

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[110] Above n106.
[111] Above n87, 110.

child aged 16 years or over now has the legal ability to both consent or refuse to consent to medical procedures.[112] The COC Act does not rule out a *Gillick* competent child and therefore it is still possible to act on the consent of a child who is under 16 and who has sufficient knowledge and understanding of a particular decision.[113] Bill Atkin, in his paper "The Care of Children Bill-All Right But Only As Far As It Goes", concluded that the Care of Children Act 2004 does not make as much progress as it could in the area of the children's rights.[114] By reforming the Adoption Act in the way this paper recommends, children's rights are likely to be advanced in a greater way than they currently are under the medical consent provisions of the COC Act in this respect.

The difficult task will be determining how competence is to be judged and by whom. The child's views are to be ascertained through a lawyer appointed to represent the child and competence could be determined as part of the judicial process by specially trained experts such as child psychologists or counselors. A pilot study and further research should be conducted in this area to best determine the most appropriate way of deciding whether a child is *Gillick* competent with regard to Adoption proceedings. *Gillick's* case itself highlights the difficulty of the test with the Law Lords unable to agree on whether fifteen-year olds had sufficient knowledge and understanding on contraceptive decisions.[115] However, clinicians and professionals already have experience with determining competence in regard to medical procedures and this experience will be of value to the determination under adoption proceedings. Furthermore, although a test may be difficult to apply it is essential that a test be used which is flexible and applicable to all circumstances as the case may arise.

D. Discussion and recommendations

This paper aims to focus on the rights and well being of New Zealand children through illustrating some of the required reform to the Adoption Act 1955. The issues as outlined above are certainly not exhaustive and it is not intended that this paper is inclusive of all

[112] Above n66, 20.
[113] Ibid.
[114] Ibid.
[115] Ibid.

reform in relation to the Adoption Act and children's rights.

The Adoption Act is archaic. It is based on parental rights and fails to address the rights, needs, or wants of children. Although adoption is a life changing experience for all concerned, the Act does not address the repercussions it can have on children or indeed on their birth and adoptive parents. It is important to address the history of the Act to fully understand that it was based on different social perceptions, different needs within society and different social attitudes including concepts such as secrecy, illegitimate children and *nullius filius* (nobody's child). Open adoption is now practiced and should be recognised within the legislation and the environment of secrecy can be removed. We have moved on from the society of 1955. The Act however has remained unchanged in substance and still represents the social stigmas of our society in the mid-twentieth century.

Given the lack of commitment by the Government to reforming the Act, interpretations of the Adoption Act which are consistent with the COC Act should instead be read when applying the legislation. The welfare and best interests of the child are not currently a mandatory consideration within the Adoption Act and the requirement that adoption be in the best interests of the child can be overlooked dependent on the context and the values of the Judge. Section 4(b) of the COC Act requires that the welfare and best interests of the child be the first and paramount consideration within the Act and 'any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with a child'. This paper recommends that the Adoption Act, can be considered to fall irrevocably within 'any other proceedings' and is therefore coloured by this requirement. The consequences of this reading are that the welfare and best interests of the child are the first and paramount consideration in adoption proceedings. This is a plausible reading when read in light of UNCROC and the CYPF Act 1989 and is likely to have a positive effect on children who are subject to adoption proceedings. In the long term, reform of the Act in relation to the welfare and best interests of children should be modeled on section 4 of the COC Act.

The Adoption Act states that due consideration should be given to the wishes of the child having regard to the age and understanding of the child. The term 'wishes' should be replaced by the term 'views' as

found in the COC Act and article 12 of UNCROC, as it is a grounded term which implies that the child is able to contribute to the decision without having to make a choice. In the short term, before reform takes place, relevant to the child's welfare and best interests[116] is that a child must be given reasonable opportunities to express views on matters affecting the child and that any views the child expresses must be taken into account. By interpreting 'any other proceedings' as applying to proceedings under the Adoption Act, the child's views would then be a mandatory consideration as an inherent part of the welfare and best interests of the child test, as found in section 4.

Other legislation such as the COC Act now recognises that children's maturity does not develop along stringent developmental lines according to their age. Thus any reference to 'age and understanding' should be removed from the legislation and the reform of this area of the Adoption Act should be modeled on section 6 of the COC Act and also section 7 (appointment of lawyer to represent the child).

As the type of adoptions taking place has changed significantly, and only a small proportion of adoptions are now stranger adoptions, it is appropriate that children have the opportunity to consent, refuse to consent, or abstain from consenting to their adoption. Rather than fixing an arbitrary age as to when a child is capable to consent or otherwise, the test should be based on whether the child is deemed *Gillick* competent. The test is that a child must not only understand the nature of what is being decided, but also understand its implications. Once a child has sufficient understanding and maturity then the child has the capacity to make decisions of his or her own and the overriding discretion is to lie with the Judge as to whether the adoption is in the welfare and best interests of the child.

Reform to the Adoption Act is well overdue. Ensuring the suggestions discussed in this paper are included in reform of the Adoption Act, will mean greater advancements of children's rights, greater consistency between legislation affecting children, and it will ensure New Zealand adheres to its international obligations. In the interim prior to reform, the suggested interpretations of the COC Act should be applied during Adoption Proceedings. This will seek to promote the rights, welfare

[116] Care of Children Act 2004, s. 4(6).

and best interests of children in New Zealand.

Conclusion

It is clear that the legislation governing adoption in New Zealand is in grave need of reform. The Act must move forward from the policy of the 1950s to the practice and research of the present day. At the forefront of this reform must be the rights of children. It is essential that children's rights and well being are elevated and no longer capable of being so easily overridden by parental rights. Children must have a voice within the legislation, an opportunity to express this and a means of doing so. An important aspect of this is giving children who are deemed capable an opportunity to consent or refuse to consent to their adoption. It is also essential that any adoption law reform addresses all aspects of children's rights, not only those focused on within this paper.

This paper recommends that the welfare and best interests of the child must be the first and paramount consideration in adoption proceedings, that the child must be given reasonable opportunity to express their views and have these placed before the court and that a child who is deemed Gillick competent should have the opportunity to consent, refuse to consent, or abstain from consenting to their adoption. These changes need to be facilitated through amendments to legislation, procedures, judicial training, and through the allocation of resources.

In conclusion the time is well overdue for adoption law to be transformed into an Act applicable within today's society, culture, and diverse needs. This law should strive to promote a more child-centered approach and ultimately give prominence to children's rights and well being.

'Ui mai koe ki ahau he aha te mea nui o tea o,
Maku e ki atu he tangata, he tangata, he tangata!
Ask me what is the greatest thing in the world, I will reply:
It is people, it is people, it is people!'

COUNSEL COMMENT

KATHERINE VENNING*

Introduction

In 1998, one of New Zealand's worst serial rapists Malcolm Rewa was found guilty of several counts of rape. After his conviction and before sentencing, both his defence counsel appeared on *Holmes* and said they believed he was innocent on some counts.[1] This was a clear example of inappropriate counsel comment to the media. The comments on national television caused public outcry.[2] The New Zealand Bar Association censured the barristers involved.[3] Nine years on, the growing interest of the media in criminal trials[4] and the subsequent temptations and pressures on counsel in such trials to speak to the media has led to an increased number of incidents of inappropriate counsel comment.[5] Despite this, the current situation is that there is no clear guidance for counsel in New Zealand as to when it is appropriate to comment and what it is acceptable to comment on.

The purpose of this paper is to discuss the issues that should be considered with a view to proposing guidelines for counsel comment in

* Candidate for BA/LLB(Hons), University of Auckland. The author would like to acknowledge the assistance of Simon Mount of Meredith Connell and Associate Professor Rosemary Tobin, Faculty of Law, University of Auckland.

[1] Susan Wood, Interview with Barry Hart and Paul Dacre (TVNZ Holmes Programme, Auckland, 1 June 1998).

[2] One Network News Item, TVNZ, 2 June 1998.

[3] See discussion below at C5.

[4] Professor Judy McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers" Paper presented to New Zealand Law Society Seminar: 'Dealing with the Media', New Zealand, November 1999, 21.

[5] For example: "I can stop Field trial – Lawyer" *The New Zealand Herald* (Auckland, New Zealand, Friday 25 May, 2007).
<http://www.nzherald.co.nz/topic/story.cfm?c_id=1&objectid=10441737> last accessed at 29 July 2008.
"Lawyer who lost case will decide on Bain Retrial" *The New Zealand Herald* (Auckland, New Zealand, Saturday 12 May 2007).
<http://www.nzherald.co.nz/topic/story.cfm?c_id=124&objectid=10439317> last accessed 29 July 2008
Marcus Lush, Interview with Peter Williams QC (RadioLIVE, 23 August 2007).

New Zealand. It is a very relevant issue due to the place the media holds in society, and the fact that its dominance will surely only increase in the future.[6] Hopefully such discussion could lead to guidelines which would prevent the situation in New Zealand becoming like that in America, where some criminal trials have turned into a media circus.[7]

Although there are certainly issues concerning counsel comment in respect of civil trials[8], the focus of this paper will be on counsel comment in respect of criminal trials. Generally, it is criminal trials which the media are most interested in because of the public fascination with crime news.[9] Therefore, it is counsel involved in criminal trials who experience the most pressure from the media, or the most temptation, to comment on the trial they are involved in.[10]

The first part of this paper will explore the special nature of counsel comment in respect of criminal trials and issues that arise from this. The first two issues considered are the conflict between the right to a fair trial and freedom of expression and the effect of counsel comment on different stages of the trial process. Next, issues arising in respect of counsel comment involving practitioner's duties are discussed, followed by a discussion of issues particular to the prosecution and the defence in a criminal trial.

The lack of guidelines in New Zealand contrasts with the situation in each of the jurisdictions to which the New Zealand legal system is most closely aligned. Thus the second part of the paper is dedicated to examination of guidelines in Australia, the United Kingdom, the United States and

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[6] Scott L Rouse "The Rising Problem of Abusive Attorneys and Trial Publicity" (1997) 21 J. Legal Prof. 267, 267.

[7] Denese Bates QC "Interviews with the Media: Lawyers' Legal and Ethical Duties" Paper presented to New Zealand Law Society Seminar: 'Dealing with the Media', New Zealand, November 1999, 1.

[8] John Burrows and Ursula Cheer *Media Law in New Zealand* 5th ed, (Oxford University Press, Melbourne, 2005) 415. See also: Christian Cormier "The Media and Solicitors: To Talk or Not To Talk" [2004] The Singapore Law Gazette 25, 28. This article discusses the issue of counsel comment in terms of civil litigation. It suggests that guidelines for counsel comment in respect of criminal trials could also apply to civil proceedings. It is possible that if guidelines for criminal proceedings were developed in New Zealand, they could also apply to civil litigation.

[9] McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers", above n 4, 21.

[10] Ibid 26.

Canada. This is followed by an analysis of certain aspects of these guidelines, with a view to how they could inform potential guidelines for New Zealand.

The third part of this paper outlines a proposal for New Zealand. The traditional position of counsel's interaction with the media is outlined, and the current position in New Zealand is set out. This is followed by an argument for the importance of guidelines for New Zealand and a potential outline for guidelines. Finally, practical issues which arise in respect of guidelines in New Zealand are discussed.

The paper will then conclude that there is clearly a need for and an opportunity for guidelines for counsel comment to be developed in New Zealand. These must be developed bearing in mind the importance of fundamental rights, the implication of different stages of the trial process and the respective duties of the defence and prosecution counsel. The analysis of the overseas experience should inform the substance and structure of the guidelines, which would have three elements.

A. The special nature of counsel comment

For the purposes of this paper, the term 'counsel comment' refers to information disclosed to various forms of media by counsel and covers press releases and written materials as well as interviews.

The issue of counsel comment is important because what is said by trial lawyers has a unique capacity to create prejudice.[11] Traditionally, the legal profession has been viewed with respect and held in high regard in the community. Because of this, the public generally accepts comments made by counsel because they are seen to be coming from a source of reliable information.[12]

Due to their close proximity to the trial, the media also regard counsel as a reliable source of information.[13] This means that the media aggressively pursue them for their point of view, particularly outside the courtroom

[11] American Bar Association Standards for Criminal Justice : Fair Trial and Free Press, 3rd ed, August 1991, ABA Criminal Justice Standards Committee, 6.
[12] Roscoe C. Howard, Jr "The Media, Attorneys and Fair Criminal Trials" (1995) 4 Kan JL & Pub Pol'y 61, 67.
[13] *Hodgson v Imperial Tobacco Ltd* [1998] 1 W.L.R 1056, 2 All E.R. 673.

which often generates the most sensational coverage.[14] There are both beneficial and harmful consequences of this special nature. For example, a benefit could be that what counsel say could enhance the general public's understanding of the legal system.[15] However, if a lawyer were to use publicity to promote his or her own side of a case in a manipulative fashion, the special nature of counsel comment could become harmful.[16] Either way, the weight put on counsel comment by the public and the media means it is essential that counsel are aware of when it is appropriate to comment and what should be said.

1. Media interest in criminal trials

Although counsel comment can arise in both civil and criminal trials, it is generally criminal trials that attract the most media attention and therefore it is usually in the context of criminal trials that counsel make statements to the media.[17] Criminal trials are covered extensively and eagerly by the media because they often involve sensational topics such as sex and murder.[18] The public demand for such news is high, so it is commercially viable for the media to report on criminal trials.[19] The media will report newsworthy trials regardless of whether practitioners make statements or agree to interviews. Given this, there are advantages in providing accurate information and assisting with interpretation.[20]

2. The right to a fair trial and the right to freedom of expression

In a democratic society, the right to a fair trial and the right of the press to have freedom of expression are both fundamentally important. These two rights intersect in the context of criminal trials.[21] The role of the media in

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[14] Paul Murray *Electronic Media Coverage of Courts and the Role of Counsel-A Survey of the Possible Impacts* (LLB (Hons) Dissertation, The University of Auckland, 2003) 39.
[15] Richard Stack "The Uneasy Alliance of Attorney and Reporter, or when Perry Mason Meets Lois Lane: Working with the Media: Challenges and Opportunities" (2003) 27 The Champion 22, 23.
[16] Ibid 23.
[17] Judy McGregor *Crime News as Prime News in New Zealand's Metropolitan Press,* Legal Research Foundation, 1994, 1.
[18] McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers", above n 4, 21.
[19] McGregor, *Crime News as Prime News,* above n 17, 2.
[20] Howard, Jr, above n 12, 65.
[21] Kiriana Harlow *Contempt of Court in New Zealand: Criminal Trial Publicity: How Far Can the Media Go?* (LLB (Hons) Dissertation, The University of Auckland, 2006).

criminal trials is a very important one. It acts as a watchdog for the public, guarding against a miscarriage of justice by exposing participants and processes in the criminal justice system to public scrutiny. Therefore, courts are often unwilling to place direct limitations on the freedom exercised by the news media as this would endanger the principle of 'open justice'.[22] However, the media can potentially also interfere with the fair administration of justice.[23]

The right to a fair trial is guaranteed by s25(a) of the Bill of Rights Act 1990. It is a fundamentally important right.[24] The Court of Appeal in *Gisborne Herald Co Ltd v Solicitor General* [1995] 3 NZLR 563 emphasised the importance of this right because it is not only for the private benefit of the accused, but is essential for public confidence in the integrity of the justice system.[25] In the criminal justice system, the right to a fair trial has been jealously guarded by the courts.[26] It has been observed that the right to a fair trial is as near to an absolute right as any which can be envisaged.[27]

The right to freedom of expression is codified in the New Zealand Bill of Rights Act 1990.[28] It is relevant to the discussion for two reasons. First, although freedom of the press is not expressly mentioned in section 14, it is an important aspect of the right of freedom of expression.[29] The right of the press to report on judicial proceedings is fundamental to the rights of those involved in proceedings as well as to the rights of the public,

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[22] *Sheppard v Maxwell* 384 US 333 (1966) 349.
[23] Simon Mount, "The Interface Between the Media and the Law", [2006] NZ Law Rev 413, 422.
[24] Paul Rishworth et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 664.
[25] *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 569.
[26] *Burns v R & Ors* [12 December 2001] CA, 308-00 [10].
[27] Ibid [10]**,** *R v Lord Chancellor*, *ex parte Witham* [1997] 2 All ER 779, 787. More recently observed in *R (on the application of Bewry) v Norwich City Council.* [2001] EWHC Admin 657, CO/3986/00, 23. But see Don Mathias "The Accused's Right to a Fair Trial: Absolute or Limitable?" [2005] NZ Law Rev 217, 218. Whether or not this actually *is* an absolute right is debatable. Mathias argues that there are many examples of dicta which support the proposition that the right to a fair trial may be limited and can be balanced against competing rights and values. However, he expresses the view that this does not mean that an accused may have to accept something less than fairness.
[28] New Zealand Bill of Rights Act 1990 s14.
[29] The Court of Appeal acknowledged this in *Auckland Area Health Board v Television NZ Ltd v Attorney General* [1995] 2 NZLR 641 (CA).

which has an interest in maintaining the integrity of the judicial system.[30] Second, it is relevant in respect of counsel's right to exercise freedom of expression as a citizen.

In respect of counsel comment, the fair trial and freedom of expression rights can conflict. The issue is which right is to prevail. A 'balancing exercise' is required, as there is significant public interest in the affirmation of each.[31] In terms of the right to a fair trial, the assurance of this right is essential for the preservation of an effective justice system. Similarly, freedom of expression and freedom of the press as a means for comment on public issues are invaluable to our democratic system.[32]

Although this balancing exercise is difficult, there are several authorities that support the conclusion that the right to a fair trial is paramount.[33] In *Gisborne Herald Co Ltd v Solictor-General* the Court of Appeal said that when balancing the values of the right to a fair trial and free press, both values should be accommodated as far as is possible.[34] However, they confirmed that the rule in New Zealand is that "where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial."[35]

Although overall the right to a fair trial is dominant in terms of counsel comment, these rights carry different weight at different stages of the trial process.[36] At the post trial stage, the right to freedom of expression arguably carries more weight.[37] However, for the majority of the trial process the right to a fair trial is the most important right.

This conclusion, that the right to a fair trial is paramount, seems reasonable when counsel comment to the media is at issue. Although the weight attributed to each of the rights may differ from situation to

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[30] Rishworth et al, above n 24, 336.
[31] *Burns v R & Ors* [12 December 2001] CA, 308-00 [8].
[32] *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 571.
[33] ibid 569; *R v Liddell* [1995] 1 NZLR 538, 547.
[34] *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 571.
[35] Ibid 575.
[36] See above at A2
[37] John McGrath QC "Contempt and the Media: Constitutional Safeguard or State Censorship?" [1998] NZ Law Rev 371, 384.

situation,[38] it is difficult to imagine a situation where it would be more important for the press to be able to report something that a practitioner disclosed than for the fairness of a trial to be protected.

(a) Counsel comment and freedom of expression

The issue of counsel comment obviously arises from interactions between counsel and the press in respect of what is reported about criminal trials. The reason that guidelines are being considered to limit what counsel may say to the media as opposed to limiting what the media can report is that freedom of expression will be least infringed in this way.[39]

Contrary to the position in America,[40] in New Zealand it is unlikely that placing limits on what practitioners can say to the media in their capacity as counsel would be seen as infringing their freedom of expression as citizens. It is probably correct to assume that when acting in their capacity as counsel, lawyers are willing to accept reasonable limits on what they are able to say and do in the interests of justice. However, to ensure that limits are reasonable, it is arguable that guidelines should not act as a prior restraint or categorically restrict any speech, and should not be a bar to a practitioner challenging a restriction on speech in a post-statement contempt proceeding.[41]

3. Stages of the trial process

The potential impact of counsel comment on a criminal trial may depend on when the comment is made.[42] When counsel make comments to the media at a certain point of a trial, this creates an expectation in the media that in other cases, involving different counsel, they will have access to the same type of information.[43] This could put pressure on members of the profession to disclose inappropriate material to the media at inappropriate times because it has become the norm. This is a very real

[38] Harlow, above n 21, 12.
[39] There are other limits on counsel when acting in their professional capacity. Therefore it is not unreasonable. See discussion of duties at 1.4.
[40] American Bar Association Standards for Criminal Justice, above n 11, 5.
[41] Ibid 4.
[42] See Director of Public Prosecutions Western Australia 'Statement of Prosecution Policy and Guidelines 2005' Appendix 6: Media Policy 7(f).
<http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005> last accessed at 29 July 2008.
[43] Interview with Simon Mount (Auckland, 11 August 2007).

possibility without guidelines, as in New Zealand. Consideration of issues arising in respect of counsel comment at each stage of the trial process is important as it may have bearing on the structure and substance of guidelines for New Zealand.[44]

For the purposes of this paper, the pre-trial period encompasses the period before bail applications, between bail applications and deposition hearings and between deposition hearings and the trial itself. During the trial refers to the duration of the trial itself. Post trial includes the period between the conclusion of a trial and before sentencing, and after sentencing before an appeal, as well as after the decision of any appellate court.

(a) Pre-trial

The starting point is that when a case is awaiting trial, no one involved in the trial, or in the media, should say anything that could prejudice the trial or the administration of justice as the matter is *sub judice*. This limits what counsel disclose prior to trial. Breach of this rule could amount to contempt of court.[45]

Publicity prior to trial is protected by the law of contempt because of the special nature of this stage of the trial process. It is at this point that interests are most focussed.[46] The right of the accused to a fair trial interest is at its most vulnerable,[47] as potential jury members may form their own opinions based on what they see or read in the press.[48] If it is

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[44] Guidelines in Western Australia recognise this. See: Statement of Prosecution Policy and Guidelines 2005, above n 42, 7(f).

[45] However, not all pre-trial publicity will amount to contempt. The test for this in New Zealand is set out in *Gisborne Herald Co Limited v Solicitor General* [1995] 3 NZLR 563, 567.

[46] Interview with Simon Mount (Auckland, 11 August 2007).

[47] See Nigel Lowe and Brenda Sufrin *The Law of Contempt,* 3rd ed, (Reed Elsevier Ltd, United Kingdom, 1996) 127. This is considered to be a particularly vulnerable stage because the lack of legal knowledge that juries have is thought to make them particularly susceptible to prejudice.

[48] Bates "Interviews with the Media: Lawyers' Legal and Ethical Duties", above n 7, 11. But see Michael Chesterman "Criminal Trial Juries and Media Reporting" (2005) 85 *Reform* 23, 25. However there is currently debate about the extent to which juries are actually affected by this. A research project carried out by the University of New South Wales and the Justice Research Centre explored the likely impact of media publicity in 41 jury trials of criminal cases. The research team concluded that jury verdicts were less influenced by media publicity than is often feared.

correct that jurors are influenced by pre-trial publicity, given the special nature of counsel comment it is likely that statements made by counsel connected to the trial would be especially harmful. Consequently it is vital that counsel do not disclose anything which could create a prejudicial atmosphere prior to the trial.

The interest in the fair administration of justice at this time is greater than at other stages.[49] The interests of the media are also intensified. As the trial is not yet underway, journalists do not have access to things presented in court, such as witness evidence. This means they have limited information, and may accordingly be more aggressive in their approach to seeking information about the trial at this stage.[50] Although the pre-trial stage is protected by the law of contempt, there is still a need for guidelines for counsel, as it is arguable that the law is not an effective control on the media, the police or the defence.[51]

Certain types of statements by counsel are particularly unsafe prior to a trial. These include statements about the character of the accused, and any information about an admission of guilt.[52] This type of statement is in a different category to innocuous information such as the accused's name and age.[53] This was recognised in *Hodgson v Imperial Tobacco Ltd,* when Lord Woolf M.R. emphasised that lawyers ought not to become engaged in commenting on proceedings, instead they should only communicate facts.[54] Guidelines for New Zealand should reflect this.

(b) During trial

It would be very unusual practice for counsel to openly make comments

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[49] New Zealand Law Commission *Reforming Criminal Pre-Trial Processes, Preliminary Paper 55* (2004) para 17. <http://www.lawcom.govt.nz> last accessed 29 July 2008.
[50] For example, they may pursue the accused for an interview or put pressure on counsel to make a statement or try to provoke a reaction from counsel about something disclosed by opposing counsel.
[51] The Lord Chancellor's Advisory Committee on Legal Education and Conduct, 1997. In *Arlidge, Eady and Smith on Contempt,* 3rd ed, (Sweet & Maxwell Ltd, London, 2005), 56.
[52] Statements of this nature are prohibited in the United States by 34.2 a), b) of the *National Prosecution Standards*, 2nd ed, published by the National District Attorneys Association.
[53] Statements of this nature are deemed appropriate in the Unites States by 34.1 a) of the *National Prosecution Standards*, 2nd ed, published by the National District Attorneys Association.
[54] *Hodgson v Imperial Tobacco Ltd* [1998] 1 W.L.R.1056, All E.R. 673.

to the media in respect of a trial they are involved in while it is before the court.[55] At this stage it is more likely that counsel will try to influence the way that a trial is reported by 'leaking' information to the media.[56] In a survey of trial lawyers at least one Auckland practitioner admitted to having a person in their team whose job was to 'leak' information to the media.[57] This practice is unethical and, if the 'leak' is of a prejudicial nature, could affect the fairness of a trial.

Guidelines for New Zealand should prohibit this practice. Further, guidelines should allow for appropriate and open interaction with the media so that there is no temptation to do this. This stage of the trial is important as there is a serious risk of miscarriage of justice. This could occur by the media reporting the trial in a manner which has been heavily influenced by counsel and is prejudicial to one side. If a juror saw it on the news at home it could unfairly influence them. This could result in a retrial, costing the taxpayer a lot of money and inconveniencing all those involved.[58]

(c) Post trial

The importance of what counsel say after trial should not be underestimated. Because the law of contempt is relaxed post trial, counsel may be less wary about comments they make to the media and any consequences of these.[59] Emotions are often high at this stage of the trial, which could lead to counsel making inappropriate statements.[60]

Although there is little danger of prejudicing a fair trial at this stage of the process there are other interests to be protected, such as confidence in the justice system. Between a verdict and before sentencing there is a very real risk of undermining the jury system. An example of this was when Barry Hart and Paul Dacre appeared on *Holmes* after their client Malcolm Rewa

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[55] It would conflict with the practitioners duty to the court. Rule 8.01 *Rules of Professional Conduct for Barristers and Solicitors,* 7th ed, Published by the New Zealand Law Society.
[56] The nature of such a 'leak' could be something like when a particularly interesting witness will give their testimony.
[57] Murray, above n 14, 84.
[58] Chris Darlow *Submissions of the New Zealand Law Society on the Criminal Procedure Bill* (2004) para 43(c).
[59] Lowe and Sufrin, above n 47, 161.
[60] Simon Moore, "Media in the Courtroom and Televised Trials" Paper presented to New Zealand Law Society Seminar: 'Dealing with the Media, New Zealand', November 1999, 41.

was convicted of several counts of rape in a jury trial.[61] The lawyers stated that their client was not guilty of those rapes. Such comment has huge potential to undermine public confidence in the jury system.

Between sentencing and an appeal the risk of prejudice to proceedings is minimal. There is no jury and there should be no risk of judges being influenced by any statements made by counsel to the media.[62] However, a successful appeal may result in a retrial, so comments made by counsel at this stage still have potential to prejudice the fairness of a retrial.[63] As soon as a retrial is ordered, the situation becomes highly sensitive again, as the process re-enters the pre-trial stage.[64]

It is generally accepted that a matter will continue to be *sub judice* until it is clear that no appeal will follow.[65]At the conclusion of proceedings the freedom to comment on and criticise judgements is of great importance. The only risk that inappropriate counsel comment poses at this stage is if it creates prejudices or interferes with an unrelated trial that is pending.[66]

Another instance where counsel may be tempted to comment at the conclusion of proceedings is when a trial has resulted in the acquittal of their client. Any counsel comment at this stage should have regard to the balance between the importance of freedom to comment on concluded proceedings and the risk of undermining public confidence in the justice system. After the recent acquittal of Chris Kahui, his counsel released several statements to the media. An example of a statement that was appropriate given the importance of freedom of expression was when Lorraine Smith said that she would lodge a complaint with the Independent Police Complaints Authority about the way police handled the murder inquiry.[67] An example of a statement that was arguably

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[61] Susan Wood, Interview with Barry Hart and Paul Dacre (TVNZ Holmes Programme, Auckland, 1 June 1998).
[62] Lowe and Sufrin, above n 47, 165.
[63] Nicholas Till, "Interviews with the Media – Practitioners' Duty to the Court" (1998) LawTalk, 31, 31.
[64] Lowe and Sufrin, above n 47, 163.
[65] Jennifer Tunna, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9 Canterbury L Rev 79, 91.
[66] Lowe and Sufrin, above n 47, 168.
[67] "Kahui defence to lodge complaint" *Otago Daily Times* (Otago, New Zealand, Saturday May 24 2008) <http://www.odt.co.nz/7011/kahui-defence-to lodge-complaint-over-police-actions>last accessed 29 July 2008.

inappropriate was when Michele Wilkinson-Smith revealed to the media that there was a doctor with specialist knowledge of brain injuries on the Kahui jury.[68]These examples show that although counsel may comment at their own discretion post-trial, perhaps some objective guidance in the form of guidelines would be desirable.

4. Practitioner's duties

Incidents of counsel comment often arise when counsel use the media to promote their client's interests.[69] While this may be admirable in respect of the duty of zeal[70] that lawyers owe to their clients, it can also be inappropriate in respect of the other duties which practitioners have.[71] It is necessary to consider the duties which counsel should be mindful of, and their relative weight as these duties are currently the only guidance that counsel have in terms of counsel comment.

Rule 8.01 of the Rules of Professional Conduct sets out the key duties of all New Zealand practitioners and their relative weight:[72]

> In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client.

This makes it clear that the primary consideration for any litigator must be their duty to the court. The commentary to this rule suggests that the main reason for this is so that practitioners behave respectfully in a way which does not bring the court into disrepute.[73] Consideration of this duty to the court has direct relevance to the issue of counsel comment

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[68] "Brain Specialist on Kahui jury" *Sunday Star Times* (Auckland, New Zealand, Sunday May 25 2008) <http://www.stuff.co.nz/print/4559394a6442.html.> last accessed at 29 July 2008.
[69] "I can stop Field trial – Lawyer" *The New Zealand Herald* (Auckland, New Zealand, Friday May 25, 2007).
<http://www.nzherald.co.nz/topic/story.cfm?c_id=1&objectid=10441737> last accessed at 29 July 2008.
[70] Duncan Webb *Ethics, Professional Responsibility and the Lawyer,* 2nd ed, LexisNexis NZ Limited, Wellington, 2006, 35.
[71] For example, the overriding duty to the Court. Rule 8.01 *Rules of Professional Conduct for Barristers and Solicitors,* above n 56.
[72] Rule 8.01 *Rules of Professional Conduct for Barristers and Solicitors*
[73] Commentary to Rule 8.01 *Rules of Professional Conduct For Barristers and Solicitors,* above n 56, paras 2, 8.

because statements to the media are explicitly mentioned in the commentary:[74]

> A practitioner should not make any statement to the news media relating to proceedings, which have not been concluded, which may have the effect or may be seen to have the effect of interfering with a fair trial.

In the United Kingdom, there are signs that the courts are now prepared to recognise that commenting to the media when acting on behalf of a client is a legitimate extension of the lawyer's traditional role.[75] It remains to be seen whether New Zealand courts will do the same. In the meantime, a more traditional approach is favoured in New Zealand, reflected in the strong wording of Rule 4.05. This Rule talks about the practitioner's duty to their client in terms of comment to the media. It states: [76]

> A practitioner may not, without the specific consent of a client, give any interview or make any public statement relating to the client or the affairs of the client, whether or not their client is involved in a matter of public knowledge.

The commentary to this rule states that it is the practitioner, not the media who should obtain the consent. The consent must be a fully informed one.

5. The prosecution perspective

In addition to the duties on all litigators as stated previously, there are further duties on the Crown. Fundamentally, there is a duty to prosecute criminal cases dispassionately and with scrupulous fairness.[77] Clearly, media publicity could prejudice the fairness of a trial[78], thus the prosecution also have a duty to avoid any conduct that may amount to contempt of court.[79] Although it may seem that these duties could be

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[74] Ibid para 7.
[75] *Regan v Taylor* [2000] E.M.L.R. 549. Discussed in *Arlidge, Eady and Smith on Contempt,* above n 52, 56.
[76] Rule 4.05 *Rules of Professional Conduct for Barristers and Solicitors,* above n 56.
[77] Rule 9.01 *Rules of Professional Conduct For Barristers and Solicitors,* above n 56.
[78] Christine Gordon, "The Prosecutor and the Media: Balancing Free Speech and Freedom of the Press" Paper presented to New Zealand Law Society Criminal Law Symposium, Auckland, New Zealand, November 2006.
[79] Commentary to Rule 8.01 *Rules of Professional Conduct For Barristers and Solicitors,* above n 56, para 8.

satisfied by avoiding publicity, prosecutors also have a duty to act consistently with the principle of open justice.[80] The importance of this principle was expressed in New Zealand in *Broadcasting Corporation of New Zealand v Attorney General* [1982] 1 NZLR 120 where Woodhouse P quoted the classic articulation of the principle from the House of Lords in *Scott v Scott* [1913] AC 417, 477 (HL).[81]

Because prosecutors perform a public function, it is arguable that they have a duty to uphold the principle of open justice on two bases. First, as part of the criminal justice system, they share the duty that attaches to the system as a whole.[82] Second, on the basis that the prosecution has a responsibility to ensure the public has reasonable access to information about their work, as their work can involve quasi-judicial functions.[83] Although there is no such duty codified in the Rules of Professional Conduct or created at common law, the principle of open justice is surely a genuine interest which should be taken into account by the prosecution when responding to media requests for comment.[84]

A pertinent question in respect of prosecutor's interaction with the media is whether or not they should respond to inaccurate information disseminated in the press by the defence. When this occurred during the Pitcairn Island sex trials, the prosecution was able to correct inaccurate information at a later date after the trial.[85] This does not seem to be entirely satisfactory. If the inaccurate information published by the defence during the trial prejudiced the fairness of the trial, it seems odd that the prosecution is only able to correct this information at the conclusion of the trial. The American National Prosecution Standards stipulate that nothing in the guidelines should be deemed to preclude the prosecutor from making reasonable and fair response to comments of defence counsel or others.[86] This gives the prosecutor wide discretion.

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[80] Gordon, above n 78, 2.
[81] In *Scott v Scott,* Lord Shaw quoted Jeremy Bentham and said: "...Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."
[82] Joseph Jaconelli *Open Justice: A Critique of the Public Trial,* (Oxford University Press, New York, 2002) 63.
[83] Gordon, above n 78, 3. An example of this is the decision to accept a guilty plea to a lesser charge and thus determine the appropriate level of culpability for a crime.
[84] Gordon, above n 78, 4.
[85] Ibid 21.
[86] *National Prosecution Standards*, above n 53, para 34.3.

There is another argument in favour of prosecutors being able to make statements to the media. This is that the prosecutor has an affirmative duty to maintain and improve the criminal justice system. In order to fulfil this duty it may be necessary for the prosecutor to be allowed to criticise aspects of the justice system that warrant improvement. This is subject to the discretion of each prosecutor.[87] This could be an issue to be considered in respect of guidelines in New Zealand.

6. The defence perspective

Counsel for the defence do not face the same restraints that prosecuting counsel do[88]as they do not have special duties beyond the general duties to the court and their client in respect of media interaction.[89] This lack of control is one of the reasons why defence lawyers are subject to pressure from the media to comment, and feel greater temptation themselves to disclose information to the press.[90] Without guidelines, it is very difficult for defence counsel to interact with the media in a consistent manner. At present, inconsistencies arise amongst defence lawyers who adopt vastly different approaches to the media. Some go so far as to 'leak' materials to the press. In contrast, others attempt to avoid the media entirely, believing that their client's interests are better served without it.[91]

There are also ethical issues which arise for defence counsel, particularly in respect of dealings with the media. The potential for media exposure to enhance a practitioners' public profile is obvious.[92] The name recognition gained as a result of making comments in the press in a high profile trial often attracts new clients.[93] Thus there is potential for comments to be made in the interests of self-promotion. This is problematic, as any comment made to the media by a defence lawyer should be in the best interests of their client.[94]

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[87] Ibid 4.
[88] John Sprack *Emmins on Criminal Procedure* 9th ed, Oxford University Press, New York, 2002, 280.
[89] See Rule 8.01 *Rules of Professional Conduct For Barristers and Solicitors,* above n 56.
[90] Howard Jr, above n 12, 62.
[91] Murray, above n 14, 84.
[92] Ibid 88.
[93] Howard Jr, above n 12, 64.
[94] Webb, above n 71, 35.

Another reason why the defence often use the media more blatantly than the prosecution is that defence counsel sometimes feel there is a power disparity between the prosecution and themselves.[95] The perception that the prosecution has more resources may make the defence turn to the media as a valuable resource, especially as they know that prosecutors are often more limited in their ability to do this.

Granting interviews to the press and making statements is also popular among defence lawyers due to their reluctance to respond to the media by saying 'no comment'. There is a general perception amongst defence counsel that saying 'no comment' to the media often implies that their client is guilty, and that they have something to hide.[96]

Comments by Elias CJ in a recent New Zealand case could further encourage defence lawyers to speak to the media about their client. In *Solicitor-General v W&H Specialist Publications,*[97] the Chief Justice said that expressions of innocence by those accused of crime and by people close to them a lawyer will not usually constitute contempt. It is likely that an accused's lawyer will be considered a person close to them. This could result in defence lawyers speaking more freely about clients as the deterrent effect of the law of contempt is removed.

For the reasons discussed, defence counsel may face more temptation to use the media to generate publicity in criminal trials. Coupled with the fewer restraining factors on the defence as opposed to the prosecution,[98] this makes comment by the defence potentially more dangerous and prejudicial than comment from the prosecution.

An important question when considering the shape of future guidelines for counsel comment in New Zealand, is whether there should be separate guidelines for the prosecution and the defence given that their roles are so different? This question was considered by the American Bar Association when compiling the Standards for Criminal Justice, Fair Trial and Free Press.[99] A double standard for attorneys was rejected for several

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[95] Gerard E Lynch "Our Administrative System of Criminal Justice" (1998) 66 Fordham L Rev 2117, 1231.
[96] Till, above n 64, 32.
[97] [2003] N.Z.A.R. 118 at 23.
[98] See discussion at A5.
[99] American Bar Association Standards for Criminal Justice, above n 11, 7.

reasons. The standard applies equally to all lawyers. A separate standard for the defence and prosecution was rejected on policy grounds because there is a presumption in the adversarial system that rules apply equally to both sides. Also, it was feared that giving one side a preferred position with respect to out of court statements would encourage that side to exploit the advantage, thus endangering the notion of a fair trial. Finally, there was no apparent way to enforce a dual standard and make it work.[100] In light of this, it is clear that any guidelines in New Zealand should apply equally to all practitioners.[101]

B. The overseas experience

The current position in New Zealand contrasts with the position of the jurisdictions which New Zealand is most closely connected to; Australia, the United Kingdom, the United States and Canada. This strengthens the case for guidelines in New Zealand. Aspects of the overseas guidelines themselves may provide a guide for the form of future guidelines for New Zealand.

1. Australia

Within Australia, each state and territory has its own media guidelines for prosecutors. For the purposes of this paper, the discussion will be limited to the guidelines of New South Wales and Western Australia.

The starting point for the New South Wales guidelines for prosecutors is that contact with the media should not be avoided because the public have a right to know what is happening in the criminal justice process.[102] However, this seems to be discretionary as the guidelines later state that there is no obligation to provide information to the media. This is then qualified by the statement that: "prosecutors need to be aware of the limits of their professional obligations and should be aware of the way in which their comments could be reported." The guidelines then

[100] Ibid 7.
[101] Mount, "In Search of the Soundbite" [2007] NZLawyer, Issue 61. 20, 21.
[102] Director of Public Prosecutions New South Wales 'Prosecution Guidelines 2007' 57. <www.odpp.nsw.gov.au/Guidelines/Guidelines.html>last accessed 29 July 2008.

acknowledge the importance of Bar Rule 59 of the Barristers' Rules, which all barristers and solicitors are bound by.[103] Under this rule, which applies to both prosecution and defence counsel, a barrister may answer unsolicited questions from journalists concerning proceedings in which there is no possibility of a jury ever hearing the case or any re-trial. However, the barrister must limit the answers to information such as the identity of the parties, the nature of the issues and the judgement given including reasons for the judgment.[104] Furthermore, the answers must be concise and accurate and should not express the barrister's own opinions.[105]

The body of the guidelines are set out by the Director of Public Prosecutions and apply only to prosecutors. Prosecutors are allowed to disclose to the media information already given in open court, statements, documents and copies of some exhibits. Prosecutors are not permitted to discuss the probable result of a trial, the likelihood of appellate proceeding being brought and the correctness of any judgment of the court. The guidelines state that discretion should be used in relation to sensitive material such as medical reports and pre sentence reports. The guidelines also provide that the public release of information must be consistent.

The guidelines set out by the Director of Public Prosecutions for Western Australia state that the public's interest in information must be balanced against the need to maintain the integrity of the criminal process, and the tenets of fairness and justice.[106] The guidelines state that prosecutors may use their discretion as to the information they supply. Prosecutors should not express opinions, and should not reveal anything more than the facts and what was disclosed in open court. Interestingly, the guidelines state that the type and nature of the information that can be disclosed will depend upon the stage and nature of the proceedings. The guidelines then set out what is appropriate to say at each stage.

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[103] New South Wales Barristers' Rules 2003. Rule 59: "A barrister must not publish, or take steps toward the publication of, any material concerning current proceedings in which the barrister is appearing or has appeared." The rule then sets out some exceptions.
[104] Ibid 59(b)(1)
[105] Ibid 59(b)(3)
[106] Statement of Prosecution Policy and Guidelines 2005, above n 42, para 1.

In contrast to the guidelines of the Australian states, the Crown Prosecution Service in the United Kingdom employs a centralised model. It has a national press office which provides a centralised 24-hour 365-day a year service. There are also area communication managers and area press officers. Individual prosecutors are generally shielded from direct contact with the media.[107]

2. The United States of America

Although many states have their own media guidelines for attorneys,[108] for the purposes of this paper, it is the ethical rules published by the American Bar Association and the National Guidelines for Prosecutors which will be focussed on because these cover the whole of the United States.

The American Bar Association publishes guidelines in the form of ethical rules called the 'Model Rules of Professional Conduct.'[109] These arose out of the case *Sheppard v Maxwell* in which the Supreme Court noted the pervasiveness of the media and the prevalence of prejudicial news comment on pending trials.[110] They cover both the prosecution and the defence. Rule 3.6 deals specifically with trial publicity, and the practitioners' role in this. It states that a lawyer should not make extrajudicial statements which will be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.[111] It then elaborates on matters which a lawyer may comment on, including the claim involved, the identity of the person, and any information contained in a public record.[112]

In addition to these there are also national guidelines for prosecutors. Under these, lawyers are permitted to comment on matters such as the name, age, residence and occupation of the accused, the substance of the charge and the circumstances surrounding the arrest.[113] The guidelines

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[107] Gordon, above n 78, 6.
[108] For example; Texas and California.
[109] American Bar Association, Model Rules of Professional Conduct (1995).
[110] *Sheppard v Maxwell* 384 US 333, 362.
[111] Model Rules of Professional Conduct, above n 109, Rule 3.6.
[112] Ibid (b)1, 2.
[113] *National Prosecution Standards*, above n 53, 34.1 (a),(b),(e).

then identify information that should only be released if it is necessary to do so to fulfil the prosecutors obligations to protect the rights of the accused and the right of the public to know about criminal trials.[114] This information includes statements about the character of the accused, the credibility of witnesses and information about arguments that will be used at trial.[115] There are similar guidelines in Canada.[116]

3. Analysis of the overseas experience

Consideration of the guidelines from other jurisdictions informs the consideration of guidelines for counsel comment in New Zealand. Australia, The United States and Canada have all developed guidelines in addition to the ethical rules of the profession. The guidelines have worked successfully alongside the rules. This suggests that guidelines could also be developed in New Zealand to be complementary to the Rules of Professional Conduct.[117]

Furthermore, the content of the overseas guidelines provides a guide to what may be appropriately included in New Zealand guidelines. For example, the Western Australia prosecution guidelines acknowledge that counsel comment can have different effects at different stages of the trial process, and provides specific guidelines on what it is appropriate to say at each stage of the trial process. [118] It may be desirable to include this level of specificity in New Zealand guidelines.

There is another issue which arises from analysis of overseas guidelines which should be considered in order to ensure the most appropriate guidelines are formulated in New Zealand. That is, several of the

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[114] Ibid 33.1.

[115] Ibid 34.2 (a),(d),(f).

[116] Dubin Committee: Protocol Regarding Public Statements in Criminal Proceedings. <www.paneljusticeandmedia.jus.gov.on.ca/> last accessed 29 July 2008. These cover both prosecution and defence counsel, and are very similar to the American guidelines. Lawyers should not make comments as to: b)i the character of the accused; b)ii the existence of a confession and b)v opinions on the merits of the case. Matters which lawyers may discuss include: c)i the nature of the charge; c)iii the name, age and residence of the accused and c)v the time and place of the arrest.

[117] Particularly Rule 4.05 and 8.01 of the *Rules of Professional Conduct For Barristers and Solicitors,* above n 56.

[118] Statement of Prosecution Policy and Guidelines 2005, above n 42, para 8. This outlines what may be commented on before a trial or plea. Para 12 sets out what may be commented on in the event of a guilty plea.

guidelines set out firm rules but then make these seemingly redundant by saying that they are subject to the discretion of the individual lawyer.[119] In respect of guidelines for New Zealand, an issue may arise as to how much discretion an individual lawyer should be afforded, given that the requirement for consistency of comments made by the prosecution has also been a feature of overseas guidelines.[120] An answer may be that the New Zealand guidelines could constitute the outer limits of what it is appropriate for counsel to comment on, and that within these boundaries, practitioners can exercise discretion as to what they say.

In referring to the overseas experience, it should also be noted that the Western Australian Bar Association has recently reverted to the traditional position in respect of barristers speaking to the media.[121] The Association has ruled against barristers discussing with the media 'any matter in respect of which the barrister has provided, is providing, or expects in the future to provide professional services.' The rationale is that the barrister is not the client's mouthpiece, and that when a barrister is dispassionate it is clear they are not representing their personal views.[122] In my view it would not be desirable for New Zealand to follow this backward step. Australian media were quick to condemn this resolution as a muzzle on free speech. It is almost certain that the reaction would be the same here.[123] Furthermore, there should be no need for a complete ban on counsel comment if guidelines are formulated to ensure that counsel comment does not become a problem.

The unique position taken by the Crown Prosecution Service in the United Kingdom[124] is interesting to consider in respect of possible guidelines for New Zealand. However, it would probably be impossible to implement such a practice in New Zealand as to ensure consistency it

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[119] 'Director of Public Prosecutions New South Wales 'Prosecution Guidelines 2007', above n 102, 59. In relation to sensitive matters which are not covered by guidelines prosecutors should exercise discretion.

[120] The Crown Prosecution Service (UK), *Media Liaison Guidance for Area Communications Managers and Area Press and PublicityOfficers,* 5.

[121] Note this only applies to barristers, solicitors are still able to comment, provided the guidelines are followed.

[122] Justice P W Young , "Speaking to the Media" (2006) 80 ALJ 211.

[123] The idea of a blanket prohibition on counsel comment would be unpopular with both counsel and the media. It would be very difficult to justify.

[124] That is, operating a central press office so that prosecutors do not have to deal directly with the media.

would have to include both the defence and prosecution and would have to be nationwide which would make it very costly and inefficient.

A particularly useful model is Rule 3.6 of the Model Rules of Professional Conduct drafted by the American Bar Association. The very purpose of this rule was to strike a balance between the right to a fair trial and freedom of expression,[125] which has been identified in this paper as a pertinent issue which arises when considering guidelines for New Zealand. Further, Rule 3.6 contains a subsection which gives lawyers a 'right of reply' where a public statement would be necessary to mitigate adverse publicity.[126] This 'right of reply' situation has also been identified as a potential issue elsewhere in this paper.[127] Because of these issues, the efficacy of this rule in practice is of interest when considering whether New Zealand guidelines should take a similar shape. Both positive and negative views on this have been expressed in America. A positive view is that Rule 3.6 is well-adapted to stopping unnecessary pre-trial publicity.[128] Further, it has been upheld by an American court, which affirms its value.[129] However, it has also been criticised for having little practical effect on members of the bar because it has not been vigorously enforced.[130]

C. A proposal for New Zealand

1. The traditional position

Traditionally, it was not common for counsel to use the media to make extrajudicial comment in New Zealand.[131] This can be attributed to a more traditional and reserved approach by practitioners to their role. This role involved keeping the press out of the judicial process[132] and was

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[125] Rouse, above n 6, 274.
[126] Rule 3.6 (c) reads: 'A lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyers client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity'.
[127] See discussion at A5.
[128] Rouse, above n 6, 274.
[129] *Gentile v State Bar of Nevada* 501 US 1030 (1991).
[130] Rouse, above n 6, 275.
[131] Mount, "The Interface Between the Media and the Law", above n 23, 419.
[132] Howard, Jr, above n 12, 65.

succinctly summed up by a lawyer who said: "We make our arguments in the courtroom, not on the courthouse steps."[133] In addition to this, the media generally confined themselves to traditional boundaries of court reporting meaning they were not overly aggressive in the area of court reporting. [134] Court proceedings were generally not as open to the media; for example there was no in-court camera coverage.[135] Relationships between counsel and press were more aloof and there were generally more lifetime court reporters that understood court protocol and were respectful towards reservations around publicity.[136] Furthermore, counsel comment was regulated by a provision in the Code of Ethics which prohibited comment on a client's affairs without the consent of both the client and the President of the District Law Society.[137] These factors meant that counsel comment did not often occur.

2. The current position

The current situation in New Zealand is vastly different from the position that formerly prevailed. Over the past two decades, the media landscape in New Zealand has changed dramatically. This has been influenced by several factors. The rise of global media conglomerates has influenced the news media in New Zealand. As a result of deregulation the number of television and radio channels has increased, resulting in competition to attract viewers to news programs. [138] Several media commentators argue[139] that these factors have altered the culture of journalism in New Zealand to such an extent that there is an increased emphasis on entertainment and sensationalism in the news as opposed to information and the discussion of issues.[140]

In addition to this changed media landscape, the legal landscape changed significantly in 1990 with the enactment of the Bill of Rights Act. This has

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[133] Brendan Sullivan Jr, quoted in Mount, "The Interface Between the Media and the Law", above n 23, 419.
[134] Ibid 414.
[135] Ibid 417.
[136] McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers", above n 4, 28.
[137] R E Harrison, "The Mass Media and the Criminal Process: A Public Service or a Public Circus?" [1992] New Zealand Law Journal 271, 276.
[138] Mount, "The Interface Between the Media and the Law", above n 23, 414.
[139] McGregor, *Crime News as Prime News,* above n 17, 3.
[140] Ibid 3.

had a large impact on the media in New Zealand. Section 14 has allowed the media to be more assertive in pressing claims to freedom of expression and freedom of the press, as the courts are required to act consistently with this statutory right.[141] Although freedom of the press is not specifically mentioned in section 14, it is obviously an important aspect of the right to freedom of expression, and has been upheld as such by the Courts.[142] The result has been that the media have been able to publish with more freedom than ever before.[143]

Reporting of criminal trials in particular has changed significantly with the introduction of in-court camera coverage in 1995.[144] The media take more liberties than ever before when reporting crime.[145] Although journalists are able to cover trials more extensively within the courtroom with the introduction of televised court proceedings, this has not dampened their appetite for out of court coverage where the most sensational material is often generated.[146]

The above factors have all contributed to the changed media landscape in New Zealand in which practitioners are increasingly pursued by the media or feel able to approach the media themselves to give interviews or make comments.[147]

3. The importance of guidelines for New Zealand

Although practitioners in general are increasingly exposed to the media, there are vast differences in attitudes toward the media among the

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[141] Mount, "The Interface Between the Media and the Law", above n 23, 416.
[142] Rishworth et al, above n 24, 334.
[143] Mount, "The Interface Between the Media and the Law", above n 23, 417.
[144] Moore, above n 61, 35.
[145] For example, coverage of David Bain being granted bail in May 2007. The extensive reporting, and in particular the rather biased nature of it, was careless given that a retrial was being considered. See also McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers", above n 4, 27: Another example is the conduct of the media during the trial of Scott Watson for double murder. The press hassled the Watson family as they came and went from the courtroom. This treatment resulted in an altercation between the accused's father and a cameraman. This incident was then shown on the front page of the *Dominion Post*.
[146] An example of this was the media scrum outside the Auckland High Court in March 2007 when Clint Rickards was found not guilty of historic sex charges. Both he and his lawyer made controversial statements to the press which were widely reported.
[147] Bates, above n , 7.

profession. For example, there are some lawyers who would prefer to ignore the media altogether and have an uneasy, distrusting relationship with the press.[148]

In contrast, there are lawyers who are comfortable with the media and who have embraced the opportunity to interact with and use the media to advance their client's interest and their litigation strategy.[149]

Guidelines would also be beneficial for the media. If the media were assured of getting information from counsel involved in a trial it is possible they may become less aggressive, which could minimise the risk of prejudicing a fair trial.[150]

In this climate of intense interaction between journalists and practitioners and for the reasons stated above, there is clearly a need for guidelines for counsel comment in New Zealand.[151]

4. Proposal for guidelines

It is apparent from analysis of the overseas experience that guidelines in New Zealand should, ideally, be clear and detailed. If they are too narrow, they could be of limited use and may be criticised as a blanket prohibition on counsel comment.[152] If they are too vague, there is a danger that they will be exploited, or not be enforceable.[153] Striking the right balance will not be an easy exercise. But that should not deter an attempt to provide appropriate guidelines.[154]

It is proposed that guidelines for New Zealand[155] could take the following

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[148] McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers", above n 4, 28.
[149] Rouse, above n 6, 267.
[150] Interview with Simon Mount (Auckland, 11 August 2007).
[151] There is, of course, an argument in the alternative. See Till, above n 64, 32. Till suggests it should be up to the individual practitioner to exercise professional judgment as to when such comments are appropriate.
[152] Ibid 32
[153] Rouse, above n 6, 274.
[154] Mount, "The Interface Between the Media and the Law", above n 23, 436.
[155] Gordon, above n 78, 2. In trials where there are statutory restrictions on publication (for example, in sexual cases) these guidelines will obviously not have the same application.

format and consist of general principles, specific directions, and a practical procedural element.[156]

General principles would cover situations where practitioners are unsure as to whether it is appropriate for them to comment on a matter or not. These principles would ideally be linked with Rules 8.01 and 4.05 of the Rules of Professional conduct.[157] This would require practitioners to consider their duty to the court and to their client before disclosing information to the press. It would be desirable if, drawing on the American rules, the principles were drafted to acknowledge the issue of balancing the right to a fair trial and freedom of the press.[158] Media requests for counsel comment on policy issues surrounding a trial are an example of the situation in which these general principles could be used.

In conjunction with general principles, specific directions as to information which counsel can and can not disclose to the media would be required. Greater certainty would be achieved if these directions were to follow the format of the Western Australian guidelines and specify what can be disclosed at each stage of the trial process.[159] Within the constraints of this paper, it is not possible to set out specific directions as completely as they would be in formal guidelines. However, it is possible to give examples of the type of guidelines that might be included. These are informed by overseas guidelines, [160] and could resemble the following:[161]

Prior to and during a criminal trial, counsel may comment on the following matters:

i) The identity of the accused (unless suppressed), their age, occupation and residence.

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[156] Interview with Simon Mount (Auckland, 11 August 2007).
[157] For example, Rule 8.01, 4.05 *Rules of Professional Conduct for Barristers and Solicitors,* above n 56.
[158] Model Rules of Professional Conduct, above n 109, Rule 3.6.
[159] Statement of Prosecution Policy and Guidelines 2005, above n 42.
[160] I have borrowed heavily from the US *National Prosecution Standards*, above n 53, and the Director of Public Prosecutions New South Wales 'Prosecution Guidelines 2005' above n 102.
[161] These have been chosen as examples of specific directions because they appear in both the US and NSW guidelines, thus are quite important and a good starting point for consideration of what may be included in New Zealand guidelines.

ii) The charge faced by the accused and any plea that has been entered.
iii) The nature of orders made by the court in open court.
iv) In addition, counsel may provide copies of the transcript of evidence and summary of facts given in open court to the press, subject to any orders for suppression.

At this stage of the trial process, counsel should not comment on the following matters:

i) The character or reputation of the accused.
ii) The contents of any admission or statement attributable to the accused.
iii) Information about tactics or strategies to be used at trial.

At the post trial stage, and after sentencing, counsel may comment on the likelihood of an appeal, but should refrain from expressing their opinion on the correctness of a jury verdict.

In addition to general principles and specific directions, guidelines would be of more use if they contained a procedural element. This procedural element would be useful, as there is the potential for counsel who feel unconfident about dealing with the media to be caught off guard and say something inappropriate. Modelled on the United Kingdom Prosecution Service Guidelines, a procedural element to New Zealand guidelines could consist of a checklist for counsel to consult when they are required to deal with the media. These could include clarifying issues such as what publication the interviewer is representing and what topic they are seeking information on in advance in order to give careful considered answers.[162] This procedural element would obviously not be enforced, as it is purely intended to help counsel, and could be supplemented by things such as media awareness courses.[163]

5. Practical considerations for New Zealand guidelines

Guidelines for counsel comment in New Zealand will require consideration of several practical issues. The first is implementation. For guidelines to have credibility, they must have authority and come from a

[162] This is similar to the advice given in the Crown Prosecution Service (UK) Guidelines, above n 120, 9 and in McGregor "Combating, Coaxing and Coping with the Media: A Guide for Criminal Lawyers", above n 4, 32.
[163] Moore, above n 61, 36.

respected source. The New Zealand Law Society would be best placed to provide them,[164]perhaps in consultation with the Criminal Bar Association and the Solicitor General.[165] Alternatively, there could be an amendment to the Rules of Professional Conduct to provide for the issue.[166]

The second is enforcement and penalties for serious breaches. Although guidelines do not necessarily need to be enforceable to be useful,[167] to promote consistency and ethical conduct among members of the profession there would ideally be some means of enforcing them for serious breaches.[168]

There are several possible options for penalising serious breaches. Where lawyers have made statements which amount to contempt of court, proceedings may be commenced against them on that basis. However there are presently no reported cases of this happening which may suggest that this would not be the most appropriate option.[169] Another possible penalty is censure by the New Zealand Bar Association. This was the penalty imposed on Barry Hart and Paul Dacre after their appearance on *Holmes*.

Finally, a practical issue for consideration is the next step to make guidelines for counsel comment a reality in New Zealand. A consultation process is probably the best way to ensure that guidelines will be well considered and thus acceptable to members of the profession and the media. It is suggested that the Solicitor-General, the Criminal Bar Association, New Zealand Law Society and Bar Association and public relations professionals be included in the consultative process.[170]

Conclusion

This paper has sought to argue the need for New Zealand guidelines for counsel comment. Examples of counsel comment in the media are

[164] Till, above n 64, 32.
[165] Mount, "In Search of the Soundbite" above n 101, 21.
[166] Till, above n 64, 32.
[167] Interview with Simon Mount (Auckland, 11 August 2007).
[168] Rouse, above n 6, 275. For example, a breach that could harm client interests.
[169] Bates, above n 7, 18.
[170] Mount, "In Search of the Soundbite" above n 101, 21.

increasing yet there is currently uncertainty and inconsistency amongst the legal profession in dealing with the media.

The first section of this paper focuses on the special nature of counsel comment in respect of criminal trials and the issues that arise in this context which could influence consideration of New Zealand guidelines. In a democratic society it is necessary to consider the relative weights to be given to the right to a fair trial and the right to freedom of expression, particularly of the press. Both are fundamental rights, however the right to a fair trial must be the most jealously protected where counsel comment is concerned. The balancing exercise may be affected by the different stages of the trial process. At different stages the weight afforded to these rights may vary. Although each stage of the trial raises different issues in respect of comment, it is at the pre-trial stage that inappropriate counsel comment is particularly dangerous. New Zealand guidelines should recognise and reflect this.

The Rules of Professional Conduct detailing practitioners' ethical duties provide the only present limit on counsel comment. However because they were not drafted specifically to address the issue of counsel comment, there is still a need for specific guidelines. Counsel for the prosecution and defence occupy different roles in the adversarial system which raises different issues about their respective comments. Although there are different issues affecting each of them, guidelines should apply equally to both, and would promote consistency within the profession as a whole.

The lack of guidelines for counsel comment in New Zealand contrasts with the position in all of the jurisdictions to which our legal system is closest. There are guidelines which cover the issue in Australia, the United Kingdom, the United States and Canada. Analysis of aspects of the overseas experience with guidelines informs consideration of New Zealand guidelines. Although most of the overseas guidelines are drafted for the prosecution, New Zealand guidelines would cover both sides.

The media climate in New Zealand has changed considerably over the last few decades. The attitude of most counsel towards their interaction with the media has also changed. The position has been reached that sooner rather than later, a trial will be put at risk by inappropriate counsel comment. There is clearly a need for, and an opportunity for guidelines

for counsel comment to be developed. These must be developed bearing in mind the importance of fundamental rights, the implications of different stages of the trial process and the respective duties of defence and prosecution counsel. The analysis of the overseas experience should inform the substance and structure of the guidelines. It is proposed that the guidelines consist of general principles, specific directions and a procedural element. To make the development of guidelines a reality the next step would be a consultative process, with a view to the development of guidelines for counsel in respect of counsel comment in New Zealand.

RECONSIDERING THE BUT FOR TEST IN THE CRIMINAL LAW

YUICHI YASUI*

Introduction

The first step in any consideration of causation problems in criminal law is said to be the application of the but for test: would the consequence defined in the relevant provision have occurred but for the defendant's conduct? Its application appears so simple that it seems little argument has been made in criminal law in New Zealand over the way it should be applied. It is true that in most cases the result would be the same irrespective of the way it is applied: the identical conclusion would be reached automatically. However, as discussed below, there may be cases the conclusion of which differs according to the way it is applied. A workable, reliable test is the one which provides an objective standard according to which the same conclusion is to be reached in relation to the same matter whoever applies it.

There are two issues which may need attention regarding the application of the but for test:

(1) What conduct is the but for test interested in?
(2) What consequence should the but for test be concerned with?

The first question is not so much one of how the but for test should be applied as of what conduct the but for test should be applied to. It is nevertheless of practical importance and thus will be discussed below. The second question is involved with how the consequence in question should be viewed, in concrete terms or in the abstract.

Besides these issues, there has been argument as to whether there is any

* LLB, Osaka University; LLM Waseda University. Studying towards GCertLaw, Victoria University of Wellington. The author would like to acknowledge Rebecca Thomson for her information and advice and Takayuki Kato for his encouragement and inspiration.

need to modify the but for test or the way it is applied to accommodate some unusual, difficult circumstances. The most troublesome are the cases of alternative concurrence discussed below.

Lastly, there is a more fundamental problem; that is, is there any need to adhere to the but for test or the enquiry for a factual nexus between the defendant's conduct and the result in question? The discussion which follows briefly surveys these problems in the context of criminal law.

A. The conduct and the consequence to which the but for test is applied

Some crimes (that is, result crimes) require as actus reus not only conduct but also a particular consequence and causation. Generally, causation in criminal law is to be considered from two distinct perspectives: whether there is a factual cause; and, if there is, whether there is a legal cause.

The first issue is determined by applying the but for test, the test to narrow down the object of consideration: it excludes from consideration the conduct which requires no further causal enquiry. Its application is usually easy, entailing no policy decision. If the consequence would not have occurred but for the conduct in question, there is factual causation between the conduct and the consequence; if the consequence would have occurred, there is not.

At this stage two questions may arise: (1) What conduct is the but for test interested in? and (2) What consequence should the but for test be concerned with?

1. What conduct is the but for test interested in?

When causation is comprised in constituent elements of actus reus, what we need to determine first is whether there is an act (or omission) which falls within the relevant actus reus; that is, whether there is an act (or omission) prohibited by the relevant provision. The next issue we

will consider is whether the consequence specified in the actus reus did occur. The problem of causation comes third for the practical purpose because causation is a link connecting the prohibited act (or omission) and the consequence, and thus these two things have to be confirmed in advance.

To take an example from *Principles of Criminal Law*,[1] suppose that D invites V for lunch, whose car is hit by a truck on her way to their rendezvous, the brakes of which have failed. In such a case, the criminal law will look first at the driver of the truck or its manufacturers concerned to determine whether the driver's or manufacturers' conduct falls within the relevant actus reus. Only after confirming the relevant consequence will causal enquiry be instituted, that is, whether there is factual causation as between the driver's or manufacturers' conduct and the consequence. The question of whether there is factual causation between D's invitation and the consequence does not arise unless some evidence exists suggesting, for example, that D knew such an accident would happen and that the act of invitation constitutes the relevant actus reus. In the absence of such exceptional conditions, on those facts above, there is no prohibited act on the part of D from which causation flows which needs to be considered.[2] Occasionally, the but for test is applied not only to the conduct falling within the actus reus but also to the conduct obviously not falling within the actus reus and the result of its application has been demonstrated.[3] This, however, would seem confusing. Since the but for test is the one to investigate whether the conduct in question constitutes the relevant crime, there is no practical purpose in the application of the but for test to those acts or omissions which are not prohibited by the law. Causation is one constituent element of actus reus. It is a link connecting the prohibited conduct and the consequence; accordingly, no problem of causation will arise, at least for the purpose of assessing criminal liability, in the absence of some

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1 AP Simester and WJ Brookbanks, *Principles of Criminal Law* (3rd ed, Wellington, Brookers, 2007) 57.

2 See Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 120. See also Jonathan Herring, *Criminal Law Text, Cases, and Materials* (2nd ed, Oxford University Press, 2006) 102.

3 See, for example, Simester and Brookbanks, above n1, 57, 76.

prohibited conduct.[4]

2. What consequence should the but for test be concerned with?

Another question which arises is how the but for test ought to be applied; in other words, to what consequence ought the but for test look.

There are two possible approaches. One approach, taking the consequence in general terms, applies the but for test in the following way: would *a* consequence defined in the relevant actus reus have occurred (probably in any way) but for the defendant's conduct?[5] The other, on the other hand, taking the consequence in concrete terms, applies the but for test in the following way: would the *specific* consequence which did occur have still occurred *at the same time in the same way* but for the defendant's conduct?[6]

Again, to borrow an example from *Principles of Criminal Law*,[7] suppose that D sets fire to V's house, razing it. It turns out that there was a faulty electrical circuit in the house about to overheat and cause a similar fire. According to the first approach, factual causation cannot be established between D's setting the fire and the destruction of V's house. This is because V's house would have been burned down by the faulty electrical circuit but for D's conduct.

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[4] Glanville Williams, *Textbook of Criminal Law* (2nd ed, London, Stevens, 1987) states that "[s]urely the notion of but-for causation is ridiculously wide" but that when the but-for causal enquiry is made "one starts with the defendant who is charged" (p 379).

[5] See, for example, Simester and Brookbanks, above n1, 58; and R Wright, "*Causation, Responsibility, Risk, Probability, Naked Statistics and Proof*" (1998) 73 Iowa LR 1022. Don Stuart, in his book *Canadian Criminal Law* (5th ed, Ontario, Carswell, 2007) at p 150, describes this way of application as "mechanical".

[6] For example, Herring, above n2, 102; Richard Card, Sir Rupert Cross and Philip Asterley Jones, *Criminal Law* (17th ed, Oxford University Press, 2006) 69; Michael Allen, *Textbook on Criminal Law* (9th ed, Oxford University Press, 2007) 34; and David Ormerod, *Smith and HoganCriminal Law* (10th ed, London, Butterworths, 2002) 43, who indicates this approach saying "[the but for principle] is that D's act cannot be the cause of an event if the event would have occurred in *precisely* the same way" but for the act (emphasis mine).

[7] Simester and Brookbanks, above n1, 58.

The second approach, on the other hand, would find factual causation at least if it can be proved that the house would not have been razed as and when it was but for D's act. This approach has commonly been espoused by academics in Japan,[8] whereas in New Zealand the but for test is relied upon as a first step to solve the problem of causation, though as discussed below the function of the but for test differs between the two.

The latter approach in Japan will generally go as far as to adopt the principle which does not allow one to give consideration to what did not actually happen.[9] In the above case where D sets fire to V's house, even if the faulty electrical circuit might have caused a similar fire, which might have razed the house in the same way at the same time,[10] but for causation, according to that principle, would be established. This is because that principle does not take into account the fire which the faulty electrical circuit would have caused. It is only one hypothesis which did not actually happen. If one can consider any hypothesis event in applying the but for test, its application will become rather arbitrary[11] and the but for test will not function as an objective standard.

The difference between those two approaches seems to derive from their slants on the function of the but for test. Generally speaking, the idea underlying the second approach is that "[s]omething cannot be a legal cause unless it is a factual cause".[12] In other words, the but for test tells us whether the conduct was a necessary condition of the consequence in question.[13] It follows that if the conduct is found to

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[8] For example, Minoru Oya, *Keihokogisoron* (3rd ed, Tokyo, Seibundo, 2007) 221.

[9] This is the principle of disallowance of adding any hypothetical event which did not actually happen, the principle which is commonly accepted in Japan. However, this principle needs qualifying when the but for test is applied to an omission. In the case of omission, "but for the omission in question" means "if a legal duty imposed on the defendant had been carried out", and thus the application of the but for test involves the consideration of a hypothetical event, that is, the performance of the relevant legal duty not actually done.

[10] Though this sort of proof will be extremely hard, if not impossible.

[11] Mitsuo Okano, "*Joukenkankei' Sonpinohandan*" (1981) The Law School 29, 41.

[12] Herring, above n2, 102.

[13] Cane, above n2, 120.

have no factual connection with the consequence, no question of legal causation will arise. This may result in cases contrary to common sense. Therefore, the but for test needs to be applied strictly in order not to allow wrongful conduct to slip easily through the meshes set up by that test.

By contrast, the first approach does not regard the but for test as a necessary requirement, nor does it consider that test to be concerned with factual causation. Rather, it views the test as a formula which merely expresses a certain sort of relationship between the conduct and the consequence.[14] As such no problem will arise if the but for test is applied in a relaxed way. This view has an advantage in that, in applying the but for test, it will never encounter troublesome problems discussed below which may stump the other approach.[15] However, if the factual relationship between the conduct and the consequence, which is to be made out by applying the but for test "is actually not a species of causation at all"[16] and not a necessary requirement for showing causation, why is the but for test employed in considering a problem of causation? There seems to be no cogent reason advanced.

The purpose of causal enquiry is to determine whether the very consequence that has been brought about can properly be attributed to the defendant's conduct, and the purpose of applying the but for test is to determine whether there is a connection as a matter of fact between that consequence and the conduct; accordingly, what needs to be brought into question should not be a consequence in general or abstract terms defined in the relevant provision but the specific consequence that has actually occurred.

B. The need for modification or substitution

1. Application to an omission

[14] Simester and Brookbanks, above n1, 58.
[15] This view, however, will have to deal with such problems at the next stage, that is, where enquiry for legal causation is made.
[16] Simester and Brookbanks, above n1, 58.

As previously mentioned,[17] the application of the but for test to an omission entails consideration of a hypothetical event which did not occur. This is also the case with the second, rigorous approach above. Since "but for the omission" means "if a legal duty imposed on the defendant had been performed", it is inevitable that the execution of the relevant legal duty not actually carried out should be hypothetically considered.

2. Application to the unlawful act of driving without a licence

Further, there seems to be at least one case in which the but for test itself needs qualifying. This may occur where the actus reus comprises conduct and those circumstances which bear on the quality of the conduct.[18] The argument which has recently been made is of manslaughter. In *R v Hawkins*,[19] for example, D caused the death of V while driving a motor vehicle while in the throes of an epileptic seizure and was charged with unlawful act manslaughter.[20] D had driven without a driver licence when she was subject to epileptic fits. Goddard J held that, even if D had had a licence, the accident would have occurred; that the unlawful act of driving without a licence was thus not causative of V's death; and that D's susceptibility to epilepsy did not transform that act into a causative factor.

The provision for unlawful act manslaughter, which is designed to prohibit strictly an unlawful act likely to do harm to others, imposes on the accused criminal liability for the death where the accused prosecuted such an act and someone's death ensued. It condemns unlawful acts, not lawful acts, when they have brought about death. It follows that, insofar as that provision is concerned, what counts as to causation is the fact that *death occurred because the conduct in question was unlawful*. The aim of forbidding unlawful activities to protect human lives can well be achieved by requiring causation between death and

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[17] See above n9.
[18] For a more detailed discussion on this matter, see Kevin Dawkins and Margaret Briggs, "*Criminal Law*" [2003] NZ Law Rev 570-576 (Dawkins).
[19] *R v Hawkins* 21/2/01, Goddard J, HC Napier T18-00.
[20] Section 160(2)(a) Crimes Act 1961.

unlawfulness of the accused's conduct.[21] If so, the but for test can be modified as follows: would the consequence (that is, death) have occurred but for the unlawfulness[22] of the accused's conduct, or the fact(s) laying foundation for the unlawfulness of it? As in the case of omissions discussed above, this application of the but for test entails the consideration of hypothetical conditions which did not happen or exist.

The act of driving is lawful when the driver holds a licence. In the case of driving without a licence, therefore, the application of that modified test involves hypothetical consideration: would the victim have died if the defendant had had a licence when driving? Where, as in *Hawkins*, D is charged with unlawful act manslaughter when D, driving a motor vehicle while in the throes of an epileptic seizure, killed V, if the accident was brought about owing to that medical condition, it can be said that V's death would have occurred had D been driving with a licence. Unlawfulness of D's act of driving was causally irrelevant to the death.

Even if the but for test is applied without modification and but for causation is established, legal causation could be denied if the way of applying the test for legal causation (i.e. "operating and substantial" test[23]) is adjusted so that it will be applied to unlawfulness, or those facts which render the conduct unlawful. In the above case of driving without a licence, the normal test will ask if the act of D's driving without a licence was an "operating and substantial" cause of V's death; whereas the adjusted test would ask if the absence of a licence while D was driving was an "operating and substantial" cause of V's death. The answer to the former question is probably yes. This is because, as was held in *Hawkins*, D's election to drive when suffering from a medical condition that could adversely affect D's ability to drive safely may be said to be an operating and substantial cause of V's death, but the act of D's driving itself also made an operating and substantial contribution

[21] Unlawfulness of the conduct in question turns on whether there are facts rendering the conduct unlawful.
[22] Not the unlawful conduct itself.
[23] Herring, above n2, 103; *R v Myatt* [1991] 1 NZLR 674 (CA) 682-683.

to the death. What would have made no difference was whether or not D had a licence when driving. Thus, the absence of a licence cannot be regarded as an "operating and substantial" cause. It is causally immaterial, and the answer to the latter question is no.

3. Application to the case of alternative concurrence[24]

Where simultaneous acts appear to be contributing to the result, mechanical application of the but for test may lead to a conclusion contrary to our common sense.[25] A classic example is as follows:

> *Case 1* D1 added a lethal dose of poisonous drugs to V's cup of coffee. As it happened, D2, without conspiring with D1, also added a lethal amount of poison to the same cup. V, unknowingly having the toxic coffee, immediately died.

Another hypothesised scenario may be compared to this:

> *Case 2*. The same as above, except that both the poison D1 added and the poison D2 added were half the lethal dose.

Another scenario which may be contrasted with both Case 1 and Case 2, is as follows:

> *Case 3* The same as Case 1, except that the poison D2 added was half the lethal dose.

Case 2 is the easiest to tackle. Because both the poison D1 added and the poison D2 added were half the lethal dose, it can be said that but for adding the poison by either of them, V would not have been killed. It follows that but for causation is established both between D1's act and V's death and between D2's act and V's death.

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[24] For a general discussion on this point, see Seiji Saito, "*Iwayuru 'Takuitsutekinakyogo' womegutte*" (1980) The Law School 24, 96-102.

[25] This point is often made in tort law. See for example *March v E* (1991) 171 CLR 506 (HCA), 516 (per Mason CJ).

Case 1, by contrast, has been considered to be the toughest to deal with. The mechanical, relaxed application of the but for test will surely negate but for causation both between D1's act and V's death and between D2's act and V's death. On the other hand, according to the view which looks at the particular consequence that did occur, but for causation can be established both between D1's act and V's death and between D2's act and V's death if, and only if, it is proved that the poison they added combined together and, even slightly, hastened V's death accordingly.

More troublesome are cases in which the prosecution failed to prove beyond reasonable doubt which poison actually had the fatal effect on V or the prosecution successfully proved beyond reasonable doubt that no difference would have been made in when and how V died had only either D1 or D2 participated. When considering these cases, one needs to bear in mind the following points:

(1) The defendant ought to incur criminal liability for his or her own conduct; but
(2) The prosecution must prove causation beyond reasonable doubt. One policy reason underlying this principle is the notion that the defendant ought not to incur criminal liability for another person's conduct unrelated to him or her.[26]

In light of (2), there is no way but to acknowledge that but for causation cannot be found either between D1's act and V's death or between D2's act and V's death where the prosecution failed to prove which poison actually had the fatal effect on V. This conclusion must be accepted in New Zealand if one recognises that "[n]o concept is more important to the criminal law than the requirement of proof of guilt beyond reasonable doubt".[27]

Then what if the prosecution successfully proved beyond reasonable doubt that no difference would have been made in when and how V

[26] This means that there is no complicity between the defendant and the other person.
[27] Kevin Dawkins and Margaret Briggs, "*Criminal Law*" [2007] NZ Law Review 137.

died had only either D1 or D2 participated?[28] The same question will arise where, for example, D3 and D4, without conspiring, fired at V and the bullets happened to enter the heart of V at the same time, who was killed instantly (Case 4). If the but for test is applied to D1 and D2 individually or D3 and D4 individually, but for causation cannot be established between any of the defendants and V's death because but for the conduct of D1 or D2, or of D3 or D4, V would have been killed at the same time in the same way.

On reflection, though, it is because D2 or D4 did an act sufficient to kill V that but for causation, by applying the but for test, cannot be established between D1's or D3's conduct and V's death, and vice versa. This indicates that there can be factual causation found between the act of at least *either of them* in each case and V's death.[29]

Here lies a quandary. The point (1) mentioned previously that the defendant ought to incur criminal liability for his or her conduct would lead to the conclusion that at least D1 or D2 in Case 1 and D3 or D4 in Case 4 ought to bear responsibility for V's death because there is factual causation between the act of either of them and V's death.

However, there is no way to choose which one should incur the responsibility. Proposition (1) needs to be read in conjunction with the principle (2); that is, it is only when the prosecution have proved causation beyond reasonable doubt that the defendant may be held criminally liable for his or her conduct.

Although there may be factual causation between the act of either of the defendants and V's death, the prosecution cannot prove beyond reasonable doubt that one act, not the other, is of causal relevance to the result. It follows that factual causation has to be negated both between D1's conduct and V's death and between D2's conduct and V's death in Case 1 and both between D3's shooting and V's death and

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[28] For the criticism that such a phenomenon can never physically happen, see Yasushi Ito, Mitsumasa Matsuike, Koichi Kawaguti, and Rikizo Kuzuhara, *Keihokyokasho Souron (Jo)* (Tokyo, Saganoshoin, 1992) 157-158 (Mitsumasa Matsuike).

[29] Leaving aside the matter as to whether to call this but for causation.

D4's shooting and V's death in Case 4.

This conclusion, however, has been regarded as absurd, generally for the following two reasons.[30] Firstly, each of the defendants did a dangerous act which was sufficient to kill V. Secondly, imbalance arises between Case 1 and Case 2, where, though D1 and D2 prosecuted a less dangerous act than in Case 1, but for causation is established between D1's poisoning the coffee and V's death and between D2's poisoning the coffee and V's death.

For those reasons, it has been argued that the but for test should be modified to cope with that problem. The modified version of the but for test is as follows: where there are some acts or omissions, any one of which is sufficient to cause the particular consequence in question, but for causation is established if, but for all of them, that consequence would not have occurred.[31] If this modified but for test is applied, since V's death would not have occurred but for the poisoning of the coffee by D1 and D2 in Case 1, or the shooting by D3 and D4 in Case 4, but for causation can be established in relation to any one of the defendants.

However, this view has met with the sharp criticism that no theoretical ground is shown which enables all the relevant acts or omissions to be seen *in toto*. Unlike where the defendants are joint principals, where they are not, they acted or omitted independently, and therefore their acts or omissions cannot be viewed as a whole.[32] In the above cases, D1 is not associated with D2, and thus the poisoning of the coffee by D1 and by D2 cannot be taken collectively; D3 is not associated with D4, and thus the shooting by D3 and by D4 cannot be taken collectively, with the result that there can be no but for causation established.

To the argument that this conclusion would create imbalance between Case 1 and Case 2, the following counter-argument is possible. For the

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[30] See for example Oya, above n8, 221.

[31] For example, Oya, above n8, 222; and Masahide Maeda, *Criminal Law: The General Part* (4th ed, Tokyo, University of Tokyo Press, 2004) 221.

[32] For example, Saku Machino, *Keihosoronkogian I* (2nd ed, Tokyo, Shinzansha, 1998) 157.

purpose of constructive discussion, it is useful to focus on the conduct of D2. In Case 1, both D1 and D2 added a lethal dose of poison. In Case 2, it is true that D2 added only half the lethal dose of poison, but D1 also added only half the lethal dose; that is, circumstances unrelated to D2 differ between Case 1 and Case 2.[33] This difference defies meaningful comparison.

It is between the conduct of D2 in Case 1 and of D2 in Case 3 that the right balance should be achieved. Since conditions unrelated to D2 do not differ between Case 1 and Case 3, it can well be said that imbalance would arise if D2's criminal responsibility was lighter in Case 1 than in Case 3. In Case 3, but for causation can be established between D1's poisoning the coffee and V's death because but for D1's poisoning the coffee V would not have been killed. However, as between D2's poisoning the coffee and V's death, unless the prosecution proved beyond reasonable doubt that the poison which D1 and D2 added combined together and, even slightly, hastened V's death accordingly, but for causation cannot be established.[34] In light of this conclusion, it cannot be said that there is imbalance between Case 1 and Case 3 in D2's criminal responsibility because it is not lighter in Case 1 than in Case 3.

The problem is that no one will incur liability for V's death in Case 1 and in Case 4[35] if the unmodified but for test is maintained, though all the defendants did a dangerous act which was sufficient to kill V.

To avoid this problem, it is necessary to replace the but for test[36] or relinquish enquiry for factual causation itself.[37] The former would be

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[33] Atsushi Yamaguchi, *Keihosoron* (revised ed, Tokyo, Yuhikaku, 2005) 50 at n19.

[34] Though it might be argued that the but for test should be modified here as well as in Case 1 and in Case 4. However, such a modification is unnecessary in Case 3 because there is at least one defendant (ie D1) who will bear criminal liability for V's death.

[35] Though all the defendants will incur liability for attempted murder.

[36] See, for example, Wright, above n5, 1018-1042; and Keiichi Yamanaka, *Keihosoron I* (Tokyo, Seibundo, 2000) 251-253.

[37] Smith and Hogan, above n6, state that the principle of but for causation may have exceptions and that "[i]t seems safe to assume that [D1 and D2 in Case 1, and D3 and D4 in Case 4] will be held to have caused" the death of V (n14 at 43), but no theoretical basis is shown.

impracticable because New Zealand law appears to be more interested in argument based upon common sense than argument based upon theory. The practicable approach would thus be the latter.

Unlike civil law countries such as Japan, in New Zealand the test for legal causation is not *logically* premised on factual causation. The general principle in Japan is that causation in law will only be established if, on the facts based on which factual causation has been found, according to the experience of ordinary people, the consequence could be regarded as natural, or not unusual.[38] For example, where D3 and D4, without conspiring, fired at V's heart and only D4's bullet hit V, who was killed instantly, there is no factual causation between D3's shot and V's death, and the question of legal causation will never arise between them. No answer can in theory be provided as to whether there is legal causation where there is no factual causation proved, upon which legal causation could be established. An absurd conclusion would be reached if it was possible to make enquiry for legal causation without establishing factual causation. In the above case, since, according to the experience of ordinary people, it is not unusual for a person covered with a rifle to be killed if the offender aimed at the person's heart and shot, legal causation could be established between D3's shot and V's death, if enquiry for legal causation did not have to be premised on those facts on which factual causation has been shown. Notice may need to be taken of the fact that the Japanese test for legal causation has been derived from German law and has theoretical foundations.[39] The question of causation arises at the stage of *Tatbestand*,[40] the concept

[38] For further details, see for example Humiaki Uchida, "*Sotoingakankeisetsuniokerusotoseino 'Handankijun' to 'Sotosei'*" (1981) The Law School 29, 15-23.

[39] For a causal theory of German law, see Hart and Honoré, *Causation in the law* (2nd ed, Oxford, Clarendon Press, 1985) Chapter XVII.

[40] The difference between the criminal law systems of New Zealand and Germany defies the comprehensive translation of the concept *Tatbestand* into English. Roughly speaking, in German criminal law, determination of whether an act or omission constitutes a relevant crime involves three stage enquiries: (1) whether the act or omission falls within the definition of the offence; (2) whether the act or omission can be justified; and (3) whether the defendant can be excused. *Tatbestand* covers the question (1) and thus could be translated into the "definition of an offence" (see George P Fletcher, "*Criminal Theory in the Twentieth Century*" 2 Theoretical Inq L 265, 237). *Tatbestand*, however, could mean more. An offence is codified to prohibit certain conduct which should be viewed as illegal; accordingly, an act or omission which has

which has been derived from German law and is unknown to New Zealand criminal law.

In New Zealand, enquiry for legal causation, whether or not it is based on the facts on which factual causation has been established, would lead to the identical conclusion. In the above example, since D3's shot did not make an "operating and substantial"[41] contribution to V's death, legal causation could not be established between D3's shot and V's death even if the application of the but for test was skipped.

C. Relinquishment of the but for test

The test for legal causation (one standard being an "operating and substantial" test) in New Zealand can be said to cover the test for factual causation. Apart from the cases of alternative concurrence (i.e. where there are some acts or omissions any one of which is sufficient to cause the particular consequence in question), where the defendant's conduct can be said to have made an operating and substantial contribution to the consequence in question, it can also be said that but for it the consequence would not have occurred when and as it did. The but for test is also unnecessary in those cases involving intervening events or acts in which the above test does not fit. Relevant principles such as a "reasonable foreseeability" test[42] and a "free, deliberate and informed" test[43] may be said to cover enquiry for factual causation. This is because an intervening event or act which is reasonably foreseeable or not "free, deliberate and informed" may properly be

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passed through the first stage enquiry and falls within the relevant definition will at least be deemed as prima facie illegal. Therefore, although it could mean more, *Tatbestand* may be said to denote constituent elements, mental and physical, of the offence, the satisfaction of which indicates that at least the conduct in question is prima facie illegal. This function which *Tatbestand* serves is reflected in the way in which causation should be examined. For a general discussion on this point, see Noriyuki Nishida, "*Koseiyokennogainen*" in Noriyuki Nishida and Atsushi Yamaguchi (ed), *Keihonosoten*, (3rd ed, Tokyo Yuhikaku, 2000) 14-15.

[41] Herring, above n2, 103; *R v Myatt* [1991] 1 NZLR 674 (CA), 682-683.

[42] Simester and Brookbanks, above n1, 61; Robertson (ed), *Adams on Criminal Law* (Wellington, Brookers, 1992) CA158.10 (looseleaf).

[43] *R v Pagett* (1983) 76 Cr App R 279, 288 (per Sir Robert Goff LJ, citing Hart and Honoré (1st ed), above n39).

viewed as depending on a defendant's initial conduct.[44] The dependence of the intervening event or act upon the defendant's initial conduct demonstrates the existence of but for causation between the defendant's conduct and the result: but for the defendant's initial conduct, the result would not have been brought about by the intervening event or act at the same time in the same way. Therefore, except for those anomalous cases above, legal causation can rightly be considered even if enquiry for factual causation has been skipped.

Further, since the test for legal causation is not logically premised on factual causation, enquiry for factual causation can be omitted theoretically as well. There is thus no need to stick to enquiry for factual causation.

Enquiry for legal causation involves a value judgment, the question being whether the consequence can fairly be "imputable" to the defendant.[45] Such cases as Case 1 and Case 4 above could well be dealt with at the stage of legally causal enquiry which may entail evaluative considerations. Even if a factually causal enquiry has been omitted, these cases could rightly be considered. Here, the question is which of the two alternatives is more just: to hold each defendant liable for V's death, or to hold neither of the defendants liable for the death.[46] Policy argument is more suitable at this stage about, say, what objects are to be achieved by the penal code. If, for example, one thinks criminal law exists to prevent particular consequences defined in the relevant provisions from occurring by prohibiting activities provided explicitly or implicitly in them, it would be futile, for this purpose, to blame a

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[44] Simester and Brookbanks, above n1, state, in the context of an intervening act by a third party, that "in law, [the intervention which is not "free, deliberate and informed"] has the status of being itself a consequence of D's wrongdoing" (at 63).

[45] Williams, above n4, 381.

[46] Simester and Brookbanks, above n1, assert that "[f]rom a moral and legal perspective, no other conclusion [than the former] is possible, even though this type of case presents difficulty for philosophical accounts of causation" (n94 at 60). However, as is shown in the text, the latter conclusion is also possible from a legal perspective (see Makoto Ida and Masao Maruyama, *Case study keiho* (Tokyo, Nihonhyoronsha, 1997) 85). Arguably, one could reach either conclusion by applying the "operating and substantial" test in accordance with one's value judgment. That being the case, this test can be said to lack objectivity in the anomalous cases of alternative concurrence.

defendant for that consequence which could not have been prevented had the defendant refrained from his or her conduct. It is only where a defendant perpetrated an act and brought about a prohibited result when he or she could have prevented it by not acting as he or she did that the imposition of criminal liability for the result can be justified for that purpose. If the consequence was an unavoidable one (that is, if it would have occurred had the defendant refrained from acting as he or she did), it would not serve that purpose to ascribe it to the defendant.[47]

Conclusion

The but for test is a useful means to determine whether there is factual causation between the defendant's conduct and the consequence. To do so correctly, however, it needs to be applied to that act or omission which falls within the particular actus reus; and the consequence viewed in concrete terms rather than in the abstract.

The test for legal causation can be said to cover the but for test as properly applied. Enquiry for factual causation can theoretically be skipped as well. Further, since legal causation is not logically premised on factual causation, enquiry for factual causation can be skipped theoretically as well. Therefore, there is no need to stick to enquiry for factual causation. What counts "in the law is not whether there is a logical *but for* relationship between the defendant's behaviour and the prohibited consequence, but whether there is a true causal relationship *at law*".[48] The proof of but for causation need not be required as a separate requirement for the establishment of causation. This conclusion would enable the courts to escape theoretical, endless argument over the modification of, or substitution for, the but for test.

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[47] Makoto Ida, "*Ingakankeinoriron*" (1999) Gendaikeijiho 4, 62-63. Although the author makes this argument at the stage of enquiry for factual causation, in New Zealand his reasoning is also applicable to the next stage of enquiry for legal causation where policy can be an overriding consideration.

[48] Simester and Brookbanks, above n1, 58 (emphases original).

LAW AS A SECULAR ENTERPRISE

MICHAEL ISHI FORSTER*

Introduction

This essay provides a long answer to a short question: do we interpret the law as if God wrote it? It will be argued that we do not. More precisely, it will be argued that key features of legal interpretation are best understood without reference to religious assumptions. The contrary viewpoint is most forcefully articulated by Steven D. Smith in his insightful article "Law as a Religious enterprise".[1] Smith's article will be this essay's target for attack. Smith identifies three shared features of scriptural and legal interpretation and argues that, in the law, these features seem "silly, superstitious or mindless" unless interpreters, either consciously or subconsciously, presuppose divine authorship of the law.[2] This essay will follow a three part structure organised around these shared features of legal and scriptural interpretation. Part one will examine why both scriptural and legal interpretation see texts "as repositories of hidden or esoteric meanings."[3] Using Ronald Dworkin's interpretive theory, this feature of legal interpretation will be explained without reference to religious assumptions. The second part of this essay will discuss why both scriptural and legal interpretation treat texts as authoritative for our own conduct and decisions.[4] It will be argued that we treat the law as authoritative because of secular liberal ideals and secular constitutional practises, not because of religious assumptions. Part three will examine why both scriptural and legal interpretation treat seemingly disparate and diverse texts as forming a

*Studying towards BA/LLB(Hons), University of Otago. The author would like to acknowledge the Otago Faculty of Law; Professor Mark Henaghan and Professor Rex Adhar, University of Otago. In particular, the author would like to acknowledge the helpful contributions made to this article by Stephen Guest, Paul Corwin and the anonymous reviewers.

[1] Smith, Steven D., "Law as a Religious Enterprise: Legal Interpretation and Scriptural Interpretation" in Richard O'Dair and Andrew Lewis (eds) *Law and Religion* (Oxford: Oxford University Press, 2001) 83-9 (Law as a Religious Enterprise).

[2] *Ibid.*

[3] *Ibid,* 84.

[4] *Ibid.*

unified, harmonious whole.[5] Smith argues that interpreting the law like this – as if it were the work of a single author – is best explained by the religious assumption of divine authorship. However, this essay will show that the appearance of divine authorship is the unavoidable result of the two previous, secular, interpretive practises.

A. Why do legal texts have hidden meanings?

In both scriptural and legal interpretation, texts are seen as having a hidden or esoteric meaning. Smith defines a 'hidden meaning' as a meaning "not obvious upon an ordinary or casual reading".[6] In hermeneutics, meanings of "Christological significance" can be found beyond the literal meaning of the text.[7] Likewise, in the law, specially trained interpreters can perceive meanings that an untrained interpreter would be unlikely to perceive.[8]

Smith argues that understanding the law as a religious enterprise can explain why esoteric legal interpretations are respected while the esoteric use of language generally is seen as a 'dodge'.[9] If we unconsciously see the law "in some sense" as the expression of "divine semantic intention" then hidden meanings are "to be expected".[10] Mortals are not able to fully comprehend the divine. Thus, hidden meanings in the law are respected because they are expected.[11]

An alternative secular explanation is possible using Dworkin's interpretive theory. In essence, words or text can be understood in a non-literal way if this "makes the best sense of" the words in their broader context.[12] Thus, hidden meanings we accept can be explained by virtue of their interpretive "fit".[13] Correct meanings in the law cohere with the surrounding body of legal rules, principles and

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[5] *Ibid.*
[6] *Ibid,* 88.
[7] *Ibid,* 87.
[8] *Ibid.*
[9] Smith, Law as a Religious Enterprise, 95.
[10] *Ibid.*
[11] *Ibid.*
[12] Dworkin Ronald, *Laws Empire.* Cambridge, Massachusetts: Belknap Press, 1986 (Laws Empire).
[13] Smith, Steven D. "Law without Mind" in *Michigan Law Review,* Volume 88, Number 1, 1989-1990, 104, 109 (Law without Mind).

practises.[14] Further, the correct interpretation of law will be compatible with "current values and the best available political and moral theory".[15] Dworkin's method recognises that the meaning of text in its full context might be quite different to the 'literal' meaning of the same text viewed in a vacuum. Context changes the meaning of text. So, to those untrained in recognising the *full* context, it could seem as if a trained interpreter has given the text a 'hidden' meaning.

Smith does not think that this secular explanation threatens his thesis. Smith's position is that religious assumptions provide the best explanation of hidden meanings in the law even when Dworkin's theory is taken into account. This is because, according to Smith, hidden interpretations produced by Dworkin's "sophisticated project of interpretation" are functionally similar to creative lies that distort language.[16] Further, we have no reason to respect hidden interpretations simply because they are creative – hidden interpretations are creative (or at least non-literal) by definition. To bolster his position, Smith uses an article by Robert Nagel which notes the similarities between Dworkin's jurisprudence and Ex-President Clinton's embellishments in regards to the Lewinsky scandal.[17] Nagel notes that both Dworkin's theory and Clinton's embellishments use high levels of abstraction to assign a counterintuitive meaning to words.[18] For example, in the law flag burning is interpreted as "speech" and in Clinton's embellishments oral sex was not "sexual relations".[19] Also, both Dworkin and Clinton creatively use language.[20] This creative use of language arises in response to obstacles that are preventing the liar's or lawyer's progress.[21] Despite these similarities, Clinton's rationalised embellishments led to an "incredulous public reaction" while, conversely, skilled legal interpreters are respected and admired.[22] Smith thinks that this respect for hidden meanings in the law flows from underlying religious assumptions.

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[14] *Ibid.*
[15] *Ibid.*
[16] Smith, Law as a Religious Enterprise, 90.
[17] *Ibid.*
[18] Nagel, Robert F., "Lies and Law", *Harvard Journal of Law and Public Policy,* Volume 22 1998-1999, 605, 607 (Lies and Law).
[19] *Ibid,* 608, 609.
[20] *Ibid,* 608.
[21] *Ibid,* 611.
[22] *Ibid,* 608, 612.

Smith's argument is mistaken. Dworkin's interpretations fundamentally differ from creative lies, and this difference explains why hidden meanings in the law are respected. Under Dworkin's theory correct interpretations follow a restrictive logical structure. Lies do not. Non-literal meanings that lawyers respect and admire can be explained because of their institutional coherence. There are two main steps in Dworkin's interpretive process which restrict the outcomes that can be considered 'correct': pre-interpretation and interpretation.[23]

Pre-interpretation recognises that people can only intelligibly agree or disagree about the application of law when they share some assumptions and practices.[24] Dworkin's point is that there cannot be argument about a concept if the participants in the argument are mistaken about what they are arguing over. To illustrate, if two chefs are going to sensibly argue about whether the flesh or the rind of an orange is better, they first need to agree upon whether they are discussing baking or fruit salads. This level of pre-interpretive agreement is needed not only for the subject matter of the discussion, but also for the interpretive method that the interpreters will use to make the best sense of the subject matter.[25] For example, in adjudication, two opposing advocates would need a degree of pre-interpretive agreement about the general area of law in question (the subject matter) *and* the general methodology which will produce a correct answer. They cannot have a sensible argument if one advocate's methodology is legal reasoning from precedent while the other advocate is planning to read the entrails of a sacrificial animal for the answer. In many instances pre-interpretation will not require explicit argument; indeed, Dworkin acknowledges that this stage of the interpretive process is often assumed.[26] Two lawyers, for example, will probably agree on the subject matter at issue and the types of argument that can be used to analyse the subject matter.

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[23] Dworkin, *Laws Empire*, 65, 66. There is also a third stage called 'Post-interpretation' (discussed at page 66 of Laws Empire) which essentially applies the correct interpretation to the relevant facts. A detailed discussion of this interpretive phase is not necessary for the purposes of this essay.

[24] Dworkin, Ronald. *Justice in Robes* (Cambridge, Mass: Belknap Press, 2006) 9.

[25] *Ibid,* 10.

[26] *Ibid*, 12.

This pre-interpretive phase is the first step to ensuring that while meanings in text might be hidden they will not be surprising to an informed interpreter. In contrast, hidden meanings that we see as 'distortions of language' are often the result of different perceptions at the pre-interpretive stage. For example, the American public assumed Clinton would give an everyday explanation of the Lewinsky affair.[27] Clinton's technical use of the words 'sexual relations' did not cohere with this assumption. In consequence people felt surprised or tricked by his use of language.[28] Because of different assumptions at the pre-interpretive stage Clinton was not seen as giving sensible explanations for his position and the 'hidden' meaning he gave the term "sexual relations" was seen as a 'distortion'.[29]

Dworkin's second interpretive stage has two interrelated strands.[30] According to Dworkin, correct interpretations must have both legal 'fit' and moral worth.[31] Legal 'fit' is the idea that an interpretation must be consistent with the surrounding legal context.[32] To illustrate, the metaphor of a chain novel with multiple authors is helpful.[33] While each subsequent author has some freedom to develop the novel, they are constrained by what has already been written. For example, each author would need to have regard to things like previous plot developments and the names of the characters if the novel is to make sense.[34] Likewise, in the law, developments must fit with the past. Legal interpretations must coherently fit within their relevant legal context; the surrounding body of statutes and precedents.

Dworkin's claim that correct interpretations must have moral worth is more controversial. This claim requires Dworkin to show that the law has a moral element. He provides several arguments to this end. First,

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[27] Nagel, Lies and Law, 605.
[28] *Ibid, 605, 609.*
[29] *Ibid, 609.*
[30] In 'Justice in Robes' Dworkin breaks the interpretive stage into the 'Jurisprudential' and the 'Doctrinal' stage at pages 12 and 13. The Jurisprudential stage deals with legal fit while the doctrinal stage deals with wider moral fit. In this essay, it is easiest to deal with both these stages together.
[31] Dworkin, Justice in Robes, 14, 15.
[32] Guest, Steven., *Ronald Dworkin.* Edinburgh: Edinburgh University Press, 1992, 49 (Guest).
[33] *Ibid.*
[34] *Ibid,* 50.

Dworkin argues that the coercive power of the State must ultimately rest upon moral justifications.[35] Other potential justifications for the State's coercive power obviously exist but, according to Dworkin, they will not be the best justifications.[36] For example, it might be argued that our legal system ultimately rests upon the pragmatic justification of 'majority rule'. However, the idea of 'majority rule' would not draw a distinction between an egalitarian legal system and a legal system that held a minority group as slaves. Because we think of the law as a system of justice, not injustice, 'majority rule' is not the best ultimate justification of our legal system. Dworkin says that the law has a moral dimension for a second set of reasons. Namely, there are moral standards, or principles, in the law.[37] Principles exist because of their substance. In comparison rules are observed because of their source or "pedigree".[38] Dworkin justifies his assertion that 'principles exist' because this makes the best sense of legal arguments, practises and judgements.[39] When we argue about hard cases in the law we act as if principles exist.[40] Because the law has a moral dimension the best legal interpretations will do more than 'fit' with the surrounding body of statutes and cases; they will also have moral worth.

Dworkin does not think that talking about moral worth is pointless. His idea is that a right moral answer is the product of everyday argumentation. Reasons are given, and the moral position is unhelpful and misleading. First, there is no logical requirement that a right answer needs proof. For example, a peasant in the Middle Ages could be right in thinking that the earth was round even if she could not prove that this is the case. Further, the very proposition that proof is needed for something to be true is not true under its own standard – it cannot be proved. This argument is purely defensive. It is protects Dworkin's idea that a best justified answer can be right even though it cannot be objectively proved to be right. Dworkin's ultimate point is that forgoing moral argument because of "objective truth" concerns is

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[35] *Ibid,* 33.
[36] *Ibid.*
[37] Dworkin, Ronald., *Taking Rights Seriously.* London: Duckworth, 1977, 40 (Taking Rights Seriously).
[38] *Ibid*, 17, 26.
[39] *Ibid,* 45.
[40] A 'hard case' in the law is simply a case where the outcome is not immediately obvious, but is the product of legal argument.

unproductive. The reality is that we do argue about moral issues. Further, we give reasons for our moral convictions. If we think rational argument can help us reach the right conculsions in everything from politics to tlaw to predicting who will win the rugby, why reject the worth of rational argument in the moral realm? As put by Dworkin, when one is confronted with a moral argument:

> it will not be wrong to reply, "but that is only your opinion." However, you must ask yourself whether, after reflection, it is your opinion as well.[41]

The cumulative effect of these moral and legal requirements of interpretation is that legal interpreters are restricted when they interpret texts. Dworkinian interpretation produces 'hidden' meanings of text that are consistent with both the law and our moral convictions. This contextual and ethical consistency explains, without religious assumptions, why we respect hidden meanings in the law while we see unrestricted displays of linguistic creativity as a communicative 'dodge'. Hidden meanings in the law are interpretations that 'fit' with the principles, practises and ethics that surround the question. In contrast, an embellishment or lie will cut against an informed perception of reality. Note that this difference between lies and interpretations is only discernable when the context surrounding the question is known. This is why lawyers can derive meanings from legal texts that would not be evident to laymen; lawyers have a well informed understanding of the surrounding legal context.

Smith's article challenged us to account for the difference between "sophisticated" interpretations and lies which distort language.[42] His argument was that an unconscious religious assumption can best account for this difference (namely that we see legal texts as "in some sense" the product of divine authorship, so hidden meanings are "expected"). Upon reflection, and with Dworkin's interpretive theory in mind, we can provide a better secular explanation. Sophisticated interpretations differ from lies *because of their sophistication*. Lies are a creative free-for-all. In contrast, correct legal interpretations are restricted in their creation and have coherence with the surrounding law and our moral convictions. This difference explains why we respect

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[41] Dworkin, *Laws Empire*, 86

[42]Smith, Law as a Religious Enterprise, 90.

interpretations of the law but not embellishments of language even though both invoke the 'hidden' meaning of text.

A few final points can be made about Smith's argument that religious assumptions best explain why some hidden meanings are accepted while others are not seen as credible. Smith asks why hidden meanings are accepted in legal and religious texts when they are not accepted in ordinary language.[43] However, this observation is mistaken. What Smith has seen as a distinction between legal and religious interpretation on the one hand, and ordinary use of language on the other, is actually a distinction between coherent interpretations and manipulations of language. In ordinary language, just as in the law, the meaning of a word in its full linguistic, ethical and social context might be different to the literal meaning of the word if viewed in a vacuum. To those considering the word in isolation, a contextual meaning would appear to be a 'hidden' meaning. To borrow an example from Stanley Fish, imagine a notice in a plane lavatory which says "do not put waste down the toilet".[44] Here, we obviously recognise that waste does not include excrement. In contrast, when looking at a hose connection on the side of a campervan labelled "waste outlet" we would clearly read waste to mean "human excrement". The hidden meaning of 'waste' is accepted in both these instances because it coheres with the broader context. Interpretations that are accepted in law also cohere with the broader context in this way.

Having given a secular explanation for why certain 'hidden' meanings in language are accepted it is pertinent to ask Smith the converse question: to what extent do religious assumptions actually explain hidden meanings in law and scripture?

Smith's argument is that because humans will never be able to fully comprehend the divine, we expect to find hidden meanings in religious and legal texts. However, our very conception of God supplies the answer to Smith's argument. God is omnipotent, omniscient and omni-benevolent.[45] A benevolent God would want to clearly communicate

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[43] *Ibid.*

[44] Fish, Stanley., *Doing what comes Naturally: Change, Rhetoric and the Practise of Theory in Literary and Legal Studies*. Durham, North Carolina: Duke University Press, 1989, 302 (Doing What Comes Naturally.)

[45] McCann, Hugh J., "Divine Providence", *The Stanford Encyclopedia of Philosophy (Fall 2006*

with humanity.[46] Further, an omnipotent God would, by definition, have the power to clearly communicate with humanity. Thus, without further explanation by Smith, 'religious assumptions' poorly explain why we accept hidden meanings in scripture and the law. Our religious assumptions cut against the existence of hidden meanings in scripture.

In sum, 'religious assumptions' seem to provide a poor explanation of why hidden meanings are accepted in the law. Further, the acceptance of hidden meanings in legal texts can be convincingly explained using Dworkin's interpretive theory. Namely, hidden meanings that cohere with their broader context are accepted as correct. In comparison, distortions of language which do not have any broader contextual coherence are treated with scorn in both the law and ordinary language.

B. Why do we treat legal texts as authoritative?

The second similarity Smith notes between legal and scriptural interpretation is that both methods treat texts as authoritative for our conduct and decisions.[47] By this Smith means that both legal and scriptural texts are seen as authoritative on the basis of their own intrinsic authority. We obey scripture because it is scripture and we obey the law "because it is the law". Smith notes that this is a striking contrast to the "forward looking, pragmatic costs-and-benefits decision making that we employ in many areas of life."[48] He argues that it is hard to understand why we would treat legal texts as intrinsically authoritative.[49] However, this would not be hard to understand if legal texts, like scriptural texts, were supposed to express the will of God.[50]

Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/fall2006/entries/providence-divine/> Last accessed 28 May 2008.

[46] God's word is meant to provide a code for proper religious and secular conduct. (Kuntz, Paul Grimley, The 10 Commandments in History: Mosaic Paradigms for a Well-Ordered Society, (Grand Rapids, Mich: Eerdmans, 2004) Ch 1). If people are to follow God's instructions without conflict, his or her instructions would need to be clear. A benevolent God would not want unnecessary conflict and would therefore ensure all his communications with mankind could be clearly understood.

[47] Smith, Law as a Religious Enterprise, 90.

[48] *Ibid*, 91.

[49] *Ibid.*

[50] *Ibid*, 95.

Smith is overstating the problem. It is not difficult to explain why we treat the law as authoritative even if a pragmatic costs-and-benefits analysis would yield a more 'rational' result in individual cases. We respect the law as authoritative as part of the Lockean social contract.[51] In exchange for protection, individuals allow the curtailment of some freedoms by the state.[52] We prefer the governance of the law to a state of nature where life is "nasty, brutish, and short".[53] Further, we respect the law as authoritative because we trust the constitutional structure which creates, interprets and applies the law. Society feels comfortable being governed by a state operating under the rule of law, whose coercive power is checked by the separation of powers and political accountability.[54]

Further, because the law is a body of generalised rules and principles there will be instances where a legal outcome differs from what a pragmatic costs-and-benefits analysis would dictate.[55] The reason we treat the law as authoritative, even in this circumstance, is because we value the principle of legal certainty.[56] Legal certainty, by way of predictable law, is a control on the on the exercise of state power.[57] Even if rules are not always just, we can plan our activities successfully under rules provided they are consistently interpreted and applied.[58] As put by John Smillie, this predictability of legal outcomes "encourages future planning and co-operative activity".[59] Thus, a key reason for treating the law as authoritative is precisely because it is *not* pragmatic.

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[51] Locke, John., *The Second Treatise of Government*, (New York; Bobbs Merrill) (First Published 1690) 76, 77, 78.
[52] *Ibid.*
[53] Hobbes, Thomas., *Leviathan* (New Jersey, Prentice Hall, 1958) (Originally published in 1651).
[54] Blackstone, W., *Commentaries on the Laws of England.* (Reprint of 1st ed, London, Dawsas of Pall Mall, 1966) Volume 1. 142.
[55] Schauer, Frederick., *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life*. New York: Oxford University Press, 1991, 17 (Playing by the Rules).
[56] Craig, P. P., "Substantive Legitimate Expectations in Domestic and Community Law" *Cambridge Law Journal,* July 1996, 289, 299.
[57] Stinchcombe, Arthur L., "Certainty of the Law: Reasons, Situation-Types, Analogy and Equilibrium. *The Journal of Political Philosophy:* Volume 7, Number 3, 1999, 209.
[58] Schauer, *Playing by the Rules*, 138.
[59] Smillie J., 'Formalism, fairness and efficiency: civil adjudication in New Zealand' [1996] *NZ Law Review* 254, 257.

This raises a prima facie objection. On the one hand, it has been argued that correct interpretations in the law will only be discernable to those with a full knowledge of the surrounding legal context. This precludes all but specialised legal interpreters from knowing what the law is. On the other hand, it has been argued that Smith has erred by not taking into account the principle of legal certainty. For the principle of legal certainty to have any worth it must be possible for the majority of the people to find out the majority of the law the majority of the time. If people do not know the law they cannot plan future conduct around it.

This charge of self-contradiction does not stand. Nowhere does Smith assert that *all* legal text has hidden meaning.[60] Rather, Smith's point is that there are tricky problems of interpretation which are solved by reference to 'hidden' meanings.[61] Dworkin's interpretive theory explains why some 'hidden' interpretations are respected as providing the answer in hard cases.

The point is that the vast majority of legal text will not be hard cases requiring interpretation. Most cases before the courts are not argued on a legal basis; the law is applied to the facts (which often are in dispute) with little argument as to the substance of the law. This is consistent with Smith's observations, Dworkin's theory and the principle of certainty in the law. Because the majority of the law is unambiguous the majority of the time, the general public can embrace legal certainty as a worthwhile goal. The principle of legal certainty, combined with our constitutional principles and the Lockean idea of a social contract explains, in a completely secular manner, why the law is treated as authoritative.

The final similarity between legal and scriptural interpretation identified by Smith is that both types of interpretation treat seemingly disparate and diverse texts as forming a unified and harmonious whole.[62] Smith notes that this assumption is extraordinary.[63] Despite statutes made by different legislatures with different aims and intentions and despite decisions made by different judges, in different centuries, with different temperaments and training, we view the law as constituting and

[60] Smith, Law as a Religious Enterprise, 83.
[61] *Ibid, 89.*
[62] *Ibid*, 84.
[63] *Ibid,* 93.

reflecting a unified, coherent whole.[64] The law, like the Bible, Qur'an or Torah, is seen as the work of a single author.

However, there is nothing mysterious about this aspect of the law. It can be explained by summarising the conclusions of the previous parts of this essay. Under the Dworkinian interpretive method, the correct interpretation of hard cases will be consistent with the surrounding legal rules and principles. This drive for consistency and coherence is further buttressed by the fact that we treat the law as authoritative. Then, because the law is seen as authoritative, we attempt to give full effect to it. This means we try to read inconsistent texts in a consistent manner; we give the law a coherent and consistent meaning even if pragmatic considerations would require a different result. This is because we value the principle of legal certainty. In sum, our secular practices of interpretation aim for the law to represent a consistent, coherent whole. Smith sees our approach to interpretation as presupposing divine authorship of the law.[65] He has got it backwards. The appearance of divine authorship in the law is merely a symptom of our wholly secular approach to interpretation.

Conclusion

It has been argued that we do not interpret the law as if God wrote it. Interpretive practises in the law make sense without reference to religious assumptions. This thesis was advanced in three parts. These parts were organised as an attack on the main pillars of Smith's article "Law as a Religious Enterprise". Part one set out Smith's position that underlying religious assumptions best explain the acceptance of hidden meanings in legal texts. This position was wrong, as hidden meanings in legal texts are accepted due to their coherence with the surrounding body of law and our moral convictions. This idea, that context can alter literal meanings, holds true in ordinary language as well as in the law. Part two of this essay explained the law's "inherent" authority without reference to religion. We treat the law as authoritative because rule by law is an attractive alternative to a Hobbesian state of nature. Further, the secular principle of legal certainty explains why we continue to treat the law as authoritative even though a pragmatic cost-and-benefits

[64] *Ibid,* 93.
[65] *Ibid*, 98.

analysis might yield more rational results in individual cases. Smith's observation that the law presupposes a single divine author was countered in the final part of this essay. Because correct legal practise demands coherence and consistency in the law, a symptom of our secular practices is that the law appears to be the work of a single author.