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THE CASE FOR CLIFF-TOP DUTIES

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Introduction

The common law has long rejected the notion of a general duty to rescue. As Lord Keith famously explained, should a man see another about to walk off a cliff-top there would be no legal duty to shout a warning or intervene.[1] This rejection reflects not only the law's commitment to maintaining the distinction between moral and legal duties, but also its strict adherence to the principled construction of positive obligations. The two greatest obstacles to such a duty are therefore the general rule relating to nonfeasance and the issue of causation. While the courts remain strong advocates of the general rule against finding positive duties, the growing number of exceptions suggest a gradual erosion of its austerity. These obstacles and the rationale behind them are discussed in the first section of this dissertation. Moving on from these issues, the second section sets out the argument for a limited duty to rescue based upon an assumption of responsibility coupled with general reliance or dependence, as proposed by James Edelman and Nathalie Gray. The authors focus on the special role that certain professionals hold within society and the expectations that society consequently places upon then in relation to effecting rescue. I argue that while this framework is compelling, it is also open to critique, most crucially in relation to their evaluation of the doctrine of general reliance. In light of the implications of a duty that necessarily arises between strangers, it is imperative that the doctrine be correctly applied. The final part of this dissertation therefore endeavours to present a logical justification for how the doctrine might be applied within the framework of the proposed duty so as to sufficiently justify an exception to the general rule against positive obligations.

[1] *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] A.C. 175; [1987] 2 All E.R. 705, at 192.

I.

A. The Current Approach and the Distinction between Moral and Legal Duties

There is currently no general common law duty to aid a person in peril, regardless of the ease of rescue or the severity of the consequences. Thus the courts have held that there was no duty for a expert swimmer to rescue an intoxicated party from drowning,[2] for a bystander to come to assist a stranger bleeding to death,[3] or for a physician to answer the call of one who is dying and might be saved.[4] While in such circumstances there may be a moral duty to act, the common law has steadfastly held that moral duties, while compelling, are not legally enforceable. The distinction between moral and legal duties is founded on two connected assertions. First, that morality is an internal phenomenon and decisions to act altruistically ought therefore to be matters of free choice.[5] As Kant asserts 'law cannot make a person virtuous'.[6] Secondly, the translation of morality directly into law faces practical difficulty in light of its inherently subjective nature. In Heyman's words: [7]

> [as] morality is rooted in the inner subjectivity of the individual…the moral duty to aid others is too indefinite for legal enforcement. Although morality enjoins one to promote the well-being of others in general, it does not specify to whom this duty is owed or how much must be done to satisfy it. Therefore, insofar as the obligation to aid others is a moral one, it may not be enforced by positive law.

Accepting however that much of the law is founded upon notions of moral right and wrong, and that the lines between moral and legal wrongs inevitably overlap, the courts have imposed a number of rules

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[2] *Osterland v Hill* (1928) 160 NE 301.

[3] *Allen v Hixson*, (1990) 111 Ga 460, 36 SE 810

[4] *Hurley v Eddingfield*; (1901) 59 NE 1058l; (1901) 156 Ind. 416.

[5] Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90 Yale L.J. 247, at 266.

[6] I. Kant, (1797) *The Metaphysical Elements of Justice Second Edition,* (Translation by J. Ladd 1999) at 19-20, paraphrase by Weinrib, Ibid, at 266 .

[7] Steven J. Heyman, 'Foundations of the Duty to Rescue', (1994) 47 Vand. L. Rev 673, at 721

pertaining to the finding of a legal duty.[8]

When a proposed novel duty in negligence arises "one should ask not whether it is covered by authority but whether recognised principles apply to it".[9] This approach might be demonstrated by reference to Lord Atkin's interpretation of the moral and Biblical rule that one is to love thy neighbour. In the Biblical text, when posed with the question "who is my neighbour?" Jesus responded by telling the story of a man lying bleeding on the side of the road. Three strangers walked past. While two simply ignored the injured man, the third, a Samaritan,[10] came to his rescue.[11] The story suggests that all persons are morally obliged to aid a fellow human-being in peril. Within the legal context however, Lord Atkin stated in *Donoghue v Stevenson* that "the rule that you are to love your neighbour, becomes in law, you must not injure your neighbour". [12] Thus, while one is obligated to not harm another there is no general legal duty to confer a benefit. Furthermore, when asked who then is one's neighbour? Lord Atkin pointed toward the principles of foreseeability, proximity and causation, stating that such a duty was owed only to:[13]

> Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

His Lordship's statement has since been developed by the courts into a number of tests under which the scope and existence of a duty is determined in reference to established legal principles, furnished by, but not founded on, considerations of what is moral or 'fair, just and

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[8] Arthur Ripstein, 'Three Duties to Rescue: Moral, Civil, and Criminal, (2000) 19 Law & Phil. 751, at 754.

[9] Per Lord Reid, *Home Office v Dorset Yacht Co Ltd* [1970] A.C. 1004; [1970] 2 All E.R, at 1026.

[10] Who, being an ethnic 'outsider' would have no relationship of kinship with the stranger.

[11] *The Bible,* Luke 10:25-36 (New Revised Standard Version, Division of the Christian Education of the national Council of Churches of Christ in the United States of America, 1989).

[12] *Donoghue v Stevenson* [1932] A.C. 562 (HL), at 580.

[13] Ibid 580, also see 581 where his Lordship used the term 'proximity'.

reasonable'.[14] Consequently, under the common law the first two strangers in the Biblical parable would have incurred no liability.[15] There are two major obstacles to the finding of a general duty to rescue under these current duty tests. First, the law's distinction between misfeasance and nonfeasance, and second, the requirement of a causative connection between the party's own behaviour and the loss suffered by reference to the principle of proximity. This discussion now turns to an examination of these two points.

1. Misfeasance and Nonfeasance

As Bohlen states "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance".[16] While a party will be liable for a wrongful act that renders another positively worse off, they will generally not be liable for merely declining to act so as to confer a benefit. The justification for this approach lies in the law's jealous protection of personal autonomy and the theory of the social contract.[17]

Social contract theory holds that in submitting to the governance of the state, an individual is granted the state's protection and 'the assurance that he will be free to realise his life plans'.[18] In order to effect this protection, the state requires that, all citizens, in return, consent to not actively interfere with the rights of others. The law generally imposes liability only where an individual acts contrary to this

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[14] See Lord Wilberforce's judgment in *Anns* v *London Borough of Merton* [1978] AC 728; [1977] 2 All ER 492 (HL); Lord Keith's judgment in *Yuen Kun Yeu* v *Attorney General of Hong Kong*, above n1; Lord Bridge's judgment in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL); [1990] 1 All ER 568 (HL); and Cooke P's judgment in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282 (CA).

[15] *Home Office v Dorset Yacht Co Ltd* above n9, at 1060.

[16] Francis H. Bohlen , 'The moral Duty to Aid others as a basis of Tort Liability', (1908) 56 U. Pa. L. Rev 217, at 219.

[17] R. J Lipkin 'Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue (1983) 31 UCLA L. Rev. 278, at 277.

[18] John Rawls, *A theory of Justice*, (Harvard University Press, United States, 1971) at 407-16, paraphrase by Lipkin Ibid, at 279.

requirement, not when they simply decline to advance the interests of others, as that would constitute a more serious interference with their liberty.[19] Here the social contract represents a fine balance between protection, right, and autonomy. It is the role of the state, not the individual, to afford protection to other citizens. However, the rules and laws that are imposed in order to deter and punish individuals for unduly interfering with the rights of others in turn limit all citizens' autonomous rights. The general rule relating to nonfeasance therefore represents one mechanism by which the balance between the rights of another and the rights of an individual are set.

Two issues might be raised regarding a general duty to rescue. First, that the imposition of such a duty effectively renders the right of an individual to make autonomous decisions subservient to the needs of others in peril. This would distort the balance between protection and autonomy, and is arguably beyond the justifiable scope of the law. Secondly, because such a duty necessarily contemplates circumstances involving strangers, it would constitute a unilateral limitation on the rights of the individual on whom it is imposed. Indeed Ripstein argues that the individual's responsibility not to interfere with the rights of others includes the subsidiary requirement that one must avoid displacing the costs of one's choices onto others.[20] Thus 'equal freedom can also be described as the idea that one person's liberty will not be limited unilaterally by another's vulnerability, nor one person's security limited unilaterally by another's choices'.[21] Indeed according to early natural right theorists such as Locke the correct function of law is to protect individual rights, not to impose upon individuals affirmative duties that act to disproportionately fetter their autonomy. [22]

2. Causation, Proximity and Exceptions to the General Rule

The principle of causation is fundamental to the establishment of liability for negligence. Generally, establishing causation requires that the harm suffered be positively caused by a defendant's conduct. In

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[19] Robert L Hale, 'Prima facie Torts, Combination and Non-Feasance' (1946) 46 Colum. L. Rev. 196, at 214.
[20] Ripstein, above n8, at 757.
[21] Ibid, at 759.
[22] Heyman, above n7, at 707.

other words it must be shown that 'but for' D's conduct, P would not have suffered loss. The obstacle presented by the requirement of the causative link is therefore closely connected to that presented by the rule relating to nonfeasance. Indeed one might question how an individual's failure to act could be seen as a legal cause of loss to another. The answer stems from Lord Atkin's reference to both acts and omissions in *Donoghue*,[23] in light of which the courts have held that where there is a positive duty of care, a failure to fulfil that duty is capable of being the active cause of loss to another. However, the formulation of a positive duty, so as to constitute an exception to the general rule, is necessarily more complex than the formulation of a negative one. In developing a body of exceptions, the courts have adopted a somewhat piece-meal approach. The difficulty in finding any obvious overarching rationale for the increasing list of exceptions reflects this inherent complexity.

Non-exhaustively, the courts have found positive duties where: a party has contributed to the risk of the harm eventuating, such as where a bar manager supplied alcohol to a patron who later crashed while intoxicated;[24] where there is a special relationship between the parties, such as the paternalistic relationship between a parent and child,[25] or the relationship of control between a prisoner and gaoler;[26] where there has been an assumption of responsibility by the defendant coupled with reliance on the part of the plaintiff, such as a military base that organised return transport for soldiers from an event where excessive alcohol consumption was expected;[27] or where a party has control over property that poses a risk to others; such as the owner of a cattle-station who failed to put out a fire that then spread to

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[23] *Donoghue v Stevenson,* above n12, at 580.

[24] *Stewart v. Pettie*, [1995] 1 S.C.R. 131; also see *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 S.C.R. 1186 (where an organiser of a ski competition allowed another to enter whilst intoxicated).

[25] *McCallion* v *Dodd* [1966] NZLR 710 (CA).

[26] *Home Office* v *Dorset Yacht Co Ltd* , above n9; *New South Wales v Bujdoso* (2005) 227 CLR 1; Also see discussion in *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L No 14 Pty Ltd v Scott [2009] HCA 47*, at para 38.

[27] *Jebson v Ministry of Defence* [2000] 1 W.L.R. 2055; also see *Barrett v Ministry of Defence* [1995] 3 All E.R. 87.

neighbouring property.[28]

As stated, there is no obvious general principle linking these categories. However, in all cases there is some direct or indirect connection or relationship of proximity between the parties, which at the very least might be distinguished from those instances of pure nonfeasance involving mere strangers. As explained in Prosser and Keeton on Torts:[29]

> The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has gotten himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit on him.

In such circumstances it is both by virtue of this proximate connection to the other party, and only to the extent determined by the nature of that relationship, that the law justifies the prioritisation of another's right to protection over the individual's right to autonomy.

In rescuer cases, a mere stranger (A) who happens to witness another (B) in peril is not responsible for the creation of any risk to B and there is no special relationship which would place an affirmative duty on A so that the failure to carry it out could be seen to cause the injury.[30] Indeed, as B's predicament arose entirely independently of A, the only arguable basis for a duty is that of means and circumstantial proximity. It is clear however, that this alone is not sufficient to give rise to a positive duty. [31] There are a number of good policy reasons for this. Firstly, unlike instances where there is a previous relationship, A would have no ability to take steps to prevent or decrease the risk of

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[28] *Goldman* v *Hargrave* [1967] AC 645 (PC); also see *Wilson & Horton v A-G* [1997] 2 NZLR 513 (CA).

[29] W Page Keeton, Dan B Dobbs, Robert E Keeton, David G Owen, *Prosser and Keeton on Torts.* (5th Ed, West Publishing Co., Minnesota, United States 1984) at 375.

[30] James Edelman, Nathalie Gray, 'Developing the law of Omission: a Common Law Duty to Rescue' (1998) 6 TLJ 240, at 241.

[31] *Home Office* v *Dorset Yacht Co Ltd* , above n9, at 1027.

B finding himself in that position of peril.[32] Secondly, as any duty to rescue would be imposed purely by B's plight, such a duty stands in clear conflict with both the rule that persons cannot unilaterally impose duties on other,[33] and the requirement that duties be founded on notions of what is fair, just and reasonable.[34] Finally, on a more practical level there is no rational justification for singling out or 'picking' A over any other stranger.[35] In Lord Reid's words: 'where a person has done nothing to put himself in any relationship with another person in distress…mere accidental propinquity does not require him to go to that person's assistance'.[36]

There is therefore no foundation on which the law can justify upsetting the aforementioned balance between autonomy and right by imposing a general duty to rescue. The current discussion does not seek to defend such a duty, but rather presents a more limited duty which rests somewhere between the rejected general duty and the accepted exceptions. It is to this more limited duty that the discussion now turns.

II.

A. *Lowns v Woods* – A good place to start?

Before addressing the specific perimeters of the proposed duty there is one case worth noting. In *Lowns v Woods*[37] the New South Wales Court of Appeal upheld the finding of a duty to rescue on the part of a doctor who failed to respond to a request to attend a 10 year old boy having an epileptic fit nearby. As a result of this failure the boy did not receive treatment in time, suffered major brain damage and consequently became permanently disabled. The Court upheld the

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[32] Clare Elaine Radcliffe, 'A Duty to Rescue: The Good, the Bad and the Indifferent: - The Bystander's Dilemma' (1985) 13 Pepp. L. rev. 387, at 396.

[33] Ripstein, above n8, at 759.

[34] *Caparo Industries Plc v Dickman*, above n14; *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

[35] *Stovin v Wise* [1996] A.C. 923; [1996] 3 All E.R. 801, at 943.

[36] *Home Office* v *Dorset Yacht Co Ltd*, above n9, at 1027.

[37] *Lowns v Woods* (1996) Aust Torts Reports 81-376 (HCNSW). Approving the decision in *Woods v Lowns (*1995) 36 NSWLR 344.

finding of a positive duty, notwithstanding the fact that there was no previous relationship. The judgments presented in both the initial Court and on appeal have been heavily criticised for failing to appropriately address the issues of nonfeasance and causation.[38] It would appear that rather than addressing the difficulties associated with establishing a positive as opposed to negative duty, the judges misused policy as a justification for the finding of proximity, thus failing to acknowledge the distinction between moral and legal duties.[39] This dissertation argues however that the facts of the case demonstrate exactly the sort of situation in which a limited duty to rescue ought to apply. As the arguments presented in *Lowns* fail to sufficiently address the relevant issues, this discussion now turns to an academic proposal that seeks to do exactly that.

1. Edelman and Gray: A proposed Limited Duty to Rescue

In their article 'Developing the law of Omission: a Common Law Duty to Rescue',[40] Gray and Edelman propose a limited duty to rescue based upon the dual components of assumption of responsibility and reliance or dependence. They assert that the mistake that the (lack of) causation/proximity type argument makes is in assuming that, for the purposes of rescue, all bystanders are in the same position in relation to the person in peril. They suggest that 'the existence of a special relationship should not merely be determined by reference to the individual rescuer and victim but by having regard to the societal relationships that exist between classes of potential rescuers and the victims they would be capable of assisting'.[41] The author's tentatively base their proposed duty on the doctrine of general reliance, which acts to relax the specificity required for both elements of assumption and reliance, thus allowing it to be applied to circumstances involving complete strangers. Noting a number of uncertainties surrounding the validity of the doctrine, Edelman and Gray present a piecemeal

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[38] Les Habberfield, 'Lowns v Woods and the Duty to Rescue', (1998) 6 Tort L Rev 56, at 58.

[39] Thomas Fuance, Kumaralingam Amerthalingam, 'Patching up Proximity: Problems with the judicial creation of a new medical duty to rescue', (1997) 5 TLJ 27, at 31.

[40] Edelman, Gray, above n31.

[41] Ibid, at 241

justification for its application within their proposed duty. Applied to the facts of *Lowns* the authors argue that by voluntarily holding himself out to be a practising medical practitioner Dr Lowns entered a special relationship with the epileptic boy characterised by an assumption of responsibility on the part of Dr Lowns and vulnerability and dependence on the part of the boy. Consequently Dr Lowns owed a positive duty of care to the boy which he failed to fulfil, thus causing his injury.[42]

(a) Elements of Proximity - Assumption of Responsibility and Reliance

Ever since the House of Lords decision in *Hedley Byrne*,[43] the concept of an assumption of responsibility, coupled with reliance on the part of another party have been regular features of the determination of a duty of care. Here, whether in relation to a certain activity or in relation to an undertaking that affects the plaintiff, responsibility is seen as some kind of choice made and acted upon by the parties. One party consciously takes on something while another consciously relies upon that.[44] Proximity in such cases is thus 'understood as being governed on both sides by perception and intention'.[45] The application of this dual construction of proximity has been varied, and at times the courts have found sufficient proximity in circumstances where the reliance element is weaker, or indeed absent altogether. However, it is clear that in all constructions save one, the courts have held that it is crucial that there be a sufficient degree of specificity as to who the elements are directed at. The one exception, which also features in Edelman and Gray's proposed duty, is the somewhat contentious doctrine of general reliance established in *The Council of the Shire of Suntherland v Heyman*.[46]

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[42] Ibid, at 241.

[43] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

[44] Desmond Manderson, 'The Ethics of Proximity', (2005) 14 GLR 295, at 315.

[45] Ibid, at 315.

[46] *The Council of the Shire of Suntherland v Heyman* (1985) Aust Torts Reports 80-322, at 68,324; (1985) 157 CLR 424.

(i) Doctrine of General Reliance

The reliance element of the assumption/reliance construction of proximity normally arises out of a previous relationship, or alternately, in a very limited group of cases, by way of a previous relationship by proxy, such as the relationship between a legatee of a solicitor's client and that solicitor.[47] In such cases the imposition of liability for the loss suffered is logically justified because the defendant has had the opportunity to take precautions to decrease the likelihood that harm would come to the plaintiff.[48] As stated in *Barrett v Ministry of Defence* 'The characteristic which distinguishes those relationships is reliance expressed or implied *in the relationship* which the party to whom the duty is owed is entitled to place on the other party to make provision for his safety'.[49]

Under the doctrine of general reliance however, this requirement of a prior relationship, or indeed any form of specificity as to whom an assumption of responsibility or reliance is directed at is significantly relaxed. Mason J presented the doctrine in the Australian case of *Sutherland* stating that: [50]

> There will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care…This situation generates on one side (the individual) a *general expectation* that the power will be exercised and on the other side (the authority) a *realisation* that there is a general reliance or dependence on its exercise of the power.

His Lordship further discussed the basis of the concept stating: [51]

> Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of

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[47] *White and another* v *Jones and others* [1995] 2 AC 207.

[48] Radcliffe, above n33, at 396.

[49] Per Bedlam L.J *Barrett v Ministry of Defence*, above n27, at 1224, emphasis added.

[50] *The Council of the Shire of Suntherland v Heyman*, above n47, at 463-464, emphasis added.

[51] Ibid, at 463-464

> such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection.

Similarly, in *Parramatta City Council v Lutz* [52] McHugh J stated that the doctrine was justified by the failure of the traditional categories to give protection to individual members of the community from harm. Thus, the normal conscious assumption and reliance is, in essence, replaced by implied assumption and implied reliance on the basis of a legislative power or duty.

Under Edelman and Gray's proposed construction of proximity, rather than being the product of a legislative power general reliance arises out of the reasonable expectation that persons who constitute a particular class performing a specific role within society will act according to their skills and powers. They argue that in the same way that parties are dependent on public bodies to exercise statutory functions, so too are individuals reliant on specific skilled groups within society to assist in times of peril. It would also logically follow that such persons would be aware of those expectations and the extent to which citizens depend upon the exercise of their skills in times of emergency.[53]

The general reliance doctrine has been adopted by some courts in Australia[54] and New Zealand.[55] It was however, rejected by a 3/2 majority of the High Court of Australia in *Pyrenees v Day.*[56] While

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[52] *Parramatta City Council v Lutz* (1985) 157 CLR 424 ; (1985) 60 ALR 1.

[53] Edelman, Gray, above n31, at 243.

[54] *Casley-Smith v FS Evans & Sons Pty Ltd (No 5)* (1988) 67 LGRA 108; *Nagle v Rottnest Island Authority* (1989) Aust Torts Rep 80-298; *Hicks v Lake Macquarie City Council (No 2)* (1992) 77 LGRA 269; *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71; *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378 ; 123 ALR 155; *Northern Territory of Australia v Deutscher Klub (Darwin) Inc* (1994) 122 FLR 135.

[55] *Invercargill City Council v Hamlin* [1996] AC 624; [1996] 1 NZLR 513, at 519 See *Hope v. Manukau City Council* (unreported), 2 August 1976; *Brown v Heathcote County Council* [1986] 1 NZLR 76, at 81; Also see statements made by Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, above n14, at 297.

[56] *Pyrenees Shire Council v Day* 192 CLR 330 [1998] Aust Torts Reports 64,673 (81-456).

Edelman and Gray acknowledge the difficulty posed by *Pyrenees*, they argue that this merely renders the approach difficult as a unitary test.[57] They assert that where coupled with additional proximity factors the doctrine may provide a powerful argument for proximity.

(ii) Assumption of Responsibility and Dependence – the Additional Proximity Factors

The concept of an assumption of responsibility first appeared within the law of negligence in the case of *Hedley Byrne* v *Heller*. In his judgment Lord Devlin described such an assumption as 'a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.'[58] If established, such an assumption was capable of giving rise to a duty of care.

Under Edelman and Gray's proposal, every 'class of professional person which has rescue as an aspect of its work, and which carries on its duties in accordance with standards of conduct or specialised training,' has by taking up that position assumed responsibility for certain relevant rescue situations should they arise.[59] This would apply notably to medical practitioners and public rescue bodies such as fire-fighters and ambulance officers.[60] The finding of such an assumption is founded on the fact that such parties hold themselves out as being capable of rescuing, and from the realisation that lay persons in peril would not have the skills or ability to aid themselves.[61] Taking the example of a doctor, Edelman and Gray note both Dr Lowns' acceptance in *Lowns* that, under the ordinary standards of a medical practitioner, he would have been obliged to respond, and that the

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[57] Edelman, Gray, above n31, at 243.

[58] *Hedley Byrne & Co Ltd v Heller & Partners,* above n44, at 529.

[59] Edelman, Gray, above n31, at 246.

[60] Subject to policy considerations, for example it is clear that there are limitations on the laws willingness to impose liability on public bodies where such would adversely affect the allocation or use of resources. See *Hill v West Yorkshire Police* [1989] AC 53 (HL); *Smith v Chief Constable of Sussex* [2008] 3 WLR 593 (HL).

[61] Edelman, Gray, above n31, at 241.

Medical Practitioners Act sets out a professional obligation to assist those in need of urgent attention.[62] They argue that while these factors are neither necessary nor sufficient in themselves to establish a duty of care, they do lend support to the argument that doctors are, or could reasonably be expected to be, aware that in entering the profession they are assuming responsibilities beyond those that they have specifically contracted for. Similar legislation and general understandings of what the role entails might be noted in regards to other professional rescuers. However, as with the medical example, such factors are merely required to lend support to the argument.

Edelman and Gray then turn to a number of cases where an assumption of responsibility has been associated with the concept of induced dependence or vulnerability rather than reliance in a specific sense. In *Hawkins v Clayton*[63] a solicitor was held liable for the loss suffered by a deceased client's estate as a result of the solicitor failing to inform the executor of the existence of a will.[64] In his judgment Deane J held that there was a sufficient relationship of reliance and assumption between the solicitor and the deceased client to hold the solicitor liable for foreseeable loss to the estate even where there was no actual reliance by the estate's representative.[65] Alternately, Gaudron J held that sufficient proximity was based on the executor's 'reasonable expectation' of disclosure regardless of the fact that he had no knowledge of the existence of either the solicitor or the will and thus could not have relied on the solicitor in the specific sense.[66]

Edelman and Gray assert that this concept of 'reasonable expectation' in the absence of specific reliance might be used to justify a duty based upon an expectation that a certain class of persons would act according to their skills and powers once they have assumed responsibility for doing so.[67] The authors argue that it is difficult to distinguish between a non-specific reliance on a class of persons who hold themselves out to have certain skills (such as solicitors), and general reliance in a class

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62 See above Section 2.1.
63 *Hawkins v Clayton* (1988) 164 CLR 539.
64 Edelman, Gray, above n31, at 244.
65 *Hawkins v Clayton* , above n64, 578-9.
66 Ibid, at 596.
67 Edelman, Gray, above n31, at 242.

that claim that they will perform a certain role in society (such as rescue professionals).[68] Furthermore, persons in need of rescue are certainly vulnerable in the sense that they are necessarily incapable of assisting themselves. [69]

The authors conclude that an assumption of responsibility by one class of persons over a situation coupled with dependence on the part of another class (or the existence of a reasonable expectation as to how the former will act) is sufficient to create an overriding relationship of proximity upon which a duty to rescue might be found. In addition, they claim that such a construction of proximity is really only a one-step extension of the category of exceptions covering relationships where there has been an assertion of control over the plaintiff.[70] They argue that where there is dependence, an assertion of control is expected.[71]

2. Critique and an Alternate Argument

Two significant objections might be raised to Edelman and Gray's proximity argument. While these objections are not fatal to the duty proposed, they do render unsatisfactory the authors' justification for their construction of proximity. This part of the discussion seeks to identify and address these objections and propose and justify a slightly altered argument for proximity.

(a) *Pyrenees* – Rejection of the Doctrine

The first objection to Edelman and Gray's argument relates to the majority's rejection of the doctrine of general reliance in *Pyrenees*.[72] While the authors acknowledge that *Pyrenees* is problematic, they assert that the judgment merely renders the doctrine incapable of being utilised as a unitary test, concluding that when coupled with other elements it is still strongly arguable. This analysis is both insufficient in that it fails to address the arguments raised by the majority and

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[68] Ibid, at 244
[69] Ibid, at 243.
[70] See above section 1.3 and n26.
[71] Edelman, Gray, above n32, at 244.
[72] *Pyrenees Shire Council v Day* above n56.

incorrect in that the 'additional elements' presented by the authors are not sufficient to fulfil the proximity requirement needed to justify an exception to the rule of nonfeasance.

Pyrenees concerned the existence of a common law duty of care owed by a council to subsequent occupiers of a property it had inspected. In 1988 the Pyrenees Shire Council had inspected a chimney and discovered that it was not safe to use. The Council wrote to the occupier of the premises warning that it was not safe to be used until it was repaired. The repairs were not carried out, and the Council made no further enquiries to see if it had been repaired or ensure that it was not in use. In early 1990 the lease to the premises was assigned to the Plaintiffs who were unaware of the letter or the danger. In mid-1990 a fire broke-out destroying the premises and damaging adjoining premises. The High Court of Australia held that the Council owed a statutory duty to the Plaintiffs, but rejected the doctrine of general reliance and held that the doctrine had no part to play in the finding of the duty.[73]

Each of the three majority judges in *Pyrenees* had slightly different reasons for rejecting the doctrine. Gummow J rejected it on the basis that as there was no conscious reliance actually placed on the defendant, the doctrine represented the creation of a new legal fiction, something the law approached with hostility. He concluded that liability should not be imposed in terms that do not command an intellectual assent or refer liability directly to basal principle.[74] Alternately, Brennan J noted the practical and undesirable implication of making general community expectations the touchstone of liability. Were legislative powers and grants to be found capable of attracting common law damages, the appropriate criterion would be legislative intention.[75] Kirby J took a slightly different approach, first rejecting the doctrine as a legal fiction but then suggesting that the factors that had been thought to establish the doctrine might be viewed as "proximity factors" going to the establishment of the normal

[73] *Pyrenees Shire Council v Day* above n56.
[74] Ibid, at para 163.
[75] Ibid, at para19.

requirement.[76] It is perhaps this position that led Edelman and Gray to the conclusion that *Pyreness* posed no issue to the doctrine when combined with other elements. However, one might point out that there is nothing in Kirby J's statements to imply that by allowing factors thought to give rise to the doctrine to be counted as proximity factors, the standard of proximity would be relaxed. In fact, Kirby J cited Lord Hoffman's judgment in *Stovin v Wise* specifically criticising the doctrine for appearing to discard the requirement that a plaintiff specifically rely upon the defendant.[77] It is therefore clear that under the majority's judgment, any combination of proximity factors will still have to demonstrate a sufficient degree of proximity to justify an exception to the rule against nonfeasance, whether or not it includes those associated with general reliance.

Edelman and Gray's discussion of the various additional elements that might be combined with the doctrine to produce a convincing argument for proximity becomes confused relatively quickly. They assert that the doctrine is arguable when coupled with both an assumption of responsibility on the part of professional persons assuming certain roles within society, and dependence or 'general expectations of the community' as to the fulfilment of those roles. However, the idea of "combining" these elements with the doctrine of general reliance is difficult to conceive considering that these elements themselves would appear to be the only arguable factors that could have been seen to establish the two parts of the doctrine of general reliance in the first place. In reality there is no "combining," as these were not "additional elements". Rather there is simply an argument asserting a very unspecific assumption on the part of certain person with a very unspecific reliance or dependence on the part of society. Having rejected the assertion that the doctrine of general reliance somehow provides some additional argument for proximity over and above the proximity factors actually identified, the question becomes whether the assumption and dependence factors proposed are capable of providing a sufficient argument for proximity.

In relation to the first factor proposed, it is submitted that an assumption of responsibility by professional parties to any person

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[76] Ibid, at para 203.

[77] *Stovin v Wise* , above n36, at 464.

needing rescue in circumstances where that party is capable of carrying it out essentially amounts to an assumption of responsibility to the whole world. While the concept of an assumption has been applied in a number of different forms[78] they have always involved a specific assumption for a specific activity in relation to a specific group of persons. The concept that a duty cannot be owed to the world can be seen in a number of decisions.[79] In *Caparo,* Lord Bridge stated in that the requirement of specificity acted to prevent 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[80] As Todd states: [81]

> Merely assuming an office or status and having the ability to help is not likely to be enough…there must at least be an assumption of responsibility for, and close control over, a *particular* activity in relation to a *particular* person or class before a duty might come to be recognised.

Accepting that an assumption of responsibility indicates proximity, the ability of the proximity requirement to act as a 'limit[ing] or control mechanism' for liability[82] would arguably be defeated if a party could be held to have assumed responsibility to all persons. The proposed assumption of responsibility is therefore incapable of providing a sufficient argument for proximity.

In relation to the second proposed proximity factor it is submitted that non-specific reliance or dependence had only ever been accepted in a very limited category of cases where there has been some form of specific assumption or control justifying the imposition of liability. Edelman and Gray point to the case of *Hawkins*[83] as providing support for their assertion that dependence alone constitutes a valid proximity factor. While the authors acknowledge that the judgments began by

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[78] Mary-Anne Simpson, 'What Amounts to an Assumption of Responsibility' [1995] 1 NZLJ 61, at 62.

[79] *Sutradhar v Natural Environment Research Council* [2006] 4 All ER 490 (HL).

[80] *Caparo Industries Plc v Dickman* above n14, at 609 citing Cardozo CJ in *Ultramares Corporation v. Touche* (1931) 174 N.E. 441, at 444.

[81] Stephen Todd, *The Law of Torts in New Zealand,* (4th ed. Brookers, New Zealand, 2005), at 155-6. Emphasis added.

[82] *Caparo Industries Plc v Dickman*, above n14, at 622.

[83] *Hawkins v Clayton* , above n64, See above section 2.2.1.2.

noting that proximity existed between the deceased and the solicitor, they fail to acknowledge the relevance of this in relation to other parties. Furthermore, both Gauldron and Deane JJ identified the relationship of control between the executor and the solicitor by way of the solicitor's assumption of control over the deceased's will and thus his testamentary intentions.[84] Here the solicitor had made a conscious undertaking toward the deceased specifically, which, when coupled with dependence, reliance or indeed 'general expectations', could be extended to those parties foreseeably affected by it.[85] Such a specific undertaking or assumption is significant in justifying an exception both because it means that the duty in question was not unilaterally imposed, and because, on the basis of this prior relationship, the defendant was capable of preventing or alleviating the risk placed upon the plaintiff. A similar objection might be raised to the authors' assertion that their construction of proximity is merely one-step beyond the category of control. At the core of the rationale for allowing an exception where there is a relationship of control is the fact that once control has been exerted the party exerting it is capable of preventing or alleviating risk.[86] Thus, the solicitor had the ability to prevent any loss to the estate simply by informing the executor of the will. Where however, as the authors propose, there is merely the potential or the expectation of an exertion of control this fundamental characteristic is lacking. It might be merely one-step, but that one-step is fundamental. In sum, the softening of the reliance requirement in *Hawkins* was based on the specific undertaking and control held by the defendant, the fact that those affected were readily ascertainable, and the unavoidable vulnerability of the plaintiff.[87] Considering that Edelman and Gray's proposed argument lacks the key elements of control and specific undertaking, *Hawkins* can provide little support. Indeed the courts have demonstrated an unwillingness to apply the exception where all these elements are not present.[88]

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[84] Ibid, Per Deane J at 579 and Per Gaudron J at 597.

[85] Per Gaudron J, *Hawkins v Clayton*, above n64, at 597.

[86] Radcliffe, above n33, at 396.

[87] Other cases demonstrating this approach are: *White and another* v *Jones and others*, above n48; *Hill v Van Erp* (1986) 162 CLR 341; *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 (CA).

[88] See *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA); *Kapfunde v Abbey National plc* [1999] ICR 1 (CA).

Summing up the first objection: Edelman and Gray's failure to adequately deal with the rejection of the doctrine as a unitary test meant that any proposal they presented necessarily required a closer connection (proximity) between the parties than the non-specific elements provided by the doctrine. In light of the fact that no additional proximity factors connecting a rescuee and rescuer would be present in situations to which the duty would apply, their argument was necessarily based simply on a deemed assumption of responsibility to the world and non-specific reliance or general expectations. It is submitted that if specificity is unavailable then the only possible way to render the proposed duty arguable is to address the issues raised in *Pyrenees* and defend the doctrine in its unitary form. This was, I believe, successfully done by the minority judges.

In his dissent Toohey J stressed that the doctrine of general reliance is only a fiction in the sense that it is not actual reliance. He further pointed out that negligence is not a stranger to legal fictions.[89] Indeed the concept of an assumption of responsibility is itself essentially a legal fiction, as, in reality tort obligations are imposed not assumed.[90] The question therefore is whether such a "fiction" is desirable in light of the practical dangers of making general community expectations the touchstone of liability. Here McHugh J asserted in his dissent that if the limitations of the doctrine are properly understood then this danger is overstated. The doctrine applies only in cases where it can be established that individuals could not protect themselves and thus were entirely dependent on the public body and where that body knew of the danger of not exercising their powers. Furthermore, he noted that the doctrine would not lead to liability merely by reason of a failure to carry out a power, as this would depend on all the circumstances in the case including competing demands on the body in question and terms of the statutory power.[91] In sum, as the law is not adverse to legal fictions, this alone is not reason enough to reject the doctrine. Considering the practical limitations that might be applied to curtail the duty, it is arguable that the value in the protection that the doctrine provides to those members of the public who are vulnerable to loss

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[89] *Pyrenees Shire Council v Day,* above n56, at para 62.
[90] See Tipping J in *A-G v Carter* [2003] 2 NZLR 160 (CA), at 168.
[91] *Pyrenees Shire Council v Day*, above n56, at para 107-9.

justifies the fiction. Indeed one might note that the House of Lords did not hesitate to uphold the doctrine in the New Zealand case of *Invercargill City Council v Hamlin* stating that it was 'nothing new' and had been 'feature of New Zealand law for years'.[92] It is submitted that the position of the minority is to be favoured and the doctrine of general reliance is at the very least an arguable exception to the rule relating to nonfeasance.

(b) General Reliance and Professionals

The second objection to the proposed duty arises out of the exclusive application of the doctrine of general reliance to cases where reliance is placed on public bodies for the exercise of statutory powers. [93] As Edelman and Gray chose not to apply the doctrine of general reliance as a unitary test they were not required to present a justification for this extension. The construction proposed by this dissertation however rests entirely on the extension of the doctrine. This can only be achieved by referring back to the initial rationale given for the doctrine. In *Heyman* Mason J stated that general reliance was 'the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection'.[94] Under the social contract the state is positively obliged to confer protection on citizens. The state generally achieves this through the actions of agents employed to fulfil certain protective roles. The court's softening of the requirement of specificity under the doctrine of general reliance is therefore justified because the party on whom a specific statutory power is placed is acting as the agent of the state in ensuring the protection of members of society. In the execution of their statutory power, such agents effectively stand on the other side of the social contract and, rather than being owed the protection of their autonomy, to that limited extent, they are under a positive obligation to grant protection.

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[92] *Invercargill City Council v Hamlin*, above n 56, at 519.

[93] Indeed the cases almost exclusively concern the powers of local councils or council regulatory bodies - See *Invercargill City Council v Hamlin* Ibid; *Hope v. Manukau City Council*, above n56; *Brown v Heathcote County Council* above n56.

[94] *The Council of the Shire of Suntherland v Heyman*, above n47, at 463-4.

The proposed extension of the doctrine is justifiable on the basis that certain parties within society, whose professional functions include rescue, assume the position of agents of the state to the extent of carrying out rescue. At the core of this proposition is the protective nature of the role that parties such as doctors, lifeguards and rescue services are viewed, and indeed view themselves, as fulfilling within society. Such roles are necessary to the peace of mind of citizens in any state, and therefore might be distinguished from purely professional positions such as solicitors and businesspersons. Consequently, a citizen's expectation that a doctor (B) will not stand by while he perishes is not based, as the authors assert, on the known skills and qualifications of B so much as it is based on the role that B is seen to hold within society and the understanding that by taking up that role, B has agreed to act, within limitation, for the protection of society. In sum, to the extent that a party's professional role involves rescue they might correctly be seen to be acting as agent of the state in carrying out the state's protective function. Consequently, under Mason J's explanation, when coupled with circumstances involving danger of 'such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection'[95] the doctrine of general reliance will give rise to a positive duty to rescue.

The acceptance of this argument constitutes a clear extension of the doctrine of general reliance as it has previously been understood. However, as noted in *Soldano v O'Daniels,* "What the courts have power to create, they also have power to modify, reject and re-create in response to needs of a dynamic society. The exercise of this power …is the strength of the common law".[96]

3. Application of the Duty

Accepting that the doctrine of general reliance is based upon the recognition of a risk of 'such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection', the duty could only logically arise in situations where the threat is: grave,

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[95] Ibid, at 463-4.
[96] *Soldano v O'Daniels* (1983) 141 Cal.App.3d 443, 190 Cal.Rptr. 310.

immediate, and where the person concerned is unable to act to protect themselves. By way of example, the duty would not arise in the case of a patient in need of a life-saving operation where the option to pay or contract for the treatment is available.[97] Such limitation is necessary on a practical level in order to protect those subject to the duty. Otherwise medical practitioners, for example, would be obliged to assist any party needing treatment regardless of the circumstances or cost, which in turn would create opportunities for free-riding and abuse of the medical profession.

One must also note that the existence of the duty does not mean that the partial or total failure to carry-out a rescue constitutes a breach of duty.[98] Rather, liability would depend upon all the circumstances of the case, and an application of the general principles of breach and the reasonable person standard.[99] Considerations such as the probability and gravity of risk; the expense, difficulty, and danger involved in attempting rescue; and any other competing interests would be taken into account. [100] Thus, as Edelman and Gray note, the duty may sometimes be an empty one.[101]

Conclusion

At the heart of the common law's rejection of a general duty to rescue is the balance between 'right' and 'autonomy' represented in the social contract. Any limitation on individual autonomy must be justified on the basis of legal principle rather than notions of morality. The greatest obstacle to a general duty is posed by the fact that any duty to rescue necessarily contemplates situations involving complete strangers. This is significant as there would appear to be no arguable proximity relationship between the parties that could justify an exception to the rule against positive duties. With no positive duty to rescue, there is no basis on which a court can find a causative link between a failure to act and the injury or death of the victim. The duty to rescue has therefore

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[97] See Weinrib, above n5, at 275.

[98] See McHugh J's discussion of the scope of the duty arising out of cases of general reliance in *Pyrenees Shire Council v Day,* above n57, at para 109.

[99] Lipkin, above n17, at 274.

[100] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, at 47-8

[101] Edelman, Gray, above n31, at 248.

traditionally been viewed as merely a moral duty lacking a principled basis sufficient to render it legally justifiable.

However, as Edelman and Gray argue, the mistake that the (lack of) causation/proximity type argument makes is in assuming that, for the purposes of rescue, all bystanders are in the same position in relation to the person in peril. Their proposed framework for a limited version of the duty to rescue based upon the special role that certain parties have within society is compelling. However, I argue that their application of the assumption of responsibility/dependence exception to the rule against nonfeasance and their analysis of the doctrine of general reliance are inadequate. The authors fail to truly appreciate the significance that the required specificity as to whom each of these elements are directed has in relation to the creation of proximity, and thus to the establishment of an exception to the general rule.

If this specificity requirement is acknowledged however, the potential for its relaxation under the doctrine of general reliance is of great import. I argue that the rejection of the doctrine in *Pyrenees* is unfortunate and it is the position of the minority that ought to be favoured. While the doctrine has never been applied to private individuals, I present a rational for the doctrine that allows for its extension to certain individuals on the basis of the role that they play within society. I argue that the doctrine rests upon the law's recognition that, in some instances, certain bodies or individuals act as agents for the state in the carrying out of the state's obligation to protect members of society under the social contract. In such cases the doctrine allows a softening of the requirement of specificity because it acknowledges that such agents effectively stand on the other side of the social contract and, rather than being owed protection of their autonomy, to that limited extent, they are obliged to grant protection. Accepting this interpretation, it is then conceivable that, where particular professional roles within society are viewed as fulfilling a wider function of protection, and to the extent that the state is incapable of otherwise effecting that protection, such persons might also be regarded as acting as agents of the state in certain situations. Where this is the case, the doctrine of general reliance would apply. I argue that this is a more apt and persuasive justification for Edelman and Gray's proposed duty.

This discussion began by acknowledging that morality alone is not capable of creating a legal duty, however, that is not to say that it is not a valid reason for allowing a principled extension of the law. As Radcliffe states 'Society has changed, and so have its problems and needs. The law must also change in order to address those needs'.[102]

[102] Radcliffe, above n33, at 388.

'GUILTY BUT NOT SUBSTANTIALLY IMPAIRED'

THOMAS WESTAWAY

Introduction

The New Zealand criminal law provides two regimes for dealing with mentally impaired defendants. The first, insanity, provides an acquittal for defendants suffering a mental impairment rendering them incapable of understanding their actions, or knowing they were morally wrong. The second prevents defendants from standing trial because they are too mentally impaired. However, despite these regimes there is a grey area in the law. There exist in New Zealand a number of defendants who suffer mental impairment insufficient for either an insanity or 'unfit to stand trial' verdict, but who are nevertheless significantly mentally impaired. These defendants potentially face the full force of the law when it is inappropriate for them to do so.

This paper aims to rectify this discrepancy in the law by proposing a new regime which, in its suggested form, does not exist in the common law world. Many overseas jurisdictions use the partial defence of diminished responsibility to resolve a similar problem, but this has limited application and has been rejected in New Zealand as being too difficult to define. Infanticide is the closest equivalent in this country, but this too has limited application and an unsound medical validity. Instead, the underlying bases of these two regimes – fair labelling and reduced culpability for mental impairment short of insanity – provide the theoretical foundations for the new regime. In order to deal adequately with those mentally impaired defendants falling outside the insanity and 'unfit to stand trial' verdicts, it is submitted the new regime will apply to all offences. Conforming to insanity and

diminished responsibility, the defendant should bear the burden of proof. Finally, a definition of the regime is proposed which should overcome many of the difficulties inherent in wording diminished responsibility. It is hoped that the proposed regime can enable the New Zealand criminal law to advance towards a position which more satisfactorily and fairly deals with mentally impaired defendants.

A. Dealing with mentally impaired patients in New Zealand

To demonstrate the deficiencies in the law, the current regimes for dealing with mentally impaired defendants must be explained. The first regime is insanity, [1] where a defendant is entitled to an acquittal if s/he can show, on the balance of probabilities, that s/he was insane at the time of the offence.[2] However, a defendant acquitted on the grounds of insanity may be subject to special disposal orders, rather than being able to 'walk free'.[3] Insanity sets a high threshold, requiring proof of either 'natural imbecility'[4] or 'disease of the mind'.[5]

'Natural imbecility' (meaning 'subnormality' or 'mental retardation') is a legal concept, so it is a question of law for the trial judge whether a particular medical condition qualifies.[6] The term does not necessitate permanence, but connotes durability.[7] 'Natural imbecility' indicates that disorders developing later in life and congenital defects suffice.[8] There is little judicial guidance on the scope of 'natural imbecility' in

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[1] See s 23 *Crimes Act 1961*.
[2] See s 23(1) *Crimes Act 1961*.
[3] See *Criminal Procedure (Mentally Impaired Persons) Act 2003*.
[4] s 23(2) *Crimes Act 1961*.
[5] s 23(2), n 4.
[6] Simester AP and Brookbanks WJ, *Principles of Criminal Law* (3rd ed, Brookers Ltd, Wellington, 2007) at 301.
[7] Campbell, *Mental Disorder and Criminal Law in Australia and New Zealand* (Butterworths, Wellington, 1988) at 126.
[8] Robertson B (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at CA23.04.

New Zealand, perhaps because of the obvious nature of cases where this is a real issue, and court verdicts of 'unfit to stand trial'.[9]

'Disease of the mind' is also a question of law, but medical witness testimony will always be crucial.[10] The New Zealand courts have never precisely defined the term.[11] The law normally only accommodates disorders affecting the mind: the faculties of reasoning, memory and understanding, and is unconcerned with disorders merely causing disturbed *behaviour*.[12] The major mental disorders medically classified as 'psychoses' qualify.[13] A common feature of psychoses is a loss of appreciation of reality, often involving hallucinations or delusions.[14] Bodily or mental disorders endemic in the physical or psychological makeup of the defendant which affect the balance of the defendant's mind and/or produce a state of automatism also qualify.[15] Because a 'disease of the mind' must result from an internal condition arising from an 'underlying pathological infirmity of mind',[16] it can include physiological conditions impacting the mind's operation (e.g. epilepsy, hyperglycaemia and cerebral arteriosclerosis).[17] However, the term excludes self-induced intoxication from alcohol or drugs, transitory states (such as hysteria or concussion)[18] and psychological disturbances

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[9] "Part III Defences, Insanity" <http://www.lexisnexis.com.ezproxy.canterbury.ac.nz/nz/legal/search/runRemoteLink.do?bct=A&risb=21_T10334474248&homeCsi=273939&A=0.6178593236998488&urlEnc=ISO-8859-1&&dpsi=008E&remotekey1=REFPTID&refpt=475:B185:P35&service=DOC-ID&origdpsi=02IQ>

[10] Simester and Brookbanks, n 6 at 301.

[11] Robertson, n 8 at CA23.05. It has been said to be 'a term which defies precise definition and which can comprehend mental derangement in the widest sense': *R v Cottle* [1958] NZLR 999 (CA), at p 1011 per Gresson P.

[12] Simester and Brookbanks, n 6 at 303.

[13] Allen, *Textbook on Criminal Law* (Butterworths, London, 1991) at 106.

[14] Robertson, n 8 at CA23.06.

[15] Simester and Bookbanks, n 6 at 307.

[16] *R v Radford* (1985) 42 SASR 266, 247 (King CJ).

[17] Simester and Brookbanks, n 6 at 302.

[18] Ibid. at 304.

common in normal people (for example extreme anger or loss of self-control).[19]

A 'disease of the mind' or 'natural imbecility' must affect the defendant's responsibility by producing a relevant incapacity in one of the two ways specified in s 23 of the *Crimes Act 1961*: the defendant must prove s/he was 'incapable' *either* 'of understanding the nature and quality of the act or omission' *or* 'of knowing that the act was morally wrong, having regard to the commonly accepted standards of right and wrong.'[20] This limits the conditions sufficing for insanity. 'Incapable' imposes a high threshold of cognitive impairment, to a degree sufficient to eliminate a defendant's capacity to coherently reason about the circumstances of the offence.[21]

To establish the 'nature and quality' limb the defendant must show that s/he did not know what s/he was doing, or did not appreciate the consequences of his/her act, or did not appreciate the circumstances in which s/he was acting.[22] This includes cases where the defendant was not consciously acting and circumstances where conduct would not constitute the alleged offence if it was as the defendant believed it to be.[23] A traditional (albeit unlikely) example is a defendant strangling the victim thinking s/he is squeezing a lemon.[24]

Alternatively, the defendant must establish that s/he did not know the act was morally wrong 'having regard to the commonly accepted standards of right and wrong.' In *R v Windle* it was held that 'wrong' meant 'contrary to law',[25] but the High Court of Australia rejected this

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[19] *R v Porter* (1933) 55 CLR 182, per Dixon J at p 188.
[20] See ss 23(2)(a), (b) *Crimes Act 1961*.
[21] Simester and Brookbanks, n 6 at 314. See also *R v Cheatham* [2000] NSWCCA 282.
[22] Ibid.
[23] Robertson, n 8 at CA23.14.
[24] Simester and Brookbanks, n 6 at 314.
[25] *R v Windle* [1952] 2 QB 826; [1952] 2 All ER 1 (CA)

in *Stapleton v R* by holding that insanity may succeed even though the defendant realised the conduct was illegal.[26] This approach was endorsed by the New Zealand Court of Appeal in *R v Macmillan*,[27] and the use of 'morally' in s 23(2)(b) clearly rejects the *Windle* verdict.[28] From *Macmillan*, it seems that insanity will be established in New Zealand even where the accused perceived that the act was 'morally wrong in the eyes of other people', if s/he thought him/herself that the act was right, or thought that his/her own acts were 'above judgement on moral standards'.[29] Insanity can thus be established where the defendant believes s/he is morally justified in his/her behaviour, even though s/he may have known his/her acts were illegal or contrary to public standards of morality.[30]

The second regime is under the *Criminal Procedure (Mentally Impaired Persons) Act 2003 (CP(MIP)A)*. Under s 4, a defendant may be 'unfit to stand trial' where, as a result of mental impairment, s/he is unable to instruct counsel or conduct a defence, so as to be incapable of pleading, understanding the nature or purpose and possible consequences of the proceedings, or of communicating adequately with counsel for the purposes of conducting a defence.[31] The evidence of two health assessors is required.[32] In *P v Police*, Baragwanath J

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[26] *Stapleton v R* (1952) 86 CLR 358; [1952] ALR 929

[27] *R v Macmillan* [1966] NZLR 616 (CA), at 622.

[28] Robertson, n 8 at CA23.15.

[29] *R v Macmillian*, n 27 at 622.

[30] Simester and Brookbanks, n 6 at 317. For example, in *R v Macmillan* [1966] NZLR 616 (CA) the defendant, who suffered from paranoid schizophrenia, pleaded insanity to a charge of attempting to break out of Mt. Eden jail. He did not regard the act as wrong, but knew that people generally would regard it as wrong.

[31] Section 4(1) *Criminal Procedure (Mentally Impaired Persons) Act 2003*.

[32] See s 14 *Criminal Procedure (Mentally Impaired Persons) Act 2003*. Note that the health assessors' evidence must address the legal criteria for s 14 which requires a finding that the defendant is 'mentally impaired'. The court must then decide if the impairment is such so as to prevent the defendant's effective participation in the trial. See *R v Duval* [1995] 3 NZLR 202; (1995) 13 CRNZ 215.

considered relevant questions to be whether the defendant could: understand the charge; understand the proceedings; give instructions to counsel; understand the substantial effect of the prosecution's evidence; and make his/her version of facts known to the court and counsel.[33]

The *CP(MIP)A* does not define a 'mentally impaired defendant'. This was so the term would be widely interpreted so it would apply equally to persons who may be mentally ill or intellectually disabled.[34] 'Mentally disordered' persons under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* are probably covered, where a 'mental disorder' is defined as an 'abnormal state of mind' to such a degree that the defendant poses a serious threat to others or themselves, or seriously diminishes the defendant's capacity to take care of him/herself.[35] 'Intellectually disabled' defendants under the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID(CCR)A)* are also probably covered, and are similar to defendant's suffering natural imbecility under insanity. 'Intellectual disability' means 'permanent impairments' which became apparent in the developmental period of the defendant, and which result in significantly sub-average intelligence (e.g. I.Q. less than 70) and significant deficits in adaptive functioning in skills like communication, social skills, reading, writing and arithmetic.[36]

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[33] *P v Police* [2007] 2 NZLR 528, at [43]. For example, in *R v Codd* [2006] 3 NZLR 562 at [9], [10] the defendant was held unfit to stand trial because of his inability to instruct counsel and follow the processes of the court. The defendant was 80 years old and suffered from Parkinson's disease and post-traumatic stress disorder. His affected functions included memory, ability to think and reason, ability to organise and articulate thoughts and slower processing.

[34] "Guide to the Criminal Procedure (Mentally Impaired Persons) Act 2003, <www.courts.govt.nz/publications/publications-archived/2003/guide-to-the-criminal-procedure-mentally-impaired-persons-act-2003>

[35] s 2(1) *Mental Health (Compulsory Assessment and Treatment) Act 1992.*

[36] See s 7 *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.*

Section 24 *CP(MIP)A* provides orders for detaining defendants found unfit to stand trial or insane as 'special patients' under the 1992 Act, or as 'special care patients' under the *ID(CCR)A*.[37] Alternatively, if the court is satisfied that it is safe and in the interests of public safety to do so, it may order, under s 25 *CP(MIP)A*, a defendant's detention as a 'patient' under mental health legislation or as a 'care recipient' under the *ID(CCR)A*.[38]

A. The 'neither nor' defendants

Unfortunately, these two regimes fail to deal with *all* mentally impaired defendants. There exist in New Zealand a number of defendants who offend whilst under some mental impairment, but who are nevertheless 'neither' legally insane, 'nor' unfit to stand trial. These are the 'neither nor' defendants. Instead of receiving an acquittal and treatment under the other two regimes, 'neither nor' defendants face a potential full verdict and sentence, and must rely on their mental impairment as a mitigating factor at sentencing.[39] This paper will show that this is inappropriate, so the law must introduce a new regime providing for these defendants.

This section only aims to illustrate the *types* of cases and classes of 'neither nor' defendants, without determining their exact parameters. It is difficult to comprehensively list the mental impairments constituting a 'neither nor' defendant, as this will depend on the facts of the case and the degree of the impairment. For example, a severe case of schizophrenia may suffice for insanity, but a mild form may comprise a 'neither nor' defendant. It is also in the interests of public policy to exclude those who commit offences whilst under a transient state or

[37] See s 24 *Criminal Procedure (Mentally Impaired Persons) Act 2003*.
[38] Simester and Brookbanks, n 6 at 289. See section 25 *Criminal Procedure (Mentally Impaired Persons) Act 2003*.
[39] See s 9(2)(e) *Sentencing Act 2002*.

the voluntary influence of drugs or alcohol.[40] It would be unacceptable if self-induced conditions were to improve a defendant's prospects of a successful defence.[41]

Insanity excludes impairments of volition or control, instead focussing on mental impairments of understanding and cognition.[42] Provided a defendant grasps the nature or wrongfulness of an act, a defendant's abnormal emotional and volitional capacities will not render the defendant insane.[43] This establishes a class of 'neither nor' defendants, who can appreciate the nature or wrongfulness of their conduct, but whose mental impairment is such that they cannot control their actions. Consider a defendant suffering from kleptomania who is accused of stealing property. ICD-10, the International Classificatory Coding of Diseases and Related Health Problems, as classified by the World Health Organisation, defines kleptomania (or 'pathological stealing') as characterised by 'repeated failure to resist impulses to steal objects'.[44] Alternatively, consider a defendant who, suffering from pyromania, is accused of setting fires to property. ICD-10 characterises

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[40] In New South Wales this is explicitly provided in legislation. Section 23A(3) *Crimes Act 1900* (NSW) provides: 'If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.'

[41] Simester and Sullivan *Criminal Law: Theory and Doctrine* (3rd ed, Hart Publishing, London, 2003) at 586. See *R v Dietschmann* [2003] UKHL 10; [2003] 1 AC 1209 (HL).

[42] Note that in the Commonwealth of Australia and most of its States, insanity legislation includes a 'volitional' arm which asks whether or not the accused lacked the capacity to control his or her conduct. See *Criminal Code 1995* (Cth) s 7.3; *Crimes Act 1900* (ACT), s 428N; *Criminal Code 2002* (ACT), s 28; *Criminal Code* (NT), s 43C; *Criminal Code* (QLD), s 27; *Criminal Law Consolidation Act 1935* (SA), s 269C; *Criminal Code Act 1924* (TAS), s 16; *Criminal Code* (WA), s 27.

[43] Simester and Brookbanks, n 6 at 317.

[44] World Health Organisation *Statistical Classification of Diseases and Related Health Problems* (10th Revision, WHO, Geneva, 2007) at F 63.2.

pyromania (or 'pathological fire-setting') with 'multiple acts of, or attempts at, setting fire to property or other objects' and with 'a persistent preoccupation with subjects related to fire'.[45] These 'neither nor' defendants cannot control their actions, but, under the current law, will not necessarily receive some benefit on the basis of their mental impairment when they probably should do.

Another class of 'neither nor' defendants are the 'deserving cases'. These are defendants suffering some mental impairment who, because of their circumstances, deserve reduced culpability in a way the law currently fails to provide. For example, in *R v W* the defendant, a loving father, learnt that his baby child had been born with the worst survivable brain dysfunction and would never have independent functioning.[46] Consequently, the defendant became mentally debilitated and developed acute stress disorder (recognised in ICD-10),[47] which was a causal factor in him killing the baby. He was held to be sane. As shall be discussed, infanticide is the only statutory form of reduced culpability for defendants suffering mental impairment short of insanity in New Zealand.[48] However, infanticide is only available to *mothers* who kill their children, so the defendant here was charged with murder.

An additional 'deserving' group is battered defendants, where encountering a long course of cruel and abusive behaviour may lead to distress and depression constituting a mental impairment. Indeed, studies suggest higher rates of post-traumatic stress disorder in battered women than in the general population.[49] In *R v Gordon*, the defendant was convicted of murder after arranging her husband's

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45 Ibid, at F63.1.

46 *R v W* (2004) 21 CRNZ 926

47 ICD-10, n 44 at F43.0.

48 See s 178 *Crimes Act 1961*. Discussion on this begins at Heading 6 'Infanticide: New Zealand's Closest Equivalent'.

49 New Zealand Law Commission *Battered Defendants: Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at 20.

death.[50] However, the husband had often severely beaten her, and, consequently, at the time of the murder, the defendant, although not insane, suffered post-traumatic stress disorder, battered wife syndrome and depression (all recognised by ICD-10).[51] Ablett-Kerr argues that *Gordon* illustrates the inadequacies of the present regime because the defendant was precluded from being able to use any defence recognising mental impairment, despite her ability to reason being substantially impaired by the abuse from the deceased.[52]

A further class of 'neither nor' defendants are the 'nearly, but not quite, insane'. The contemplated defendant is one suffering a disease of the mind or natural imbecility sufficient for insanity, but who falls short of s 23 on some other ground. These defendants can be considered 'borderline insane'. However, caution should be exercised towards these defendants. The case law shows that they often commit serious offences and can pose a threat to society.[53] However, excluding them does not countenance the risk of preventing worthy cases. It would seem unfair to exclude these defendants because they are possibly the most deserving of appropriate recognition. Their mental impairments are often very serious, albeit insufficient for insanity. For example, in *R v Abraham* the defendant erratically drove a car, crashing

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[50] *R v Gordon* (1993) 10 CRNZ 430 (CA).

[51] ICD-10, n 44 at F43.1, T74.1 and F33.

[52] Ablett-Kerr J, "A Licence to Kill or an Overdue Reform? The Case of Diminished Responsibility" (1997) 9 Otago Law Review 1 at 4. Note that in *R v Gordon* (1993) 10 CRNZ 430 (CA) at 441, Hardie Boys J said that '[w]ere the defence of diminished responsibility available in this country, it may well have availed here'. Battered women overseas have been able to rely on the partial defence of diminished responsibility: see *R v Ahluwalia* [1992] 4 All ER 889; (1993) 96 Cr App R 133 (CA); *R v Humphreys* [1995] 4 All ER 1008; *R v Thornton (No. 2)* [1996] 1 WLR 1174; *R v Hobson* [1998] 1 Cr App R 31.

[53] See for example: *Police v C* (HC Auckland 49/03, 22 May 2003, Rodney Hansen J); [2003] BCL 613; *R v Lucas-Edmonds* [2009] 3 NZLR 493; *R v Mohamed* (CA330/06, 2 May 2007, Robertson, Baragwanath and Venning JJ); [2007] NZCA 170; *R v Carmichael* (CA521/94, 23 March 1995, Eichelbaum CJ, Gault and Williamson JJ).

into a motorcycle and killing a passenger.[54] Despite suffering a disease of the mind (schizophrenia), the condition was not quite serious enough to render him 'incapable' of understanding the nature of his actions. In *R v Craw* the defendant attacked and stabbed his mother.[55] The defendant, although not insane, suffered paranoid schizophrenia and obsessive compulsive disorder and was experiencing delusions and significant thought disorder, which Harrison J noted, was of such 'a nature to significantly diminish [his] responsibility'.[56]

B. The need for a new regime

The current criminal law inadequately deals with the 'neither nor' defendants. To satisfactorily provide for these defendants, it is submitted that a new regime should be created. This regime would operate with an intermediate status between a potential full conviction and sentence, and an acquittal on the grounds of insanity, or an 'unfit to stand trial' result.

A perceived advantage of an intermediate regime is that it offers more options to a judge and jury. If judges and/or jurors are only faced with a stark choice between acquitting or convicting, then in cases where there is sympathy for the defendant, they may (perversely) acquit, or be unable to decide, thus requiring a re-trial.[57] This could have negative implications on the public perception of the justice system.

One conceptual basis underpinning the proposed regime is that a defendant's responsibility for committing a serious crime should be assessed in light of any substantial mental impairment suffered by that

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[54] *R v Abraham* [1993] BCL 556.
[55] *R v Craw* [2006] BCL 556.
[56] Ibid, at [2].
[57] Hemming A, "It's Time to Abolish Diminished Responsibility, The Coach and Horses' Defence Through Criminal Responsibility for Murder" (2008) 10 *UNDALR* at 4.

defendant.[58] The rationale of insanity is that no-one should be convicted of a crime whose mind is so disordered that s/he cannot make the moral judgements which enable 'sane' people to live socially integrated lives and to choose conduct conforming to legal and moral norms. It is that capacity an 'insane' person lacks.[59] If total mental incapacity absolves all blame, then serious mental incapacity short of total impairment should reduce culpability.

Perhaps the most important justification for the new regime is the 'fair labelling' argument. Fair labelling seeks to ensure that distinctions between degrees of wrongdoing and levels of offences are respected and signalled by the law so that offences are labelled to fairly represent the nature and magnitude of the lawbreaking.[60] The criminal law speaks to society and wrongdoers alike in convicting offenders, and it should communicate its judgement with precision by accurately naming the crime committed or verdict reached.[61] Fair labelling is important for showing society the appropriate degree of condemnation to be attached to the defendant, so that the public may understand the nature of the defendant's transgression.[62] If the verdict or name of the crime inaccurately reflects the degree or nature of the wrongdoing, then the defendant may be unfairly stigmatised.[63] Not only should 'neither nor' defendants receive reduced culpability, they are not fully responsible for their conduct, and thus should not be labelled for the full offence as would a mentally 'normal' person. It is important in any justice system to measure culpability for offences according to the

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[58] *R v Tuia* (CA552/99, 27 July 2000, Thomas, Anderson and Panckhurst JJ) at [15]: 'criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend.'

[59] Simester and Brookbanks, n 6 at 317.

[60] Ashworth A, *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) at 88.

[61] Simester and Brookbanks, n 6 at 29, 30.

[62] Ibid at 30.

[63] Chalmers J and Leverick F, "Fair Labelling in Criminal Law" (2008) 71 Modern Law Review 217 at 228.

defendant's mental state in committing that offence.[64] The new regime would reduce murder to manslaughter. Manslaughter carries a lesser degree of blameworthiness and condemnation, reflecting the defendant's mental impairment in committing the offence. How this regime could operate in terms of other offences will be discussed later.[65]

The current law fails to provide fair labelling for 'neither nor' defendants; the pyromaniac may be (unfairly) labelled an 'arsonist', or the battered wife a 'murderer'. These labels carry stigma inaccurately reflecting the defendant's mental impairment. To fairly label 'neither nor' defendants, the best approach is to introduce a new verdict. A defendant who successfully fulfils the regime's requirements will be entitled to a new verdict of '*guilty but substantially mentally impaired*'. This attaches a label recognising the defendant's mental impairment in committing the offence, and enables the public to better understand how the defendant's reduced culpability arose. The label attached to this guilty verdict carries a lesser stigma than a 'guilty' of murder or arson conviction, as befitting a 'normal' defendant. Therefore, unlike insanity, the regime does not result in an acquittal. However, because the regime is to have an intermediate status, and since by definition 'neither nor' defendants are unable to attain the insanity threshold, a result not amounting to an acquittal is necessary.

C. Diminished responsibility: The overseas solution

A number of overseas jurisdictions[66] somewhat resolve the identified

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[64] New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) at 3.18.

[65] See Heading 7 'A Regime of General Application'.

[66] Including England: s 2 *Homicide Act 1957*; New South Wales: s 23A *Crimes Act 1900* (NSW); Australian Capital Territory: s 14 *Crimes Act 1900* (ACT); Queensland: s 304A *Criminal Code 1961* (QLD); Northern Territory: s 37 *Criminal Code* (NT); Singapore: Exception 7 to s 300 *Penal Code* (Singapore); Bahamas: s 2 *Bahama Islands (Special Defences) Act 1959* (Bahama Islands);

problem through the partial defence of diminished responsibility. Diminished responsibility operates as an intermediate regime of the kind required in that it *only* operates to reduce murder to manslaughter where the defendant's mental responsibility is substantially impaired by reason of mental abnormality short of insanity. However, diminished responsibility has never been part of New Zealand law,[67] and, as shall be shown, the closest variation is infanticide.[68] To compensate for a perceived deficiency of a regime like diminished responsibility, the New Zealand courts demonstrated a tendency to stretch the boundaries of provocation.[69]

In 2001, the Law Commission rejected the idea of introducing the

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Barbados: *Offences Against the Person Amendment Act 1973* (Barbados); Hong Kong: s 3 *Homicide Ordinance Act 1963* (HK); and 14 states in the United States of America: Hayes S, "Diminished Responsibility: The Expert Witness' Viewpoint" in Yeo (ed) *Partial Excuses to Murder* (Federation Press, Sydney, 1990) 145, 146. In Canada, the courts have developed and applied the defence: see Gannage "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19 Osgoode Hall LJ 301.

[67] There was a proposal to introduce it in the *Crimes Bill 1960*, but the abolition of the death penalty was seen to render the defence unnecessary. The Crimes Consultative Committee considered it in its report on the *Crimes Bill 1989*, but noted that the defence in England has attracted criticism, and also thought that matters relating to diminished responsibility could be better dealt with as mitigating factors in sentencing: Brookbanks W, "Status in New Zealand of the Defences of Provocation, Diminished Responsibility and Excessive Self-Defence with Regard to Domestic Violence" at 142, Appendix D in Law Commission of England and Wales *Partial Defences to Murder* (Consultation Paper 173, 31 October 2003). See also Brookbanks W, "Insanity in the Criminal Law: Reform in Australia and New Zealand" [2003] Jur Rev 81.

[68] See s 178 *Crimes Act 1961*. Discussion of Infanticide begins at Heading 6 'Infanticide: New Zealand's Closest Equivalent'.

[69] See *R v Aston* [1989] 2 NZLR 166; (1989) 4 CRNZ 241 (CA); *R v McCarthy* [1992] 2 NZLR 550; (1992) 8 CRNZ 58 (CA); *R v Rongonui* [2000] 2 NZLR 385 (CA). Provocation (s 169 *Crimes Act 1961*) was repealed on 8 December 2009 by section 4 of the *Crimes (Provocation Repeal) Amendment Act 2009*.

defence; a key reason being the difficulty in defining the concept.[70] This is the main criticism of diminished responsibility.[71] The defence is substantially the same in every jurisdiction and is based on the English defence requiring the defendant to prove on the balance of probabilities: [72]

> Abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease of injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

Firstly, the defendant must suffer an 'abnormality of mind'.[73] Unfortunately for medical and psychiatric experts the term 'mind' engenders disagreement. The term is not based on either legal or medical concepts, nor is it a psychiatric term, so it is unclear whether it is restricted to known mental illnesses, or whether the condition must be serious.[74] Consequently, the courts have incrementally developed its meaning far beyond the identification of the narrow range of permissible 'causes'.[75]

The abnormality of mind must also arise from one of three causes.[76] There is no agreed psychiatric meaning as to these terms, and they are

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[70] New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC PP73, 2001) at 47.

[71] Woodward K, "In Defence of Diminished Responsibility: Considering Diminished Responsibility in the New Zealand Context" (2009) 15 Auckland University Law Review 1 at 176, 177.

[72] s 2(1) *Homicide Act 1957* (UK).

[73] *R v Byrne* [1960] 2 QB 396 per Lord Parker at 403: 'abnormality of mind means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.'

[74] NSWLRC, n 64 at 3.35.

[75] Ibid, at 3.35

[76] s 2(1) *Homicide Act 1957* (UK): 'arrested or retarded development of mind or any inherent causes or induced by disease of injury'.

as much a hindrance as a help.[77] Identifying the cause of the impairment can lead to disagreement amongst expert witnesses, who may be unable to conclusively nominate the origin of a condition, or may disagree on a diagnosis. This causes complex and confusing technical debate in an attempt to define the listed causes and fit a specific condition into them.[78]

The abnormality of mind must 'substantially impair mental responsibility'. This wording is criticised for combining two different concepts: that of 'mind', which may be subject to expert psychiatric opinion, and 'responsibility', which is a matter of ethical judgement on which psychiatrists have no expertise.[79] Consequently, up to 70 percent of expert witnesses answer this 'ultimate issue'.[80]

These criticisms have been noted overseas and, in light of law reform proposals and legislative amendment,[81] in October 2010 s 52 of the *Coroners and Justice Act 2009* (UK) came into force in England. Whilst its effectiveness remains to be seen, section 52 is a legislative response to the criticisms of diminished responsibility, and attempts to redefine and modernise the defence.

In its current overseas form, diminished responsibility has correctly been left out of New Zealand law. However, its conceptual basis is analogous to that underpinning the proposed intermediate regime: those suffering mental impairment short of insanity should receive appropriate recognition through reduced culpability. Because of the

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[77] Law Commission of England and Wales *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide* (LAW COM No. 304, 2006) at 5.111.

[78] NSWLRC, n 59 at 3.39.

[79] Dawson J, "Diminished Responsibility: The Difference It Makes" (2003) 11 JLM 103 at 105.

[80] Law Commission of England and Wales *Partial Defences to Murder* (Final Report, 6 August 2004) at 5.51.

[81] See n 64; n 77; n 80; n 140; n 148.

concerns with adopting diminished responsibility, and its limited application, it should merely be used as a starting point for the development of a regime for the 'neither nor' defendants.

D. Infanticide: New Zealand's closet equivalent

The only form of diminished responsibility in New Zealand exists in some cases where a mother, who has not fully recovered from the effects of giving birth, kills a child. Section 178 *Crimes Act 1961* provides for infanticide,[82] which operates as both a substantive offence *and* defence to charges of murder and manslaughter.[83] In proposing a new intermediate regime, the future of infanticide must be concurrently considered. It is submitted below that the new regime would be broad enough to cover infanticide cases, and so the 'anachronistic'[84] s 178 should be repealed. This has been recommended overseas, where it is thought that diminished responsibility would suffice.[85]

Infanticide derives from English legislation,[86] where, by the end of the 19th century, attempts had been made to formulate a means of

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[82] s 178(1) *Crimes Act 1961* provides: 'Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation...to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not of murder of manslaughter, and is liable to imprisonment for a term not exceeding 3 years.'

[83] Simester and Brookbanks, n 6 at 558.

[84] Law Commission of England and Wales, n 77 at 8.24.

[85] New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at 3.18. The Law Commission of Canada has also recommended the abolition of infanticide, although diminished responsibility is not legislatively provided for in Canada: see the Law Reform Commission of Canada *Homicide: Working Paper 33* (Law Reform Commission of Canada, 1984).

[86] *Infanticide Act 1938* (UK), replacing the *Infanticide Act 1922* (UK).

avoiding the death penalty in cases of child killing without requiring the prosecution, juries and judges to circumvent the law to exercise mercy. Infanticide allowed a judge to sentence a woman as if for manslaughter, which carried a discretionary penalty.[87] The underlying basis for infanticide, therefore, was to offer a humane means of dealing with women who killed whilst 'temporarily deranged' consequent to the effects of childbirth.[88]

Section 178 only applies to a 'woman' causing the death of 'any child of hers'. Although in *R v P* this was broadly interpreted to beyond any 'natural child',[89] infanticide is still gender specific and limited to *whom* it applies. Consequently, fathers, male partners or other child-carers cannot take advantage of s 178. An advantage of the proposed regime is that it would not be gender specific and therefore *not* limited to who it could apply, thus extending the availability beyond 'mothers' (e.g. *R v W*[90]). This accords with criticism from feminists, who argue the concept of biological vulnerability presents women as irrational and unable to take responsibility for their actions. The privileges infanticide affords women are said to be bought at the expense of making 'legal invalids of women, of excluding them from their full status as legal subjects and of perpetuating their social and legal subordination.'[91]

One argument favouring the retention of infanticide is that it operates as both an offence *and* a defence, whereas the intermediate regime would only operate as a defence. An advantage of infanticide as an offence is that it enables the defendant to avoid the trauma of a

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87 New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at 3.5.

88 Ibid, at 3.5.

89 [1991] 2 NZLR 116; (1991) 7 CRNZ 48 (CA). At p 54, Heron J interpreted this as including any child 'who can, in fact and law and common sense, be said to be hers', not just her natural child.

90 *R v W*, n 46.

91 Allen H, 'Rendering Them Harmless' in P Carlen and A Worrall (eds) *Gender, Crime and Justice* (1987).

murder charge and trial.[92] However, an accused may be charged with murder and then have a plea of guilty to infanticide or manslaughter accepted by the prosecution.[93] Furthermore, the prosecution may choose to exercise its discretion of laying an indictment for manslaughter, instead of murder, where it is clear the defendant suffered some mental impairment.[94] Therefore, it would not necessarily be disadvantageous to defendants to subsume infanticide into a new regime.

A strong argument favouring the abolition of infanticide is the unsound medical and psychiatric premises upon which it is based. Section 178(1) requires the mother to have a disturbed balance of mind 'by reason of not having fully recovered from the effect of giving birth, or by reason of effect of lactation, or by reason of any disorder consequent upon childbirth or lactation'.

Regarding 'the effect of giving birth' and disorders 'consequent upon childbirth', it is argued that there is rarely any direct biological link between childbirth and mental imbalance.[95] Indeed, infanticide provisions more often apply to women suffering conditions arising from psychological, environmental and social stresses of childbirth and child-raising, or from pre-existing mental conditions, rather than from dubious biological causes.[96] Furthermore, it has been suggested that as a result of the restrictions on the types of mental disturbances necessary for infanticide, medical experts have to distort their diagnoses to conform to legislation.[97]

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[92] NSWLRC, n 87 at 3.43.

[93] See for example *R v Metuatini* 18/11/03, Harrison J, HC Auckland T025795; *R v H* 19/3/04, Williams J, HC Auckland T023428; *R v Golovale-Siaosi* 11/12/07, John Hansen J, HC Dunedin CRI-2006-012-2533.

[94] NSWLRC, n 87 at 3.43.

[95] Law Commission of England and Wales, n 80 at 9.21.

[96] Mackay R D, "The Consequences of Killing Very Young Children" [1993] *Criminal Law Review* 21 at 29-30

[97] R Lansdowne, "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 *Monash University Law Review* 41 at 52.

It is also doubtful whether there is any medical basis for the notion of 'lactational insanity'.[98] Overseas jurisdictions have proposed reformulations of infanticide omitting reference to 'lactation', on the basis of its precarious validity.[99]

Nevertheless, some argue there *is* a medical basis. In 1987 Kendall found that mental illness was far more common in women after childbirth than at any previous time.[100] In 1995, Cooper and Murray identified a group of women who became depressed after childbirth, but after no other life events.[101] Furthermore, Marks' research suggests that lactation may increase dopamine sensitivity in women, which may trigger psychosis.[102]

A new intermediate regime could resolve this debate by subsuming infanticide's uncertain medical validity into a more internationally and professionally accepted model. As shall be shown, it is submitted that a defendant's mental impairment should arise from a 'recognised medical condition'.[103] Postpartum psychoses and disorders are referred to in ICD-10[104] and DSM-IV-TR,[105] indicating their medical

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[98] Ibid.

[99] See England and Wales Criminal Law Revision Committee *Offences Against the Person* (Report 14, HMSO, London, Cmnd 7844, 1980) at 47; Law Commission of England and Wales *Criminal Code of England and Wales* (Law Comm 177, 1989) cl 64(1); Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility* (Report 34, 1990) recommendation 28 at para 166. The Tasmanian infanticide provision makes no reference to lactation: see s 165A *Criminal Code* (TAS).

[100] Kendall R E, Chalmers J C and Platz C, 'Epidemiology of Puerperal Psychoses' (1987) 150 British J of Psychiatry 662.

[101] Cooper P J and Murray L, 'Course and Recurrence of Postnatal Depression. Evidence for the Specificity of the Diagnostic Concept' (1995) 166 British J of Psychiatry 191.

[102] Law Commission of England and Wales, n 80 at 8.26.

[103] For discussion on this see Heading 13 'Arising From a Recognised Medical Condition'.

[104] World Health Organisation, n 44.

recognition. Mackay's research into English infanticide cases between 1990 and 2003 found that the most common medical conditions were post-natal depression, depression, puerperal psychosis and dissociative disorder.[106] These are all recognised medical conditions.[107] An advantage of the new regime is that not only are those suffering from such conditions covered, but the impact of environmental and social causes on conditions can be recognised, meaning it would not depend on whether a condition was a direct result of childbirth.[108]

E. A regime of general application

The conceptual and theoretical bases underpinning diminished responsibility and infanticide provide the foundations for the new regime. However, a major drawback is that they are both limited in *what* they apply to: diminished responsibility to murder, and infanticide to the killing of a child. It is submitted that the new regime should apply to *all* offences. The United Kingdom Royal Commission on Capital Punishment favoured such an extension to diminished responsibility, claiming that forms of mental abnormality resulting in diminution of responsibility were of frequent occurrence and of importance to a wider range of offences.[109] Insanity is not restricted to certain offences. The new regime purports to provide for those falling short of insanity, so limiting the regime to certain offences fails to resolve the problems faced by the 'neither nor' defendants.

Restricting the regime would also not accord with the stated theoretical

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[105] See DSM-IV-TR: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, APA, Philadelphia, 2000).

[106] Law Commission of England and Wales, n 77 at p 202.

[107] World Health Organisation, n 44. See F53 (post-natal depression); F30-39 (depression); F53.1 (puerperal psychosis); F44 (dissociative disorders).

[108] NSWLRC, n 87 at 3.30.

[109] Report of the United Kingdom Royal Commission on Capital Punishment 1949-1953 (1953) Cmd 8932 at 84.

bases of the regime. Fair labelling heavily underpins the new regime.[110] Although murder and child killing are heinous crimes carrying great stigma, other offences are not immune to this. It is illogical to restrict the proposed regime when offenders who commit other offences may also be acting under mental impairment.[111] If a defendant who kills with the requisite *mens rea* for murder can, and should be, labelled as someone other than a murderer (as under diminished responsibility), then why not someone guilty of other offences? Restricting the regime to certain offences does not fulfil the fair labelling argument, and thus undermines part of the regime's intended purpose. Further, a defendant's criminal responsibility should be assessed in light of any mental impairment suffered by that defendant. A limited regime means a defendant suffering mental impairment who commits an offence not covered is not protected.

F. Sentencing: The current approach

In rejecting the introduction of diminished responsibility into New Zealand, the Law Commission preferred matters to be dealt with under a sentencing discretion.[112] This is the current approach. Section 9(2) of the *Sentencing Act 2002* provides a list of mitigating factors which the court *must* consider in sentencing, but only section 9(2)(e) makes reference to mental health considerations, providing for a defendant's 'diminished intellectual capacity or understanding'.[113]

Unfortunately, this sentencing discretion is not the best approach because it creates the risk of inappropriate results and 'neither nor' defendants are not always adequately dealt with. The wording of s

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[110] For introductory discussion on 'Fair Labelling', see Heading 4 'The Need For a New Regime'.

[111] NSWLRC, n 87 at 3.76.

[112] NZLC, n 70 at 45.

[113] In *R v Nilsson* [2003] NZLJ 24 at [10] it was noted that a 'mental disorder falling short of exculpating insanity may nevertheless be capable of mitigating a sentence.'

9(2)(e) may be insufficient to cover all 'neither nor' defendants. Whilst a court can consider other mitigating factors it 'thinks fit',[114] these factors are not protected by legislative mandate. A judge may choose not to exercise his/her discretion to consider other forms of mental impairment beyond s 9(2)(e), like volitional impairments.[115] In some cases where sentencing judges have considered diminished responsibility due to mental impairment as a mitigating factor, it has often only been considered in passing without expansion.[116]

Furthermore, although the court must consider factors which may make the sentence disproportionately severe,[117] other factors also need to be considered, such as the need to protect the public.[118] Therefore, whilst a defendant's mental impairment would *suggest* a lesser sentence, it is not always so. In *R v Taueki*, the Court of Appeal noted that a defendant's mental illness or disorder (such as an obsessive disorder manifesting in violence) will *not always* be a mitigating factor.[119] So, whilst the legislation provides for the potential of a reduced sentence due to mental impairment, a 'neither nor' defendant is not *guaranteed* one.

G. Sentencing: How to deal with 'neither nor' defendants

So, if a pure sentencing discretion is not the answer, what is? The proposed regime is of general application so the issue becomes how it would operate towards other offences. Murder can logically be downgraded to manslaughter, but what about other offences like kidnapping[120] or robbery?[121] The problem of attempting to downgrade

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114 s 9(4)(a) *Sentencing Act 2002*.
115 Woodward, n 71 at 197.
116 See for example *R v Smail* [2007] 1 NZLR 411; *R v Mayes* [2004] 1 NZLR 71 (CA).
117 s 8(h) *Sentencing Act 2002*.
118 s 7(1)(g) *Sentencing Act 2002*.
119 *R v Taueki* [2005] 3 NZLR 372, at [45].
120 s 209 *Crimes Act 1961*.

offences with no logical second tier might be avoided by a sentencing limitation, either in choice or severity.[122] However, sentencing 'neither nor' defendants is a complex and demanding task.[123] Not only does it 'occupy an uncertain ground between a judicial finding of full responsibility and exculpatory non-responsibility',[124] but the process is also permeated by tension between proportionality of sentence and community protection.[125] Although not insolvable, the mechanics of sentencing 'neither nor' defendants, and how such an approach would interact with the *Sentencing Act 2002*, including the newly enacted 'Three Strikes' legislation',[126] requires detailed discussion beyond the scope of this paper.

H. Burden of proof

It is submitted the defendant should bear the burden of proof. This implies the defendant has both an evidential burden to point to direct evidence to bring the regime 'into play', and the legal burden of establishing the regime.[127] The defendant must persuade the court on the balance of probabilities, which will normally mean adducing medical evidence regarding the defendant's mental state at the time of the offence.[128] However, the new regime will only be an issue after the prosecution proves the *actus reus* and *mens rea* of the relevant offence

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121 s 234 *Crimes Act 1961*.

122 Walker, "Butler v The CLRC and Others" [1981] Crim LR 596, 597. Note that a similar process occurs in Italy, where the maximum prison sentence is reduced if a partial defect of mind is found, and in the Netherlands, where punishments are varied according to a defendant's mental disorder - above n 71 at 194.

123 Woodward, n 71 at 195.

124 Brookbanks W, "The Sentencing and Disposition of Mentally Disordered Defendants" in Brookbanks W, (ed), *Psychiatry and the Law* (2007) at 199.

125 Woodward, n 71 at 195.

126 See *Sentencing Act 2002* ss 86A – 86I.

127 See *R v Fontaine* (2004) 183 CCC (3d) 1 (SCC) at [68] (Fish J).

128 Simester and Brookbanks, n 6 at 298.

beyond reasonable doubt.[129]

Arguably the defendant should merely bear an evidential burden. Putting the burden on the defendant defies general principles that it is up to the prosecution to establish all elements of the offence.[130] The United Kingdom Criminal Law Revision Committee said it is unusual for the burden to be on the defendant in serious charges, such as manslaughter or murder. It was thought that juries are likely to be confused between being sure and satisfied on the balance of probabilities, and by different requirements for different outcomes.[131] However, this argument was in the context of diminished responsibility which only applies to murder, and thus always requires a jury. The proposed regime applies to all offences, and some (serious) offences are tried without a jury.[132]

It has also been argued that when the burden is on the defendant, there exists the likelihood of a conviction despite the presence of evidence favouring the defendant, because the evidence did not meet the standard of the balance of probabilities.[133] However, having an evidential burden may make it near impossible for the prosecution to get a conviction. Once the defendant discharges an evidentiary burden, the prosecution must prove *beyond reasonable doubt* the defendant did not fulfil the new regime.[134] Because medical evidence is vital under this regime, where there is conflicting evidence (as there is bound to be), the defendant receives the benefit because the prosecution cannot disprove to the requisite standard.

Nevertheless, the defendant should bear the burden of proof. This

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129 Ibid at 37.
130 *Woolmington v DPP* [1935] AC 462; [1935] All ER 1 (HL).
131 Criminal Law Revision Committee *Offences Against the Person* (14th Report, Cmnd 7844, London, HMSO, 1980) at 6.54.
132 See ss 361B-E of the *Crimes Act 1961*.
133NSWLRC, n 64 at 3.108.
134 Simester and Brookbanks, n 6 at 35.

conforms to insanity and diminished responsibility. The main argument in favour of such a burden is that the new regime is a special matter calling for expert evidence wholly known to the defendant.[135] The regime depends not on external factors which can be investigated and challenged independent of the defendant, but on the defendant's state of mind. This can only be properly investigated with the defendant's co-operation.[136] The defendant should appropriately bear the burden because, with an evidential burden, a defendant may improperly co-operate with the prosecution's attempts to disprove the regime beyond reasonable doubt. This could mean the prosecution cannot meet the requisite standard, and the defendant may take advantage of the regime, perhaps in unwarranted cases.

Furthermore, society may not accept the imposition of lesser sentences and verdicts if defendants can only point to a small amount of evidence (i.e. to discharge an evidential burden), but, because of conflicting medical testimony, the prosecution cannot disprove the regime beyond reasonable doubt. Society would more likely accept the new regime and its consequences where the defendant can point to sufficient evidence (i.e. on the balance of probabilities), which can best be achieved where the defendant bears the burden.

I. Defending the regime

Despite the definitional issues with diminished responsibility, it may be possible to create a definition for the proposed regime which is more readily understood and accepted than that currently of diminished responsibility. It is submitted the regime could be drafted along the following lines:

> A person (D) who commits, or is a party to the commission of any offence, is entitled to a verdict of 'guilty but substantially mentally

[135] Law Commission of England and Wales, n 80 at 5.90.
[136] Ibid.

impaired' and be sentenced accordingly if, at the time of the acts or omissions in committing the offence, D was suffering from an abnormality of mental functioning arising from a recognised medical condition which substantially impaired D's capacity to:

(i) understand the nature of D's conduct; or[137]
(ii) form a rational judgement; or[138]
(iii) exercise self-control.[139]

J. 'Abnormality of mental functioning'

The defendant must show an 'abnormality of mental functioning', not an 'abnormality of mind'. 'Abnormality of mental functioning' is a term endorsed by the United Kingdom[140] and New South Wales Law Commissions,[141] and enacted in s 52 *Coroners and Justice Act 2009* (UK). The term was developed with assistance from forensic psychiatrists and psychologists.[142] This suggests it will be a more readily understood term than 'mind' amongst expert witnesses, which is crucial, for they must deal with this issue.

K. 'Arising from a recognised medical condition'

The criticisms of specifically listed causes under diminished

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137 s 23A(1) *Crimes Act 1900* (NSW) provides for capacity to 'understand events'. S 52(1A) *Coroners and Justice Act 2009* (UK) provides 'to understand the nature of D's conduct'.

138 s 23A(1) *Crimes Act 1900* (NSW) provides for capacity to 'judge whether the persons actions were right or wrong'. Section 52(1A) *Coroners and Justice Act 2009* (UK) provides for the defendant's ability 'to form a rational judgement'.

139 S 23A(1) *Crimes Act 1900* (NSW) provides for a person's capacity to 'control him or herself'. Section 52(1A) *Coroners and Justice Act 2009* provides for a defendant's ability to 'exercise self-control'.

140 Law Commission of England and Wales *A New Homicide Act for England and Wales?* (LCCP177, 20 December 2005) at 6.51 – 6.52.

141 NSWLRC, n 64 at 3.40 – 3.49.

142 Mackay R D, "The New Diminished Responsibility Plea" [2010] 4 Criminal Law Review 290, 293.

responsibility and infanticide have been noted. The term 'arising from a recognised medical condition' ensures the law is no longer constrained by an out-of-date and fixed set of causes from which an abnormality of mental functioning must stem. Instead, up-to-date medical knowledge can be applied, which also enables the law to evolve alongside medical science. The United Kingdom Royal College of Psychiatrists supported this term, saying it is 'consistent with the general nature and purpose' of a regime of this type.[143] The term is tied to the need for the regime to be supported by medical evidence, insofar as a condition must be recognised by medical science in a diagnosable way. It encourages reference within expert evidence to diagnose in terms of the internationally accepted classificatory systems of medical conditions (e.g. ICD-10, DSM-IV), which encompass the recognised physical, psychological and psychiatric conditions.[144] This would abolish the uncertainty surrounding lactational insanity. The condition need not be permanent, but must be more than ephemeral or of a transitory nature. A severe depressive illness which is curable would still suffice, notwithstanding that it is not permanent, and a transitory disturbance of mental functioning caused by heightened emotions would be excluded.[145]

This wording would cover 'neither nor' defendants. The medical conditions sufficing for insanity are limited by the 'incapable' threshold. However, requiring a recognised medical condition extends the reach of the regime beyond insanity, for example to include volitional disorders.

L. 'Substantially impaired defendant's capacity'

Under the proposed definition, an abnormality of mental functioning must 'substantially impair' the capacity of the defendant as listed in the

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143 Law Commission of England and Wales, n 80 at 5.114.
144 Ibid.
145 Mackay, n 142 at 295.

provision.[146] The advantage this wording has over infanticide and diminished responsibility is that it is no longer necessary to show a specific cause of the defendant's condition. The regime only applies where the *capacity* of the defendant is impaired in one of three respects and arising from a recognised medical condition.

It should be noted that whilst it may seem that some of these limbs are very similar to insanity, the standard required is different. For insanity, the mental impairment must render the defendant 'incapable' (a high threshold), whereas here the defendant must be 'substantially impaired', a lesser threshold. It is submitted that for a condition to 'substantially impair' it must be 'less than total, but more than trivial'.[147]

Importantly, if a defendant suffers a mild 'recognised medical condition', s/he must still convince the jury that an abnormality of mental functioning arising from this condition substantially impaired his/her ability to understand the nature of his/her conduct, form a rational judgement or exercise self-control.[148] This acts as a gate-keeper for undeserving cases.

The first capacity is the defendant's ability to 'understand the nature' of his/her conduct. This would cover those who would qualify for the comparable limb under insanity, but otherwise fall short of fulfilling the defence. For example, this would cover *R v Abraham*, where the defendant's schizophrenia led him to have an impaired understanding of the nature of his actions, but not to such an extent as to render him

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146 'Understand nature of D's conduct; form a rational judgement; exercise self-control'.

147 *R v Lloyd* [1967] 1 QB 175.

148 United Kingdom Ministry of Justice *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position* (CP(R) 19/08, 14 January 2009) at 22.

'incapable'.[149]

Many 'neither nor' defendants could also come under the substantial impairment to 'form a rational judgement' limb. This might cover those defendants who cannot fulfil to the requisite standard the 'knowing the act was morally wrong' part of insanity. Their mental impairments are such that, even though they may know the acts are wrong, their judgement is impaired compared with a 'normal' person. Defendants here cannot form a rational judgement as to whether or not the act was wrong. It may also cover, for example, battered defendants (like *R v Gordon*[150]), who may be able to show a mental impairment consequential to the abuse impaired their judgement.

Some overseas concern has been expressed over capacity to 'exercise self-control' in that it may be difficult for experts to definitively state whether or not the defendant was incapable of controlling actions, or simply chose not to.[151] However, excluding this category creates the risk that people who *should* receive the benefit of the regime miss out (e.g. defendants who are brain damaged, hypomanic or suffering auditory hallucinations). It is better to include this element, because the regime would be too narrow without it.[152] This limb widens the regime further than insanity to include volitional defects, which would cover, for example, the kleptomaniac or pyromaniac.

M. 'Substantially impaired'

The abnormality of mental functioning must 'substantially impair' the defendant's relevant capacity. Because 'substantially impaired' means

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[149] *R v Abraham* [1993] BCL 556. At 449, Thorp J noted that this was a case where proof of the existence of a mental disorder falling short of legal insanity nevertheless reduced the defendant's ability to appreciate the true seriousness and culpability of his actions.

[150] *R v Gordon*, n 50.

[151] Law Commission of England and Wales, n 140 at 6.58.

[152] Law Commission of England and Wales, n 140 at 6.58 – 6.59.

more than trivial or minimal, but not total, whether a condition will suffice for the regime is a matter of judgement. This can be contrasted with insanity, which is an all or nothing matter – either the defendant shows the mental impairment led him/her to not know the nature and quality of the act, or know it was wrong, or it did not.[153]

One criticism of diminished responsibility is that up to 70 per cent of expert witnesses answer the 'ultimate issue' as to whether the abnormality of mind substantially impaired the defendant's mental responsibility.[154] The proposed provision reformulates the regime in terms of whether the defendant's *capacities* have been substantially impaired. This reframes the question for the judge or jury in terms of culpability and liability, not medical terms. Expert evidence is irrelevant here. Instead, an expert would be required to offer opinions on:

1) whether the defendant was suffering an abnormality of mental functioning stemming from a recognised medical condition; and
2) whether and in what way the abnormality had an impact upon the defendant's capacities, as explained in the definition.[155]

It is submitted that the abnormality *must* affect the defendant, not merely be *capable* of doing so. Whether an abnormality is 'capable' of affecting a defendant is speculative. Allowing abnormalities 'capable' of affecting the defendant might enable someone who knew they had a condition, but controlled it, to claim. A requirement that the abnormality *must* affect the defendant avoids this and only includes actual, rather than hypothetical, cases. It would then be for the judge or jury to say, whether in light of that (and other relevant) evidence they regard the relevant capacities of the defendant to have been

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153 Law Commission of England and Wales, n 80 at 5.142. See also Mackay R D, *Mental Condition Defences in the Criminal Law* (Oxford University Press, Oxford, 1995) at 100 – 108.

154 See n 80.

155 Law Commission of England and Wales, n 80 at 5.117.

'substantially impaired'.[156]

Conclusion

Under the current New Zealand criminal law, insanity and an 'unfit to stand trial' verdict are the two regimes for dealing with mentally impaired defendants. However, as this paper demonstrates, there is still uncertainty in the law. There exist defendants who are 'neither' insane, 'nor' unfit to stand trial, and yet who are substantially mentally impaired, but still potentially face the full force of the law. These 'neither nor' defendants include those suffering volitional impairments, the 'nearly, but not quite, insane', and the 'deserving cases', like battered defendants. To enable the criminal law to provide adequately for these defendants, this paper proposes a new intermediate regime to operate between insanity and an 'unfit to stand trial' result. Although diminished responsibility has been rejected in New Zealand, fair labelling and reduced culpability for mental impairment short of insanity provide the theoretical foundations for this defence, and these bases are used to develop a new regime for the 'neither nor' defendants. Whilst infanticide provides some useful conceptual notions, its medical ambiguity means that it should be repealed and subsumed into the new regime. The proposed regime will apply to all offences, thereby having an extended application and overcoming the limitations of diminished responsibility and infanticide. To accord with fair labelling, the introduction of a new verdict – 'guilty but substantially mentally impaired' – is advocated. As with diminished responsibility and insanity, the defendant shall bear the burden of proof. Finally, drawing on the criticisms of the traditional diminished responsibility definition, a draft provision for the regime is submitted. It is hoped that this provision will sufficiently cover 'neither nor' defendants and therefore substantially ameliorate the problem identified in the New Zealand law. At the very least, this regime is capable of forming the underlying rationale for any future solution.

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[156] Ibid at 5.118.

TOWARDS A DNA DYSTOPIA? HUMAN RIGHTS CONCERNS UNDER THE CRIMINAL INVESTIGATIONS (BODILY SAMPLES) AMENDMENT ACT 2009

DAVID TURNER

Introduction

It has been described as "critical in the fight against the escalating rate of crime" in New Zealand,[1] a move which will "save more victims than probably any other single piece of legislation".[2] It has also been called "an absolute prizewinner for how badly put together legislation can be"[3] and "much worse than it could or should be".[4] Even before it was passed into law, the Criminal Investigations (Bodily Samples) Amendment Act 2009 (CIAA) managed to divide opinion as few other law-and-order statutes have done. The Act was passed into law on 28 October 2009 and received Royal Assent on 2 November 2009. Its first phase (see below) came into force on 6 September 2010. Yet the important consequences of the amendment – its impact on police investigation and crime-fighting, its implications for the civil liberties and privacy rights of New Zealand citizens, its potential conflict with New Zealand's obligations under international law – are still yet to be fully determined. The Act makes significant changes to the DNA sampling and profiling regime established under the original Criminal Investigations (Bodily Samples) Act 1995, altering the authority and procedure for the New Zealand police to take DNA samples from criminal suspects and store their genetic profiles on the National DNA Database (NDD). The fear from some quarters is that, whatever its

[1] Hon Simon Power "Parliament Passes DNA Law" (press release, 28 Oct 2009).
[2] (14 Oct 2009) 658 NZPD 7072-7073 (Chester Borrows).
[3] (10 Feb 2009) 652 NZPD 1119 (Clayton Cosgrove).
[4] (27 Oct 2009) 658 NZPD 7489 (Charles Chauvel).

touted benefits for police, the expansion of New Zealand's DNA regime under the new legislation imports with it a "host of ethical and human rights concerns" which have not been adequately addressed.[5]

1. Opposition to the Amendment

Even before it passed into law, the CIAA attracted considerable criticism from opposition MPs and interested parties. Select Committee submissions from organisations such as the Human Rights Commission, the Privacy Commissioner and Amnesty International, for example, contended that the proposed extensions of New Zealand's DNA regime were "a step too far".[6] Perhaps the strongest indictment, however, came from the government's own Attorney-General, Hon Christopher Finlayson MP, whose report on the Act's consistency with the New Zealand Bill of Rights Act 1990 (NZBORA) pursuant to s 7 of the Act found the proposed legislation to be inconsistent with New Zealand's human rights protections.[7] In the face of the lobby-group opposition and the Attorney-General's reservations, the Act was nonetheless passed by the House with the support of a large parliamentary majority – 108 votes in favour, and only 14 against.[8] Yet those 14 Green and Māori Party MPs who opposed the legislation were consistently forceful in their objections, and even the Labour Party – which ultimately supported the Act –

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[5] (27 Oct 2009) 658 NZPD 7493 (Rahui Katene).

[6] Privacy Commissioner "Supplementary Submission by the Privacy Commissioner to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 4. Amnesty International, for instance, was also concerned that insufficient reasons had been provided 'to justify the mandatory collection of DNA on such a scale, and from people who are currently innocent of a crime'. 'No justificatory material', it noted, had been provided 'to support the view that this expansion of powers is necessary in a democratic society' – Amnesty International "Submission to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 4-5.

[7] Attorney-General, Report under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill (2009) [Attorney-General's Report].

[8] (27 Oct 2009) 658 NZPD 7506.

raised reservations about the extension of the DNA collection regime, observing that the amendment created "legislative changes that take us outside the New Zealand Bill of Rights Act".[9]

2. Concerns of Political Expediency

Underlying many of the concerns about the CIAA can be discerned a fear that the Act represents a mere "knee jerk" reaction to perceived law-enforcement issues rather than a principled approach to the expansion of police powers. Law-and-order statutes are notorious for pandering to popular sentiment – the need for a government to be perceived as "tough on crime" – rather than rationally considering the best way to address the problem of criminal offending. That suspicion is heightened by the fact that the CIAA legislation comprised part of the National government's "100 Days" Post-election Action Plan of legislative reform.[10] During the 2008 electoral campaign, the National Party had promised to "bolster the tool kit of the police" in order to take a harsher stance on law-and-order issues, including an expansion of New Zealand's DNA regime.[11] The fact that the Act was essential to upholding the Party's electoral promises – "another key plank in the Government's law and order package" – played an undeniable role in motivating the Act's expedited passage.[12] The risk, therefore, is that the civil liberties and privacy implications of the expanded DNA regime were not properly considered in the race to pass the legislation into law. The risk is that with every successive extension of police powers in this area, "we become committed to them in turn, tak[ing] us progressively further away from the alternative approaches that were equally possible at an earlier stage" – making it imperative that legal developments such as the new Act be properly considered before

[9] (10 Feb 2009) 652 NZPD 1123 (Lianne Dalziel).
[10] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 1.
[11] (10 Feb 2009) 652 NZPD 1117 (Simon Power).
[12] (10 Feb 2009) 652 NZPD 1131 (Richard Worth).

further action is taken.[13]

3. **Scope of Paper**

The focus of this paper is thus to address what may not have been properly considered in the drive to push through the legislation: to assess whether the CIAA can achieve its stated aims in a manner proportionate with its potential incursions upon New Zealanders' rights to privacy, autonomy and equality – complex issues of civil liberties and the relationship between the citizen and the State. As Māori Party MP Te Uroroa Flavell observed during the Bill's First Reading in the House in February 2009, "the positive benefits of convicting serious offenders sit alongside a host of worrying issues that we cannot and must not ignore".[14] The civil liberties issues are significant and worthy of thorough consideration – international experience indicates the perils of ignoring human rights in the effort to clamp down on criminal offending. Yet, this paper shall contend, the risks to the individual rights associated with new DNA regime are ultimately not as severe as some parties have depicted them to be. The new DNA regime has the potential to operate in a proportionate manner, consistent with New Zealand's existing human rights and privacy legislation, as well as enhancing the ability of New Zealand police to track down and convict serious criminal offenders. To ensure that this occurs, however, the appropriate safeguards must be put in place, and the present lack of independent oversight of the DNA regime provides the greatest cause for concern. The National DNA Database is already a reality; what is important, in the words of a

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[13] Human Genetics Commission *Nothing to Hide, Nothing to Fear: Balancing Individual Rights and the Public Interest in the Governance and Use of the National DNA Database* (Nov 2009) at 21. Micahel Lynch and Ruth McNally have termed the phenomenon "biolegality" whereby, they say, "developments in biological knowledge and technique are attuned to requirements and constraints in the criminal justice system, while legal institutions anticipate, enable and react to those developments" – Michael Lynch and Ruth McNally *DNA, Biolegality and Changing Conceptions of Suspects* (conference paper prepared for the ESCR Genomics Forum, University of Edinburgh, Oct 2008) at 5.

[14] (10 Feb 2009) 652 NZPD 1130 (Te Uroroa Flavell).

report by the UK Human Genetics Commission (HGC), is that we consider and enforce the appropriate "conditions of acceptability" for having a forensic DNA database.[15]

A. Background

1. DNA Matching and Crime-Fighting – The Previous DNA Regime

The New Zealand DNA regime itself is nothing new – the original Criminal Investigations Act, passed in 1995, established a regulatory regime for the collection and retention of DNA profiles by police which was apparently only the second such regime to be established in the world.[16] The issue at stake today is thus not the propriety of DNA collection itself, but how far the legislative regime is gradually expanding, at an increasing potential cost to New Zealanders' civil liberties. The expansion of power granted to police under the new amendment Act, the Attorney-General noted in his NZBORA compliance report, "represents a substantial expansion of the current scheme".[17]

To understand why that expanded power has generated concern in some quarters, one must first understand how the existing DNA regime works. DNA profiles derive from two separate sources of samples, and it is the conjunction of these two sources which gives DNA profiling its functionality.[18] Firstly, crime-scene profiles are commonly derived from biological samples collected at crime scenes,

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[15] Human Genetics Commission, above n 13, at 3.

[16] See (10 Feb 2009) 652 NZPD 1117; "ESR and DNA – A Partnership that Seeks the Truth" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/default.aspx>. The UK NDNAD, the first DNA database in the world, was also established in 1995 – see Select Committee on the Constitution, House of Lords, *Surveillance: Citizens and the State* (2nd Report of Session 2008-09, Vol 1, 6 Feb 2009) at 43.

[17] Attorney-General's Report, above n 7, at 2.

[18] Human Genetics Commission, above n 13, at 26.

in the form of blood, hair, semen, skin, saliva, or sweat traces often invisible to the naked eye – as little trace material nowadays as a nose smudge left behind on a window.[19] Secondly, DNA samples known as "subject samples" can be obtained from individuals – criminal suspects, volunteers, convicted offenders.[20] Matches between the crime-scene profile and a subject profile – the numerical code derived from a subject sample – can determine if a subject was present at the scene of a crime. Matches can thus help police narrow the focus of their investigations, and DNA matches are also frequently adduced in court as often strongly probative evidence pointing to an individual's guilt (although a fresh DNA sample must be taken from the accused to be adduced in court as evidence).[21] The ability to collect DNA subject samples, however, can be useful to the police not only in respect of crimes currently under investigation. Once a person's DNA profile is added onto the National DNA Database (NDD), it can be compared against unknown DNA from unsolved crime scenes (stored on another database, the Crime Sample Database (CSD)).[22] A subject DNA profile can also be compared against DNA samples from future crime scenes when they are later entered onto the CSD.[23] The ability to take and compare DNA samples is thus of undoubted utility to police in conducting investigations into criminal offending both past and present – matching NDD profiles against the CSD has already provided police with intelligence links for more than 13,000 cases, and reportedly results in about 90 identifications between individuals and

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[19] "How Forensic Scientists Use DNA" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/forensicuseofDNA.aspx>.

[20] Human Genetics Commission, above n 13, at 26-27; Nuffield Council on Bioethics *The Forensic Use of Bioinformation: Ethical Issues* (Sept 2007) at 9-10.

[21] See Criminal Investigations (Bodily Samples) Act 1995, s 71A.

[22] "How the ESR Uses DNA to Fight Crime" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/fightingcrime.aspx>.

[23] The CSD is also matched against itself in order to identify any links between unsolved cases – Ibid.

unsolved crimes every month.[24]

2. Authority Required to Obtain Samples – Previous Law

Thus both crime-scene samples and subject samples are necessary for DNA profiling to be useful to the police, but the ease of obtaining samples from the two sources is far from equivalent. Taking a DNA sample from a crime scene involves little legal or ethical difficulty (although the practical difficulties for forensic scientists may be considerable if DNA traces are small, mixed or degraded).[25] Obtaining DNA samples from subjects, on the other hand, is much more controversial. Prior to the passage of the CIAA in November 2009, when requiring a subject sample for a particular criminal investigation, police could obtain a suspect's DNA only with the consent of the individual involved or with judicial approval through a suspect compulsion order or juvenile compulsion order (the so-called "Part 2 suspect regime").[26] The High Court could issue such an order only if satisfied that police had "good cause to suspect" that the suspect had committed an indictable offence.[27] The requirement of a judicial warrant was designed to ensure a degree of independent oversight in light of the fact that police were intruding on a person's privacy and bodily autonomy before any charges had been laid or proven in court.

If, on the other hand, police wished to take a suspect DNA sample not for the purposes of a current investigation but for comparison against unsolved crime-scene samples, the requirements were even more stringent. Police had to wait until the subject was not only charged but convicted in court of a "relevant offence" specified in a schedule to

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[24] "The DNA Databank: A Crime-Solving Tool" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/DNADatabankasacrime-solvingtool.aspx>.

[25] Human Genetics Commission, above n 13, at 62; Nuffield Council on Bioethics, above n 20, at 19.

[26] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 14.

[27] See Criminal Investigations (Bodily Samples) Act 1995, s 6.

the Act before they could issue a databank compulsion notice compelling the convicted offender to give a DNA sample.[28] A "relevant offence", generally, was an offence punishable by more than seven years' imprisonment, but also included a number of lesser offences supposedly indicating a propensity for more serious offending (or offences for which offender DNA is often left at the scene of the crime).[29] Thus the only circumstances in which police could obtain a DNA subject sample for entry onto the DNA databank without consent or judicial approval were narrowly restricted by both the requirement that the subject be already convicted and the threshold severity of a "relevant offence". Yet even those narrowly circumscribed powers proved powerful in practice – leading to the acquisition of 100,000 DNA profiles (subject and crime-scene) by October 2009.[30]

3. Changes under the CIAA

The new CIAA expands the police powers to collect and store DNA by making two fundamental changes to the DNA regime:[31]

1. It alters the "suspect regime" so that police may now take a DNA sample for the purposes of a current investigation without prior judicial approval, and allows police to use that sample for matching against unsolved crime-scenes prior to a suspect's conviction; and
2. It significantly widens the range of offences which trigger the authority of the police to take a DNA sample for matching against unsolved-crime scenes.

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[28] Ibid, ss 29 & 39.

[29] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 15.

[30] Simon Power, above n 1, at 2; Environmental Science and Research, above n 24. Of those, however, more than 8,000 are outstanding crime-scene profiles relating to unsolved crimes, including 595 cases of sexual assault and 397 of homicide – Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (Regulatory Impact Statement) at 5.

[31] Simon Power, above n 1, at 3.

This expansion is set to take place in two distinct stages. The first stage of implementation, Part 1 of the Amendment Act, is now effective. Part 1 implements the first change listed above by inserting a "new Part 2B" into the principal Act to complement the existing "Part 2 suspect regime". The new "Part 2B regime" – referred to by the Police Association as the "arrestee regime"[32] – allows police, without prior judicial approval, to compel a DNA sample from every person they merely *intend* to charge with one of the "relevant offences" listed in the Act. This means that police can now compel a DNA sample from an individual even before he or she is charged with an offence, and thus will lead to situations where police will compel a DNA sample from someone who is ultimately never charged or convicted. The Part 2B arrestee regime also allows police to enter the profile derived from a suspect's DNA sample onto a temporary databank (the new "Part 2B temporary databank") for matching against the CSD as soon as charges are brought – unlike the old regime, police need no longer wait until a conviction is entered before undertaking this task.[33] The second stage of implementation, Part 2 of the Amendment Act, is still to come into force by a subsequent Order in Council, expected to occur in late 2011.[34] Part 2 of the Amendment Act relates to the second fundamental change listed above – when implemented, it will do away with the concept of a "relevant offence" altogether, allowing police to take a DNA sample without prior judicial approval from anyone they intend to charge with *any* imprisonable offence.

What becomes clear from the above is that the CIAA also blurs the former distinction made between DNA samples taken for the purpose of a current criminal investigation and DNA samples taken to match against unsolved crime-scene profiles on the CSD. Previously, investigative samples taken under a suspect compulsion order could be

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[32] New Zealand Police Association "Submission to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 2.
[33] See Criminal Investigations (Bodily Samples) Act 1995, new s 24P.
[34] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2; (27 Oct 2009) 658 NZPD 7487 (Nathan Guy).

used only for the investigation of that particular offence; if the offender was subsequently convicted, a fresh DNA sample had to be taken by police for the purpose of databank comparison.[35] Under the new "arrestee regime", however, a DNA sample taken from a suspect in the course of an investigation can be transferred directly from the temporary DNA databank onto the permanent National DNA Database if the offender is subsequently convicted, without the need for a fresh DNA sample to be taken.[36] Unlike the United Kingdom, however, which has implemented similar threshold standards for DNA collection to the expanded New Zealand regime, in our country the DNA samples of people ultimately not convicted will be destroyed once charges against them are dropped or they are acquitted.[37] Thus in this respect the expanded New Zealand regime can be distinguished from the issues surrounding conviction and DNA retention which has given rise to legal and ethical objections in the UK – an issue that will be discussed in more detail below.

The two-stage process was apparently not the government's first preference for implementation of the new regime, and indeed raised concerns for the police that it "potentially undermines and frustrates the policy intent".[38] The staggered implementation resulted from the recognition of the need to afford the Institute of Environmental Science and Research (ESR) time to adjust to the increased workload, as well as adjusting for the significant costs involved in the new regime in light of New Zealand's current fiscal situation.[39] Tellingly, however, Minister of Justice Hon Simon Power also recognised that the expansion "raises issues that are worthy of public debate", and that staged implementation provides an opportunity "to gather more robust information about full implementation" – perhaps an concession that even the government is less than certain about the full ramifications of

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[35] Attorney-General's Report, above n 7, at 3.
[36] Ibid at 3.
[37] See Criminal Investigations (Bodily Samples) Act 1995, new s 60A.
[38] New Zealand Police Association, above n 32, at 3.
[39] See (10 Feb 2009) 652 NZPD 1117 (Simon Power); Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 1.

its proposed course of action.[40]

B. Proportionality And Public Safety: a Rights Balancing Exercise

In order to analyse the potential impact of the CIAA upon individuals' civil liberties and right to privacy, it is necessary to ascertain the problems which the new regime purports to address. In New Zealand, as in other Western liberal societies, human rights are never considered absolute, and must invariably be subject to competing rights as well as the wider public interest, a balance between personal liberty and the overall common good.[41] Of course, the NZBORA itself recognises that rights may be subject "to such limits prescribed by law as can be demonstrably justified in a free and democratic society".[42] The promotion of public safety *can* undoubtedly provide a justification for limiting human rights – the protection of the public from criminal behaviour is one of the State's primary obligations – but there is always a balance to be struck along the spectrum of societal safety and individual rights.[43] The State must always have good reason to gather

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[40] (10 Feb 2009) 652 NZPD 1117 (Simon Power).

[41] Human Genetics Commission, above n 13, at 47; Nuffield Council on Bioethics, above n 20, at 31-32.

[42] New Zealand Bill of Rights Act 1990, s 5. The need to balance the public interest proportionally against human rights is also required by the UN Declaration on the Human Genome and Human Rights, art 9 of which says that "in order to protect human rights and fundamental freedoms, limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the bounds of public international law and the international law of human rights". See also art 8(2) of the European Convention on Human Rights (ECHR), a similar qualifying provision for measures "necessary in a democratic society".

[43] Human Genetics Commission, above n 13, at 9; Nuffield Council on Bioethics, above n 20, at xiii. In *R v Chief Constable of South Yorkshire Police, ex parte S & Marper* [2004] UKHL 39, [2004] 1 WLR 2196, for instance, Lord Steyn at [3] called the taking of DNA samples "a reasonable and proportionate response to the scourge of serious crime".

sensitive personal information about its citizens, particularly those who have not yet been proven guilty of any crime.[44] Although some civil libertarians decry any measures to increase police powers of investigation as a move towards a "genetic surveillance state",[45] ultimately one must decide whether the incursion into citizens' rights to privacy, autonomy and equality may be proportionally justified by the interests of the police and the greater good of protecting society through enhanced law enforcement.[46]

The public-safety justification for expanding the police powers for compelling DNA samples was that the former regime did not allow the police to obtain a sufficient number of subject profiles to match against all outstanding crime-scene profiles. By substantially expanding the "pool" of subject profiles held in the database, the likelihood is increased of finding a match with an unsolved (or future) crime-scene profile on the CSD.[47] Simon Power, in introducing the legislation, estimated that even the first stage of implementation would result in an additional 218 convictions from 2010 to 2011, while full implementation would result in approximately 445 extra convictions.[48] Thus the legislation aims to "contribute to increasing public safety and public confidence in the justice system"; it is, supporters say, an "essential investigative tool" in policing, a "powerful tool in the toolbox for police and the justice sector".[49] The Act will, it is hoped, result in "more victims vindicated" by removing repeat low-level

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[44] Human Genetics Commission, above n 13, at 9.

[45] Privacy Commissioner, above n 6, at 3; I Steward "New Law Used to Tackle 8000 Old Cases" *The Press* (Christchurch, 29 Oct 2009).

[46] Attorney-General's Report, above n 7, at 4; Human Genetics Commission, above n 13, at 29. One might observe that the maintenance of a high degree of public safety is a prerequisite for the enjoyment of other civil liberties – an individual's right to privacy becomes a somewhat academic consideration for the victim of a serial killer murdered because of failure by the government to protect its citizens from harm.

[47] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2, 13, 15.

[48] (10 Feb 2009) 652 NZPD 1118 (Simon Power).

[49] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2.

offenders from society before their offending can escalate to more serious criminal behaviour, and by removing serious offenders before they can strike again.[50]

1. Need for Caution in Expansion

Yet notwithstanding the legitimate aim of the legislation, one must always be careful not to create injustices as one attempts to eliminate other injustices. Just as "surveillance state" scaremongering contributes little to an informed public debate, neither should concerns about human rights intrusions be derided and dismissed as a "Big Brother conspiracy theory".[51] To strike a proportionate balance, the Act must advance its objective in "the most effective, efficient and targeted way possible, with the necessary safeguards".[52] Thus although human rights are not inviolable, they should be affected to the least extent necessary. An example where the appropriate balance has not been struck – one which may provide a salutary warning to New Zealand – is the UK National DNA Database (NDNAD). The European Court of Human Rights (ECtHR) recently condemned the NDNAD in *S and Marper v United Kingdom*[53], ruling that it "fails to strike a fair balance between the competing public and private interests", and thus violates the UK's human rights obligations under arts 8 and 14 of the European Convention of Human Rights to respect private and family life.[54] Interestingly, although New Zealand's DNA database is at present much smaller as a percentage of population than the UK's (in the UK, over 5 million people – more than New Zealand's entire population –

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[50] (14 Oct 2009) 658 NZPD 7066 (Simon Bridges).
[51] (27 Oct 2009) 658 NZPD 7490 (Chester Borrows).
[52] (10 Feb 2009) 652 NZPD 1132 (Jacinda Ardern).
[53] *S and Marper v The United Kingdom* Applications nos. 30562/04 and 30566/04, 4 Dec 2008 (ECtHR) at [118]. The decision was described by UK Human Rights group Liberty as "one of the most strongly worded judgments that Liberty has ever seen from the Court of Human Rights" – "DNA Database 'Breach of Rights'" *BBC News* (4 Dec 2008) <http://news.bbc.co.uk/2/hi/uk_news/7764069.stm> .
[54] Ibid at [125]. See also arts 8 and 14 of the European Convention on Human Rights.

are on the National DNA Database) its "hit rate" in identifying criminal offenders is reportedly higher than the UK's.[55] This suggests that New Zealand's database is already operating relatively efficiently compared to its larger overseas counterparts, and that expansion of the NDD may result in little increased benefit.[56] Police must be careful to ensure that the NDD expansion does not, as Lianne Dalziel noted, merely "flood the system with a lot of irrelevant data, which will not produce anything of any merit".[57]

C. Privacy: the Nature of DNA And Informational Privacy

The primary basis of objection to the expansion of New Zealand's DNA regime is that it represents an ever-greater intrusion into New Zealanders' right to informational privacy – "the fact that *genetic* information is on *police* records is a novel conjunction, giving novel possibilities that must be treated as such".[58] Informational privacy, which concerns the right to keep private information reasonably regarded as intimate or sensitive, is generally defended both as an abstract value and because of the specific harms that can result from its violation. As the Nuffield Council on Bioethics observes, even if no specific harm results from a breach of privacy, "the unauthorised use

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[55] Human Genetics Commission, above n 13, at 4; (10 Feb 2009) 652 NZPD 1132 (Jacinda Ardern). The UK's NDNAD is currently the largest in the world *per capita*, but the US CODIS database is actually the largest in respect of the absolute number of samples – Select Committee on the Constitution, House of Lords, above n 16, at 43.

[56] Likewise, GeneWatch in the UK has observed that DNA detections in the UK have stabilised at around 20,000 a year, despite increasing numbers of profiles being added to the database – Human Genetics Commission, above n 13, at 53.

[57] (10 Feb 2009) 652 NZPD 1124 (Lianne Dalziel). Analysis from the UK shows that from 2003-2009, while ten times the number of subject profiles was added to the NDNAD compared to crime-scene profiles, the number of matches rose by only 14%, suggesting that nine out of ten subject samples were redundant – Human Genetics Commission, above n 13, at 75.

[58] Human Genetics Commission, above n 13, at 44. See also Barry Steinhardt "Privacy and Forensic DNA Databanks" *DNA and the Justice System: The Technology of Justice* (ed. David Lazer) (MIT Press, Cambridge Mass, 2004).

of such sensitive personal information might be seen as undermining the inherent dignity of human beings".[59] The right to privacy is also an important check on both the power of the State and the private sector to intrude into the private lives of citizens.[60] A report of the House of Lords Select Committee on the Constitution in 2009 expressed concern in respect of the UK NDNAD that "the huge rise in surveillance and data collection by the State and other organisations risks undermining the longstanding traditions of privacy and individual freedom, which are vital for democracy".[61] Effectively, the New Zealand Privacy Commissioner noted, the DNA database represents a "state-run collection of intimately personal information".[62] Particular concerns arise in respect of biological samples because of the quantity and quality of private information they contain. However, if handled with the appropriate oversight and safeguards, however, it is possible to minimise the potential for this large quantity of personal information to be misused or abused.

1. DNA vs. Fingerprints

Supporters of DNA profiling frequently liken the procedure to a "modern-day fingerprint" to try and make the idea more publicly palatable.[63] Fingerprinting has been used by police since the 1800s to identify offenders at crime scenes, and the intrusion into informational privacy which fingerprinting entails has been generally accepted in New Zealand and other Western countries as proportional and

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[59] Nuffield Council on Bioethics, above n 20, at 33.

[60] Amnesty International, above n 6, at 4. See also Viktor Mayer-Schönberger "Strands of Privacy: DNA Databases, Informational Privacy, and the OECD Guidelines" *DNA and the Justice System: The Technology of Justice* (ed. David Lazer) (MIT Press, Cambridge Mass, 2004).

[61] Henry Porter and Afua Hirsch "The House of Lords Report: A Devastating Analysis" *The Guardian* (London, 6 Feb 2009).

[62] Privacy Commissioner, above n 6, at 4.

[63] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 13.

appropriate.[64] Both fingerprints and DNA possess three key characteristics – particularity, variability and stability – that make them highly effective as unique markers of individual identity, able to distinguish an individual with near certainty from the population as a whole.[65] The analogy between fingerprinting and DNA profiling, however, is technically accurate but also somewhat misleading. Although both are used in effectively the same manner by police, the comparison obscures the fact that a person's DNA contains a significant amount of private information which a fingerprint does not.[66] The Attorney-General himself observed that "it has not been generally accepted that DNA samples are equivalent to the taking of fingerprints".[67] Advances in genetic technology have meant that samples from very small bodily traces can now be used to obtain DNA, meaning that DNA profiling now "provides more possibilities to obtain suspect identification evidence from crime scenes than traditional fingerprinting".[68]

2. The Unique Nature of DNA: Genetic Exceptionalism

The key issue for privacy advocates is that along with this identification function, samples of DNA can also provide a wide amount of additional information about the individual to whom it belongs. An individual's DNA, it has been said, "is not the same as

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[64] Human Genetics Commission, above n 13, at 17-18; Nuffield Council on Bioethics, above n 20, at 39. A dedicated Fingerprint Branch was first established at Scotland Yard in London in 1901.

[65] Human Genetics Commission, above n 13, at 16.

[66] Nuffield Council on Bioethics, above n 20, at 8.

[67] Attorney-General's Report, above n 7, at 5. In fact, fingerprinting is still the most commonly used method of identification, and in one respect at least fingerprint profiling is still more reliable as a marker of individual identity than DNA, as fingerprints are 100% unique where DNA is not, and fingerprints can also distinguish between identical (monozygotic) twins where DNA cannot. This means, statistically, that DNA cannot distinguish between one pair of individuals in every 250 births – Institute of Environmental Science and Research, above n 19.

[68] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (Regulatory Impact Statement) at 1.

many other more mundane pieces of information we are obliged to divulge"; rather, it contains the "very essence of that individual".[69] Every sample of a person's DNA contains the entire genetic blueprint for that person's character, and can potentially reveal information of "profound personal significance to the individual" which ought to be treated with a considerable expectation of privacy.[70] A person's DNA, the Human Genetics Commission has observed, is "personal to them – it can be both identifying and revealing – and its use by others can constitute a harmful interference in their private life".[71] This idea – that genetic information is uniquely different from other forms of personal information – has been termed "genetic exceptionalism".[72] Our ability to "read" a person's genetic blueprint is limited only by our current level of technological capacity: the more technology advances, the more genome sequencing is allowing us to identify the function of particular protein-coding genes and their correlation with real-world phenotypic characteristics.[73] This "identity revealing" function of DNA could be used to determine a person's physical traits: their height, physical build, hair and eye colour, even their likely ethnic background.[74] Even more intimately, DNA can reveal a person's

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[69] Human Genetics Commission, above n 13, at 44.

[70] Human Genetics Commission, above n 13, at 46.

[71] Ibid at 9.

[72] Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (Vol 1, 2003) at [3.41]; Nuffield Council on Bioethics, above n 20, at 29.

[73] The current rate of technological advancement is startling too – the first human genome was only fully sequenced in 2003, but private companies are now offering individuals the opportunity to have their genome presented to them on a flash drive for only US$399 – "Top 10 Medical Breakthroughs 2008" *Time Magazine* <http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1863993_1864000,00.html>.

[74] "Frequently Asked Forensic DNA Questions" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/DNAfaq.aspx>. Scientists are presently working on identifying a gene sequence, known as the *MC1R* gene, which codes in 84% of cases for red-headedness – Nuffield Council on Bioethics, above n 20, at 21.

genetic predisposition to certain diseases and conditions – from lactose intolerance to prostate cancer – and thus their potential health and life expectancy in the future. [75] Most controversially, scientists have also posited that DNA analysis may indicate a genetic propensity or susceptibility to certain behavioural characteristics – intelligence, risk-taking, extroversion/introversion, even sexuality.[76] The more DNA samples police have in their possession – especially from persons who haven't been convicted or even charged with an offence – the greater the risk of misuse of the exceptional nature of genetic information for inappropriate and harmful purposes.

3. Privacy Protections and DNA

As the Supreme Court of Canada recognised in *R v RC*,[77] because, "unlike a fingerprint, [DNA] is capable of revealing the most intimate details of a person's biological make up", the collection of DNA samples, "absent a compelling public interest, would inherently constitute a grave intrusion of the subject's right to personal and informational privacy".[78] New Zealand is obliged at international law to protect the right to privacy by virtue of its commitment to the International Covenant on Civil and Political Rights (ICCPR). The right to informational privacy is not explicitly recognised under the NZBORA, although s 21 (to be discussed below) establishes a more specific right to maintain one's private affairs from unreasonable

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[75] Human Genetics Commission, above n 13, at 46. Moreover, as the Economic and Social Research Council (ESRC) Genomics Network has observed, the necessary privacy of the information is increased by the fact that much of this information may be unknown even to the individual concerned – cited by Human Genetics Commission, above n 13, at 46.

[76] Nuffield Council on Bioethics, above n 20, at 87. The UK law reform organisation JUSTICE has described DNA as 'the most intimate medical data an individual may possess' – JUSTICE "Keeping the Right People on the DNA Database: Science and Public Protection" (response to Home Office Consultation, July 2009) at 2.

[77] *R v RC* 2005 SCC 61, [2005] 3 SCR 99.

[78] Ibid at [27]; also cited by the European Court of Human Rights in *S and Marper*, above n 55, at [54].

search and seizure.[79] Most generally, informational privacy is protected in New Zealand by the "Information Privacy Principles" of the Privacy Act 1993, with which both the police and the ESR are bound to comply.[80] Although the principles are broadly drafted, they place general limits on what the police can do with the DNA database – selling the information to third parties, for example, would clearly fall outside the scope of use "for a lawful purpose connected with a function or activity of the agency" under Privacy Principle 1.[81] Privacy Principles 10 and 11, which require that an agency shall not, except in exceptional circumstances, use or disclose information for any purpose other than that for which it was collected, would also prohibit the police from using the NDD to reveal particular characteristics about an individual unless a demonstrable link could be shown to the databank's purpose in investigating and resolving criminal offences. [82] The Act itself also provides restrictions on what constitutes legitimate use of the DNA databank, prohibiting *a priori* the possibility of police lawfully using the NDD for non-operational purposes. Section 27 of the Act provides that information on the database can only be disclosed "for the purpose of forensic comparison in the course of a criminal investigation by the Police" or "for the purpose of administering the DNA databank".[83]

4. Remedies and the Risk of Accidental Breach

But what if those controls on informational privacy are breached by police, especially in the absence of any constitutional recognition of a right to informational privacy in the NZBORA? A number of remedies are potentially available to aggrieved individuals. A complaint can be made under the Privacy Act to the Privacy Commissioner (or

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[79] Article 17 of the International Covenant on Civil and Political Rights says that "[e]veryone has the right to privacy".
[80] Privacy Act 1993, s 6.
[81] Ibid. It would also constitute a breach of art 4 of the Universal Declaration on the Human Genome and Human Rights, that "the human genome in its natural state shall not give rise to financial gains".
[82] Ibid.
[83] Criminal Investigations (Bodily Samples) Act 1995, s 27(1)(a)&(c).

the Ombudsman), with a possible appeal to the Human Rights Review Tribunal (HRRT) at the discretion of the Director of Human Rights Proceedings.[84] The remedial powers of those bodies are significant too: the Privacy Commission can refer the matter to the HRRT to make a declaration, issue an order for specific performance or restraint, or even award damages for "humiliation, loss of dignity, and injury to the feelings of the aggrieved individual" – likely to be the kind of damage suffered by an individual whose privacy is breached by misuse of the DNA databank, rather than direct pecuniary loss.[85] Since the 2004 Court of Appeal decision in *Hosking v Runting*, a breach of informational privacy can also potentially sound in common law civil damages where a "reasonable expectation of privacy" and "highly offensive" publication can be established.[86] Finally, the Criminal Investigations (Bodily Samples) Act 1995 itself establishes a number of criminal offences to protect against the misuse of DNA samples, including offences of gaining or attempting to gain access to a DNA databank, disclosing any information stored on the databank, or gaining or attempting to gain access to or use a DNA sample.[87] One concern, however, is that these remedies can really only apply *ex post facto* – by which time the damage caused by a leak of an individual's private genetic information may already have been done. The more samples collected, the greater the risk of misuse of DNA occurring

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[84] Privacy Act 1993, ss 67, 68, 82.

[85] Ibid, ss 74, 77, s 88(1)(c). Again, this is required under the UN Declaration on the Human Genome and Human Rights, art 8 of which says that "every individual shall have the right, according to international and national law, to just reparation for any damage sustained as a direct and determining result of an intervention affecting his or her genome".

[86] *Hosking v Runting* [2005] 1 NZLR 1 (CA).

[87] Criminal Investigations (Bodily Samples) Act 1995, s 77(2)(d). The CIAA now also provides the same protection in respect of the new Part 2B temporary databank (see s 28). In the UK, a specific criminal offence of "DNA theft" was created in 2004 at the recommendation of the Human Genetics Commission – see Human Tissue Act 2004 (UK), s 45 – for taking or having an individual's biological sample with the intention to analyse their DNA without their consent. In Australia, it is an offence to recklessly or intentionally cause matching that is not permitted – see Crimes Act 1914 (Cth), s 23YDAF.

before the person involved has a chance to become aware of and prevent the breach of privacy. Although one might generally trust the police to abide by their legal obligations to use the databank appropriately (as the Police Association points out, perhaps the greatest safeguard is that "it is difficult to imagine any credible scenario where police would have any interest in investigating (for example) a suspect's hereditary disorders"), a greater risk is posed by the increased likelihood of accidental breach of privacy.[88] Even in the past few years, instances have occurred in New Zealand of private information held by government departments being inadvertently released into the public domain, and again the potential for accidental privacy breaches of the DNA databank is only likely to increase as the regime is systematically expanded.[89]

5. DNA Profiles in Practice: Limited Risk of Exposure

Many of the concerns about interference with informational privacy, however, fail to recognise one significant point about the way that the DNA profiling regime operates: DNA profiling should not be confused with full genome sequencing. A distinction has to be made between the DNA *sample* taken from a subject and the DNA *profile* that is extracted as a result, and in this respect those who liken the DNA regime to the "21st-century fingerprint" are perhaps more correct. When the ESR uses a DNA sample to produce a DNA profile for storage on the database, it uses only a very small portion of the individual's total DNA – approximately 0.001% of the entire

[88] New Zealand Police Association, above n 32, at 10.

[89] Consider, e.g., the incident in Auckland in 2008 where a Department of Corrections folder entitled "High Risk/High Profile Offenders – Pending New Zealand Parole Board Hearings" containing private information about serious criminal offenders, including their post-release addresses and other personal information, was discovered near a park bench in Auckland – Patrick Gower "Police Still Trying to Retrieve 'Top Secret' File" *NZ Herald* (Auckland, 20 June 2008) http://www.nzherald.co.nz/blogging/news/article.cfm?c_id=1501095&objectid=10517325.

genome.[90] To distinguish a person's genetic identity, the ESR's Identifiler testing system examines only a very limited number of sites (known as "loci") on a person's DNA for the frequency of 15 markers known as "short tandem repeats", and these sites do not contain any hereditary identifiers or other information of an intimate nature.[91] The regions of DNA which show the greatest variability from person to person – and thus function most effectively to identify individual offenders – are the non-coding sections of DNA which bear no relation to an individual's phenotypic makeup (their appearance, medical predispositions, etc).[92] The DNA profile stored on the NDD consists of no more than a string of numbers used to identify and distinguish the individual from everyone else – effectively, therefore, little more than a genetic fingerprint.[93]

The potential for damage to be done to an individual's privacy by police abuse or accidental disclosure, and accordingly the risk as increasing numbers of DNA profiles as are created, is thus relatively minimal – the limited information stored makes it difficult for profiles to reveal private or sensitive information. The technical nature of the DNA profile, moreover, means that it "can be deciphered by only a small group of specialist scientists".[94] Apart from linking a unique sequence of numbers to a named individual on the police records, the most that can be deduced from a DNA profile on the NDD is the sex

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[90] (14 Oct 2009) 658 NZPD 7066 (Moana Mackey).

[91] "Current DNA Techniques" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/currenttechniques.aspx>; Nuffield Council on Bioethics, above n 20, at 6.

[92] Human Genetics Commission, above n 13, at 9, 27.

[93] The Human Genetics Commission gives an example of what a person's DNA profile would look like when stored on a DNA databank, to give an indication of how technical and unrevealing it truly is – a typical profile looks something like this (each discrete number representing the number of short tandem repeats found at each locus on the DNA): "X Y 18 27 38 38 10 58.2 21 28.2 13 23 10.2 19 11 19 2 5 14 23 11.2 21" – Ibid at 20.

[94] Nuffield Council on Bioethics, above n 20, at xv; (10 Feb 2009) 652 NZPD 1118 (Simon Power).

of the individual concerned.[95] Whilst it is not completely inconceivable that this last feature could raise embarrassment for transgender persons or perhaps those with hereditary sex-chromosome abnormalities such as Klinefelter's syndrome (a condition in which a person possesses an extra male sex chromosome, XXY, which would show up in their DNA profile), the risk to privacy in this respect is hardly sufficient to justify opposing the retention of DNA profiles.[96] The only other aspect of investigatory profiling which has raised cause for concern is familial profiling – analysis of an individual's DNA profile can reveal the existence, and even the degree, of a biological relationship between two subject samples.[97] The practice, which has apparently already been conducted in New Zealand, allows the police to use a close but not identical match between a crime-scene profile and a subject DNA profile as a basis for investigating family members of the subject on the assumption that one of them may provide an identical match.[98] Familial searching has the potential to be highly intrusive – the revelation of previously unknown or unsuspected biological relationships (such as a paternity link) could have, the HGC noted, "profound and destabilising consequences for the individuals involved".[99] Again, however, although it is theoretically possible that police could inadvertently reveal a previously unknown genetic relationship, the risk to privacy is minimal provided police exercise appropriate discretion in making their inquiries. As the Nuffield Council on Bioethics observes, the public fear of revealing such

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[95] Institute of Environmental Science and Research, above n 74.

[96] Nuffield Council on Bioethics, above n 20, at 19, 21.

[97] Human Genetics Commission, above n 13, at 28.

[98] However, as with other DNA profiles, the resulting evidence is not admissible in court without a further DNA sample taken from the offending relative – Criminal Investigations (Bodily Samples) Act 1995, s 71. In the UK, statistics indicate that over 100 familial searches were conducted in 2006 alone – Nuffield Council on Bioethics, above n 20, at 78.

[99] Human Genetics Commission, above n 13, at 46. See also *S & Marper v United Kingdom*, above n 55, at [75], which held that the ability to identify genetic relationships between individuals 'is in itself sufficient' to conclude that retention interferes with the right to private life under art 8 of the European Convention.

unknown family connection perhaps has more to do with the sensitivity of the issue than the true extent of the risk.[100]

6. DNA Sample Retention

If DNA profiles only were retained, therefore, the limited nature of the information available should allay many of the concerns people possess about police collecting and storing their DNA. DNA *samples*, however – the biological material which allows access to an individual's genetic blueprint – can potentially risk causing greater harm, such as the risk of insurance companies obtaining genetic information to identify genetic predisposition to disease and deny insurance coverage on that basis, or unethical research into behavioural genetics (such as the so-called study of "criminogenics").[101] Where a sample is obtained under the new Part 2B arrestee regime, the bodily sample must be destroyed "as soon as practicable after a DNA profile is obtained from it" – specified as two months after the sample was taken if the person is not charged, or straight away if the charges are withdrawn or the person is acquitted.[102] Privacy Principle 9, which says that an agency is "not to keep personal information for longer than necessary" supports the necessity of that destruction.[103] However, an individual's

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[100] Nuffield Council on Bioethics, above n 20, at 78.

[101] Ibid at 79, 82; Human Genetics Commission, above n 13, at 81.

[102] See Criminal Investigations (Bodily Samples) Act 1995, new s 60A. Those provisions are also subject to s 61, however, which allow an application to the High Court to extend the 24-month retention period under Part 2 and the 2-month sample retention period under Part 2B. DNA *profiles* entered onto the temporary database must also be removed if a conviction does not result.

[103] Most European jurisdictions require the destruction of samples following DNA profiling – in Germany, for instance, the police must show a likelihood that someone will reoffend before a sample can be retained – and, following the ECtHR ruling in *S v Marper*, the UK government has also proposed destroying biological subject samples once the DNA profile has been obtained – Nuffield Council on Bioethics, above n 20, at 52, 100; Genewatch UK "Home Office Drags its Feet on DNA Database Removals" (press release, 7 May 2009). In Australia, likewise, it is an offence to record or retain any identifying information about a person obtained from forensic material after

informational privacy will continue to be at greatly increased risk for as long as the DNA sample is retained, and individuals must ultimately rely upon the good faith of police and the Police Commissioner to ensure that samples will be destroyed by the appropriate deadline. In the UK, it was estimated in a 2000 report that as many as 50,000 profiles may have been unlawfully retained when they should have been destroyed because no conviction resulted.[104] The Privacy Commissioner has raised concerns about one agency controlling both ends of the system, from the investigation of crimes scenes to the control of the database.[105] Given that the police are effectively the sole guardians of people's private genetic information, attention will need to be paid to ensure that the police comply with the proper use and sample destruction provisions contained in the Act. On an individual level, the Privacy Act at least allows citizens under Informational Privacy Principle 6 to obtain confirmation of whether or not the police hold personal information about them, which would empower them to monitor whether the police have properly destroyed their DNA sample by the required date. The Privacy Commissioner has also suggested that her audit function be strengthened to allow her to conduct specific audits of the databank's operation on a regular basis (at present this can only be done on request from police themselves).[106] This would be a highly prudent measure to ensure a further degree of independence of oversight to uphold the Act's obligations on police to ensure sample destruction is carried out properly and efficiently.

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the material is required to be destroyed – see Crimes Act 1914 (Cth), s 23YDAG.

[104] Her Majesty's Inspector of Constabulary "Under the Microscope: Thematic Inspectation Report on Scientific and Technical Support" (2000) at [2.23].

[105] Privacy Commissioner "Submission by the Privacy Commissioner to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 5-6. In Australia, the Commonwealth Attorney-General's Department has commented that 'in essence, such a proposal means that the decision when to destroy material is left entirely in the hands of the police' – cited by the Australian Law Reform Commission, above n 72, at 1075.

[106] Ibid at 5. See Privacy Act 1993, s 13(1)(b) in respect of the Commissioner's powers to audit the activities of an agency.

7. Privacy and Public Confidence

Finally, even though in actual fact the risk of abuse of people's private genetic information may be low given the limited information retained in a DNA profile and the strict requirements for the destruction of samples, one final consideration in this respect is simply the public perception. A stated objective of the new CIAA is to "contribute to increasing … public confidence in the justice system", but the new arrestee regime may in fact have the contrary effect – the Privacy Commissioner expressed concern in her Select Committee submission that expansion of the NDD may jeopardise its value and utility by undermining the public trust in the police and government.[107] The HGC notes that regardless of the actual procedure involved, many people feel "in some ineffable way" that their genetic information is an intimate and private matter with which the state should not interfere.[108] If the public at least *believes* that retention of their genetic information on a government database infringes their right to privacy, this could have serious practical consequences for public support and cooperation, and thus for police investigatory practice.[109] In an attempt to shield their privacy by resisting police retention of their DNA, citizens might conceivably become less co-operative with police investigations, and treat police and the government with increased suspicion and mistrust (a particular concern in respect of minority groups in New Zealand – see below).[110] It is not unknown, moreover, for individuals to attempt to guard their privacy by cheating the system – the very first DNA case in England, the Pitchfork case, resulted in the true offender being initially eliminated from police investigations into the murder/rape of two 15-year-old girls because he successfully

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[107] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2; Ibid at 3.

[108] Human Genetics Commission, above n 13, at 47. A study conducted by the HGC showed that 52% of people surveyed did not trust the police to keep their DNA profile information private – Human Genetics Commission, above n 13, at 89.

[109] Ibid at 93.

[110] Ibid at 56.

substituted another man's DNA blood sample in place of his own.[111] As the UK Human Genetics Commission notes, "the [DNA databanks], and the effective prosecution of criminal justice more generally, depend on the trust, confidence and support of [private] citizens", and care must to be taken to ensure that this public trust is not eroded by perceived police abuses of their expanded powers.[112]

At base, most objections to the expansion of DNA profiling under the privacy rubric are founded on the idea that the government keeping more information on file about its citizens represents a greater intrusion by the State into the lives of ordinary citizens. As noted above, the idea of 'genetic exceptionalism' causes many to mistrust the concept of a DNA databank without considering how it operates in practice. Because the genetic information stored on the NDD is no more than a string of numbers allowing a person's unique identity to be determined (and none of their phenotypic characteristics or genetic predispositions), arguments based on the abstract right to protect personal information from the State's retention on a database are not particularly apposite. More concerning is the risk of abuse associated with the collection and potential retention of bodily DNA samples, which allow access to a much wider range of personal and intimate information, and the risk for those samples to be misused or leaked to third parties. Provided, however, that oversight is maintained by the Police Commissioner, the Privacy Commissioner, and perhaps by private citizens themselves under the Privacy Act to ensure that samples are properly destroyed, the risks of such harms arising should not give cause for undue alarm.

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[111] See *R v Pitchfork & Kelly* [2009] EWCA Crim 963; C Walker and I Cram "DNA Profiling and Police Powers" *Criminal Law Review* (July 1990) at 478-93, 480. The deception was only discovered when a woman overheard a colleague, Ian Kelly, boasting that he had substituted his DNA for Pitchfork's – "Forensic Cases: Colin Pitchfork, First Exoneration Through DNA" Explore Forensics <http://www.exploreforensics.co.uk/forenisc-cases-colin-pitchfork-first-exoneration-through-dna.html>.

[112] Human Genetics Commission, above n 13, at 10.

D. Autonomy: the Right Against Unreasonable Search And Seizure

The second key concern in respect of civil liberties intrusions under the new CIAA regime is related to informational privacy, but also distinct from it: an issue one can classify under the broad category of autonomy, personal privacy, or freedom from legal restraint. It was this concern which provided the basis of the Attorney-General's ruling that the CIAA is inconsistent with the NZBORA, in particular the right against unreasonable search and seizure under s 21.[113] Section 21 of the NZBORA says that "[e]veryone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". Concerns also arise about the potential for the NDD regime to interfere with the "due process" of criminal justice and the presumption of innocence.

Some opponents have attacked the CIAA on the grounds that the physical act of forcibly taking a DNA sample from a criminal suspect is "unreasonable" because such forcible sampling amounts to the legal authorisation of a "gross assault" on that person.[114] This is technically correct – in the absence of appropriate legal justification, the most minor touching of another person constitutes assault – but such an alarmist claim distracts from the real concerns in this area.[115] In fact, the procedure for taking a DNA sample is now as simple as taking a buccal (i.e. mouth) swab with a cotton swab known as a Q-tip rubbed against the inner cheek – a much less intrusive (and cheaper) means of sampling than the previous use of blood samples.[116] The sample can

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113 Attorney-General's Report, above n 7. Similarly, Privacy Principle 4, concerning the "Manner of Collection of Personal Information", says that personal information shall not be collected by an agency by means that "are unfair" or "intrude to an unreasonable extent upon the personal affairs of the individual concerned" – Privacy Act 1993, s 6.

114 See, e.g., (27 Oct 2009) 658 NZPD 7496 (Metiria Turei); Walker & Cram, above n 111, at 493.

115 See Crimes Act 1961, s 2.

116 See Criminal Investigations (Bodily Samples) Act 1995, new s 48A. In the UK, the use of buccal swabs was re-classified in 1994 as a "non-intimate"

be self-administered, takes only a matter of seconds and – according to the Police Association at least – "is far less invasive than brushing one's teeth".[117] The DNA sample may still also be taken by fingerprick blood sample, but, since the person concerned has the opportunity to elect which method is used, the buccal swap is likely to become the preferred option. Thus, although the procedure for taking DNA samples has been admitted to involve a "certain intrusiveness", it really amounts to little more than a minor physical inconvenience.[118] Ultimately, the worst "assault" that could occur is if police are required to use force to hold a suspect down in order to take a fingerprick sample (if the suspect does refuse and reasonable force is required to take the sample, new s 48A(5) prescribes that the sample taken must be a fingerprick sample). Police are already authorised to use reasonable force when searching a suspect who has been taken into lawful custody and to take any money and property off them, for example, and the collection of a DNA sample represents no greater an intrusion on bodily autonomy.[119] Moreover, samples can only be taken by a "suitably qualified person", a further measure to ensure that the

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means of sample taking under the Criminal Justice and Public Order Act 1994 – Human Genetics Commission, above n 13, at 30.

117 New Zealand Police Association, above n 32, at 10.

118 (14 Oct 2009) 658 NZPD 7066 (Simon Bridges). New sections 24M and 24N also require oral and written information to be given to a person from whom a bodily sample is to be taken, in order to ensure that the suspect is fully informed of the reasons and procedure for taking a bodily sample, which accords with Privacy Principle 3 of the Privacy Act requiring that individuals be informed, among other things, of the fact that the information is being collected, the purpose for which it is being collected, the law under which collection is so authorised and the agency collecting the information – see Privacy Act 1993, s 6.

119 See Policing Act 2008, s 37(3). Moreover, the Police Annual Report 2008/09 indicates that during that period, on only one occasion did reasonable force have to be used to compel compliance with a suspect compulsion order – New Zealand Police Association *Police Annual Report 2008/09* (30 June 2009) <http://www.police.govt.nz/sites/default/files/resources/2009-Annual-Report-Full-Version_e-version1.1.pdf>.

person taking the sample does not overstep the bounds of proper procedure.[120] The real concerns around the CIAA procedure are thus not so much with the potential for it to countenance physical assault by police in taking buccal samples, as with the clear intrusion it represents on a person's right to autonomy and freedom for State interference – particular as protected by s 21 of the NZBORA.

1. Reasonable Search/Demonstrable Justification

The intrusiveness of the procedural power conferred on police by the CIAA to take samples from a person's body clearly amounts to a "search and seizure of the person" for the purposes of s 21 of the NZBORA.[121] As was recognised in *R v Jefferies*, such a physical search of the person "is a restraint on freedom and an affront to human dignity".[122]The question is whether that search can be considered "reasonable", under both s 21and the test of demonstrably justified limitations under s 5 (although, of course, s 4 of the NZBORA means that no provision of the CIAA will be affected by inconsistency with s 21. The potential might remain, however, for certain provisions to be interpreted in an NZBORA-consistent way by the courts).[123] To be considered reasonable, as noted above, the intrusion must be justified

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[120] See Criminal Investigations (Bodily Samples) Act 1995, s 49A(1); and s 2(1) for the definition of a "suitably qualified person". Interestingly, however, s 79 of the Act provides an indemnity for people taking samples – no proceedings can lie against a person in respect of the taking of a fingerprick sample by force, except on grounds of negligence.

[121] In *R v SAB* 2003 SCC 60, [2003] 2 SCR 678, the Supreme Court of Canada held that the seizure of a blood sample for DNA analysis was a seizure for the purposes of s 8 of the Charter of Rights and Freedoms.

[122] *R v Jeffries* [1994] 1 NZLR 290 at 300.

[123] Attorney-General's Report, above n 7, at 6. There remains an unresolved debate about whether the test for reasonableness needs to be conducted twice under both s 21 and s 5 of the NZBORA in such circumstances. Entry into that particular debate is beyond the scope of this paper, and so the two issues will be treated herein as synonymous.

by a sufficient countervailing public interest.[124] More specifically, the right against unreasonable search and seizure means that two key principles must be satisfied before a DNA sample can be lawfully taken: [125]

1. There must be a specific and sufficient basis for taking the sample from the person concerned; and
2. Absent emergency or special circumstances, there must be lawful authorisation for the taking of the sample (up until now, by judicial warrant).

2. Conflict with NZBORA and Human Rights Standards

The new arrestee regime removes the requirement of prior judicial approval by the High Court, and thus appears to severely derogate from the second principle above in the absence of special circumstances. Such special circumstances, the Attorney-General notes, could include situations where there is a substantially reduced expectation of privacy – such as convicted offenders already in prison, perhaps.[126] Yet the police will now be able to take a DNA sample from any suspect without having to seek prior judicial authority even in the absence of extenuating "special circumstances".[127] This appears to directly cut across existing NZBORA protections under s 21 and the general principle that searches and seizures will be conducted pursuant

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[124] Andrew Butler & Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005) at 566.

[125] See, for example, the discussion in *R v Grayson & Taylor* [1997] 1 NZLR 399.

[126] Attorney-General's Report, above n 7, at 4.

[127] In fact, prior judicial authorisation has not been a necessity since 2003, when the Labour government's Criminal Investigations (Bodily Samples) Amendment Act 2003 removed that requirement, but this has become a much more concerning issue in light of the police's new power to take samples from mere suspects, and for a broader range of offences.

to judicial warrant,[128] as well as overseas jurisprudence (and may even go more deeply to the basic constitutional principle of the rule of law).[129] In the US, the EU and Canada, the courts have said that a failure to include judicial oversight of the power of physical compulsion is a breach of their relevant human rights standards, although those instruments give the courts power to invalidate legislation in a way that the NZBORA does not. In New Zealand this means that if the CIAA confers a power of search and seizure without judicial authorisation then that power must ultimately stand, yet experience overseas still provides an insight into how other countries perceive the legality of similar regimes. Moreover, the potential exists for litigation to be brought against New Zealand at an international level under the Optional Protocol to the ICCPR if an individual believes our DNA regime violates New Zealand's human rights obligations. In Canada – from whose Charter of Rights and Freedoms many of the provisions of the NZBORA such as s 21 are drawn – DNA databank samples can only be taken from convicted serious offenders – it has been held that it is the fact of a person's conviction which gives rise to a public interest contrary to their ordinary expectation of privacy and autonomy.[130] DNA samples taken from suspects can only be used for specific investigations, and their storage on the database has been considered inconsistent with the right against unreasonable search and seizure under s 8 of the Canadian Charter.[131]

Moreover, the ability of police to collect bodily evidence from people legally considered innocent, without approval of the courts and on the basis of suspicion alone, raises concerns about the proper process of justice and the presumption of innocence. It is a fundamental tenet of our criminal justice system that an accused is legally innocent until

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[128] See s 198 of the Summary Proceedings Act 1957. Exceptions to this principle do exist, however, such as under s 18 of the Misuse of Drugs Act 1975.

[129] See Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 41, 43.

[130] *R v Rodgers* 2006 SCC 15, [2006] 1 SCR 554 at [36]-[44]; Attorney-General's Report, above n 7, at 6.

[131] *R v SAB* 2003 SCC 60, [2003] 2 SCR 678 at [50].

proven guilty: the so-called "golden thread" of the criminal law extending back to *DPP v Woolmington*.[132] The principle is now also enshrined in s 25(c) of the NZBORA, and s 22 also affirms the liberty of the person and the right not to be subject to arbitrary detention (for the purpose of taking a bodily sample, for example).[133] The new DNA regime does not directly contradict the presumption of innocence (and, again, s 4 of the NZBORA means that the statutory power under the CIAA for police to detain suspects for the purpose of taking bodily samples will operate despite any rights inconsistency). DNA evidence must obviously still be presented before a judge and jury before a conviction can result. But it does raise concerns about the treatment of presumptively innocent suspects. Under the new regime, police will also be able to extract a DNA profile from a suspect's bodily sample and enter it onto the temporary DNA databank before the person is even convicted – essentially allowing the police to treat a suspect as a criminal offender before a court has had a chance to make that determination and thus placing them on a kind of "genetic probation".[134] "By placing an individual's profile on a central, national register of criminal information", the Privacy Commissioner has observed, "that individual is effectively deemed a criminal".[135] The power for police to take DNA from anyone they "intend to charge" places a considerable amount of subjective discretion in the hands of the police.[136] Where previously a judge or JP was required to assess the evidence to an objective standard before issuing an order for a DNA

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132 *DPP v Woolmington* [1935] AC 462 (HL) at 481 per Viscount Sankey LC.

133 The presumption of innocence is also now recognised internationally under art 111 of the Universal Declaration of Human Rights.

134 Human Genetics Commission, above n 7, at 98. The Nuffield Council on Bioethics has described the net effect of including a greater proportion of individuals on the databank as "shift[ing] the relationship between the individual and the state insofar as it treats all individuals as potential offenders rather than as citizens of good will and benign intent" – cited by the Human Genetics Commission at 48.

135 Privacy Commissioner, above n 6, at 4.

136 Editorial "Vague DNA Bill is a Law Unto Itself" *Manawatu Standard* (Palmerston North, 29 Oct 2009).

sample to be taken, the standard has now become a much more subjective one – "'intends' means just something that happens to be in the constable's mind".[137] The mere requirement of an intention to charge gives police legal cover to collect a DNA sample even if a charge never results, provided they can assert that there was "good cause to suspect the person of committing a relevant offence" and an intention at some point to "bring proceedings against the person in respect of that offence" – a vague and highly subjective standard.[138] The determination of a suspect's criminality (after all, matching a DNA sample against the CSD or crime-scene samples assumes there is criminality to be discovered) should not be devolved to the law enforcers themselves – as one member of the National Council of Women of New Zealand (NCWNZ) commented to Select Committee, "police must see themselves as under the law, not deciders without judicial guidance".[139]

3. Potential for Police Abuse – "Fishing Expeditions"

The conferral of such a powerful discretion on police is particularly concerning given reports of the outcome of similar practice overseas. Allegations have been made against police in the UK that they have stopped or arrested suspects on trumped-up charges purely to obtain their DNA for the database: as one retired UK police superintendent has publicly alleged, "it is now the norm to arrest offenders for everything if there is a power to do so ... so that the DNA of the offender can be obtained".[140] The risk of police going on speculative "fishing expeditions" is now also present here given that police need

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[137] (10 Feb 2009) 652 NZPD 1125 (Keith Locke).

[138] See Criminal Investigations (Bodily Samples) Act 1995, new s 24J.

[139] National Council of Women of New Zealand "Submission to Justice and Electoral Select Committee on the Criminal Investigations (Bodily Samples) Amendment Bill" at 2.

[140] The UK Association of Chief Police Officers (ACPO), however, has dismissed the claim as "plainly wrong" – "Police Arrests 'Made to Get DNA'" *BBC News* (24 Nov 2009) <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/8375567.stm>; Human Genetics Commission, above n 13, at 21-22.

only "suspect" someone in order to obtain a DNA sample from them, and need only bring charges against someone in order to enter their DNA onto the temporary databank.[141] Police may also be tempted to use the threat of charging an individual to coerce him or her into giving over their DNA sample "voluntarily". The risk of bullying or coercion may be especially acute where vulnerable people – youth, minorities, the mentally impaired – are involved.[142] Individuals subject to DNA profiling – particularly those who haven't been charged with any offence – should know that that process has been subject to the proper and impartial scrutiny which judicial oversight provides, and should also have the right to challenge that process to an independent body. On the other hand, it should be noted that one crucial difference between the new CIAA arrestee regime in New Zealand and the current UK regime is that if a person is not convicted, their DNA profile will (at least in theory) be removed from the temporary databank and the sample destroyed, reducing the value to police of such "fishing expeditions" to obtain DNA profiles.[143]

4. A Need for Greater Oversight

The justification provided by the Act's supporters for allowing the police to take extra-judicial samples and enter them into the databank before a suspect is brought to court is that an individual may now be linked with other unsolved crimes prior to conviction, and they may thus be prosecuted for these unsolved crimes alongside the original triggering offence.[144] In addition, it is suggested, the linking of an individual to other historic crimes may influence the court's perception of the risk of his or her re-offending when it comes to making bail

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[141] On a practical level, the new regime may expose the police to numerous complaints by discharged suspects challenging that the police ever possessed an intention to charge them with an offence, as noted by the *Manawatu Standard*, above n 136.

[142] National Council of Women of New Zealand, above n 141, at 2.

[143] New Zealand Police Association, above n 32, at 11.

[144] Criminal Investigations (Bodily Samples) Amendment Bill (14-1) (explanatory note) at 15-16.

decisions.[145] These are legitimate potential benefits, but they hardly justify the risk of police abusing their power in the absence of any judicial oversight when taking a DNA sample. The Attorney-General observed in his NZBORA compliance report that the lack of independent oversight was contrary to comparable DNA regimes in New South Wales, Victoria, the Australian federal DNA scheme, the United States, Canada, Japan, Germany and the Netherlands.[146] Only in the United Kingdom, South Australia and Tasmania, he noted, were schemes comparable to the New Zealand regime operating without such safeguards.[147] No special circumstances could be discerned in New Zealand to justify bucking the international trend in this respect or to render such safeguards unnecessary: "there appears to be a consensus in jurisdictions which provide for a right against search and seizure that DNA sampling regimes must be subject to strict substantive and procedural safeguards".[148]

A resolution to this serious concern would be easy to implement. Some parties, such as the Privacy Commissioner, have pushed for the establishment of an independent statutory oversight committee with additional audit powers.[149] Such an idea has merit, and accords with practice in many overseas jurisdictions – the US CODIS database, for instance, is subject to an external advisory committee including ethicists and a Supreme Court judge, while the UK system operates an advisory National DNA Database Ethics Group to provide

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145 Ibid at 16.

146 Attorney-General's Report, above n 7, at 2. Australia has such oversight of its National Criminal Investigation DNA Database (NCIDD), incidentally, even though there is no Commonwealth constitutional protection of the right against unreasonable search and seizure as in New Zealand.

147 Ibid at 2. The UK regime, moreover, with which our government is increasingly aligning itself, has been described as "effectively an 'outlier' in international terms", and is currently undergoing review following the ECtHR's highly critical ruling in 2008 – Privacy Commissioner, above n 6, at 6.

148 Ibid at 2, 6-7.

149 Privacy Commissioner, above n 105, at 5; see Summary Proceedings Act 1957, s 198 – the test for search warrants is "reasonable grounds for believing" that an offence has been committed or is intended to be committed.

independent ethical advice on the DNA databank to the government.[150] The simplest method, however, would be to require police again to obtain a warrant before they may exercise the power to compel a DNA sample, as they still currently do in almost every other case of search and seizure. Some have claimed requiring police to seek warrants from justices of the peace after-hours could create large practical headaches and incur significant costs, yet police seem to have coped previously with the requirement.[151] In fact, the Police Annual Report for 2008/09 states that of all DNA samples provided during the period, over 9,700 were obtained voluntarily with consent, and only 221 were obtained through suspect/juvenile compulsion orders – suggesting that the burden of seeking compulsion orders arises relatively infrequently in any case.[152] In total, 80,902 suspect profiles on the NDD were provided by consent, compared with only 16,596 obtained through suspect compulsion orders.[153] The relatively modest financial cost involved in seeking judicial approval, finally, is hardly a proportionate factor when weighed against the important protections which judicial oversight provides.

The strong need for judicial oversight is also further increased under the new CIAA regime because of the widened range of offences for which police can now potentially compel a DNA sample. Without some form of independent approval, the indiscriminate collection of samples by police may jeopardise the effective operation of the system. By expanding the range of relevant offences to *all* imprisonable offences, a very large number of crimes are brought within the scope of the Part 2 sampling regime, including many relatively low-level offences which carry a maximum sentence of imprisonment. Sentences importing a maximum sentence of 3 months' imprisonment include

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[150] Australian Law Reform Commission, above n 74, at 1088; Human Genetics Commission, above n 13, at 6-8.
[151] See, e.g., (27 Oct 2009) 658 NZPD 7486 (Nathan Guy).
[152] Police Annual Report, 2008/09, above n 124, at 76. Of course, this might also show that police obtaining DNA samples in the absence of both judicial oversight and consent will be relatively uncommon, but the point of principle is nonetheless important.
[153] Ibid at 77.

such relatively trivial offences as littering, shoplifting, disorderly behaviour, seeking donations by false pretence, possessing a knife in a public place, associating with convicted thieves, drink driving, and possession of cannabis (or even BZP).[154] The risk that all imprisonable offences would be caught under Part 2 was a particular concern of the Privacy Commissioner – "expansion of the databank to encompass potentially trivial lawbreaking is… not warranted".[155] The only tangible result might be, she suggested, "a loss of general public faith in the integrity of police practices if samples are taken for trivial (but imprisonable) offences".[156] Any number of ordinary New Zealanders present at a crime scene – many of whom "might just have been in the wrong place at the wrong time" – may be compelled to produce DNA samples if police are not subject to higher scrutiny.[157]

5. Undermining of the Act's Rationale

In Europe, as the ECtHR observed in *S and Marper*, Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden all restricted the collection of DNA samples "to some specific circumstances and/or to serious crimes".[158] In Austria, for instance, police may only collect DNA from suspects of "severe" crimes, and in Hungary for crimes of 5 years' imprisonment.[159] In New Zealand, however, it will ultimately be at the discretion of the police to decide whether a particular offence merits DNA collection. It is not realistic to expect that gross abuses of power by police will result, but granting such a wide discretion does risk police over-zealousness (not necessarily amongst *all* police, but

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[154] See Crimes Act 1961, s 219; Summary Offences Act 1981, ss 3, 6, 13A, 15, 27; Land Transport Act 1998, s 56; Misuse of Drugs Act 1975, s 7(2). In the UK, the list of "recordable offences" contains even more trivial offences, such as "failing to give advanced notice of a procession", "taxi touting", and "persistent begging" – Nuffield Council on Bioethics, above n 20, at xiv, 10.
[155] Privacy Commissioner, above n 6, at 3.
[156] Ibid.
[157] (27 Oct 2009) 658 NZPD 7498 (Metiria Turei).
[158] *S & Marper v United Kingdom*, above n 55, at [46].
[159] Nuffield Council on Bioethics, above n 20, at 52.

amongst some). If this occurs, the scheme will also have moved away from the original justification for its operation – which risks undermining the "specific and sufficient basis" for the regime to be justified under s 21 of the NZBORA. When it was first designed, the DNA regime was designed to operate on the basis of propensity – the idea, supported by criminological studies, is that people who were previously found guilty of a serious crime present a higher than average likelihood of being guilty of a current or future crime under investigation.[160] The category of relevant offences for which a DNA sample could be compelled were serious, violent offences such as rape, murder and serious assault for which there was a high risk of recidivism, but also lesser offences such as burglary – predicated on the assumption that such "precursor" offences indicated a high propensity for further and escalated offending.[161] Such a rationale does not hold up, however, when considering minor trivial offending, or in regard to mere suspects who have yet to be convicted of any offence at all.

Granting the police licence to take samples from suspects for all minor imprisonable offences without prior judicial authorisation thus not only goes against the principles of reasonable search and seizure, but risks jeopardising the operational efficiency of the database, its aim to identify precursor offenders, and public confidence in the justice system. For these reasons, both the Supreme Court of Canada and the ECtHR have emphasised the need for "clear, detailed rules" to provide "sufficient guarantees against the risk of abuse and arbitrariness".[162]

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[160] Institute of Environmental Science and Research, above n 24; see, e.g., Michael Townsley, Chloe Smith & Ken Pease "First Impressions Count: Serious Detections Arising from Criminal Justice Samples" *Genomics, Society and Policy* (Vol. 2, No. 1, 2006) at 28-40, whose research into "criminal careers" highlights the "significant link" between those providing a DNA sample and further offending – 80% of whom went on to commit offences different from the initial offence for which their DNA was taken (at 29-30).

[161] About 80%, in fact, of reported links between the NDD and the CSD have come from burglaries – Institute of Environmental Science and Research, above n 24.

[162] *S & Marper v United Kingdom*, above n 55, at [99].

The police, assisted by the Ministry of Justice, have also formulated Police Operational Guidelines to inform the police in exercising their discretion to take a DNA sample and to prevent the arbitrary application of their new power.[163] The Operational Guidelines envisage restricting DNA sampling to situations where it is likely the sample will reveal information about a serious crime.[164] The Attorney-General, however, rightly considered that such internally-developed guidelines would not provide "a sufficiently clear or reliable substitute for statutory safeguards".[165] The Privacy Commissioner too has been wary of placing operational controls in the hands of the police themselves, saying that "in my view it is *Parliament* that should decide where the line is to be drawn".[166]

Moreover, judicial oversight is important not only to guard against abuses of police procedure, but is also imperative for the police to ensure that the DNA evidence they adduce in court is sufficiently rigorous to be admitted.[167] This will only occur if the chain of custody – from crime-scene investigators to the ESR to the NDD operators – can be subject to a high degree of quality assurance to rule out the possibility of abuse or tampering.[168] The Police Association itself has recognised that "any dispute about lawful authority may jeopardise prosecutions, as well as creating litigation risks".[169] If police powers are abused or used arbitrarily in breach of s 21 of the NZBORA, then defendants can seek compensation under the NZBORA or seek to have the improperly obtained evidence excluded at trial under s 30 of

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163 (27 Oct 2009) 658 NZPD 7487 (Nathan Guy).
164 Cited by the Privacy Commissioner, above n 6, at 5.
165 Attorney-General's Report, above n 7, at 3.
166 Privacy Commissioner, above n 6, at 5 (original emphasis).
167 It should be noted, however, that s 71 of the Criminal Investigations (Bodily Samples) Act 1995 continues to provide that a DNA profile derived under Part 2 or the new Part 2B arrestee regime is not itself admissible in criminal proceedings, which means a fresh DNA sample must still be taken to adduce as evidence in court.
168 (14 Oct 2009) 658 NZPD 7067 (Moana Mackey).
169 New Zealand Police Association, above n 32, at 4.

the Evidence Act 2006.[170] For the justice system to operate effectively DNA evidence must be able to withstand such challenges.

6. The Risk of the Distortion of Justice

These issues are of particular importance given the powerful probative effect DNA evidence can have in jury trials. As the Hon Justice Kirby commented in a 2000 speech at the University of Technology, Sydney, "given the likely devastating power of DNA evidence, it becomes doubly important to ensure the integrity of collection of samples and their transmission, storage, testing, reportage and preservation for the scrutiny of independent experts and, ultimately if need be, by the courts".[171] DNA evidence can be strongly incriminating evidence, and the powerful "scientific aura" surrounding DNA testing can obscure the reality that DNA evidence is not foolproof.[172] Research on juries in New South Wales has found that jurors have "high expectations for the significance of DNA evidence" and indeed that "[t]his may be based more on popular culture rather than scientific understanding" – the so-called "CSI effect".[173] Another recent Australian study, in fact, found that juries were 23 times more likely to convict in homicide cases where DNA evidence was adduced.[174] The problem, as the HGC

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[170] See, e.g., *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA); *R v Shaheed* [2002] 2 NZLR 377 (CA).

[171] Hon Justice Michael Kirby "DNA Evidence: Proceed with Care" (speech given at Seminar on Science and Digital/Cyber Crime, University of Technology Sydney, 16 March 2000). Kirby J served as a member of the Ethics Committee of the Human Genome Organisation (HUGO) from 1995-2005.

[172] Human Genetics Commission, above n 7, at 28.

[173] Mark Findlay and Julia Grix "Challenging Forensic Evidence? Observations on the Use of DNA in Certain Criminal Trials" *Current Issues in Criminal Justice* (Vol. 14, 2003) at 269-82, 274; Michael Lynch, Simon A Cole, Ruth McNally & Kathleen Jordan, *Truth Machine: The Contentious History of DNA Fingerprinting* (University of Chicago Press, Chicago, 2008) at x.

[174] Michael Briody "The Effects of DNA Evidence on Homicide Cases in Court" *Australia and New Zealand Journal of Criminology* (Vol. 37, No.2, 2004) at 231-52, 242. Conversely, studies have also observed a reluctance among modern juries to convict in the absence of DNA evidence against the accused. DNA evidence, Lynch *et al* say, has effectively become "... reified as a

observes, is that "DNA evidence shifts the balance of likelihood that an individual is implicated if their DNA corresponds to DNA taken from a crime scene" – almost a *de facto* reversal of the presumption of innocence, as suspects are given the burden of providing an alternative explanation for how their DNA ended up at a crime scene.[175] Moreover, concern has been raised about the potential for jury's misunderstanding of probabilities and the so-called "prosecutor's fallacy" to distort the presumption of innocence.[176]

Thus because of the powerful probative effect of DNA evidence and the increasingly reliance upon it, the need for oversight to ensure that the evidence is robust and reliable, and the need for caution in extending the DNA regime so broadly, becomes all the more imperative. Errors can and do still occur during DNA testing – mix-ups between samples, contamination with other samples, misinterpretations drawn from partial or mixed DNA samples – which can result in the misattribution of identity or other error.[177] There also

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machinery of truth for determining guilt and innocence." – Lynch, Cole, McNally & Jordan, above n 173, at 346.

175 Human Genetics Commission, above n 13, at 28-29.

176 Australian Law Reform Commission, above n 74, at 1097. Studies on the "prosecutor's fallacy" have observed that juries tend to assume that statistical odds of "1 in a million" that the DNA match has not correctly identified the offender indicates a "1 in a million" chance that the accused is not guilty of the offence. Such a conclusion is clearly not logically defensible, but increased reliance on DNA evidence makes such distortions of juries' reasoning increasingly likely to occur – Nuffield Council on Bioethics, above n 20, at 70. See *R v Keir* [2002] NSWCCA 30 for an example where the prosecutor's fallacy was held to have led to a miscarriage at trial.

177 Nuffield Council on Bioethics, above n 20, at xiii, 22-23; Australian Law Reform Commission, above n 74, at 1092-3. A study conducted by the California Association of Crime Laboratory Directors (CACLD) found a 1 per cent error rate in DNA testing in the laboratories it reviewed – cited by the Committee on DNA Technology in Forensic Science, National Research Council (US) *DNA Technology in Forensic Science* (1992), <http://www.nap.edu/catalog.php?record_id=1866>. Indeed, even in New Zealand a DNA profile obtained from an assault victim in the South Island matched the profiles from two separate homicide scenes in the North Island, and although police were satisfied that the assault victim had not been present

exists the potential for abuse and manipulation by both corrupt police investigators and forensically sophisticated criminals.[178] It is not unknown even in New Zealand for police to plant circumstantial evidence at a crime scene or deliberately contaminate evidence in order to secure a conviction, and this has led to notorious miscarriages of justice such as in the Arthur Allen Thomas case.[179] Naturally the police have a vested interest in using the DNA database to solve crimes, and this confluence of interest and power creates the risk of both inadvertent error and deliberate tampering in the drive to ensure convictions. Criminals too are aware of the increasing significance of DNA sampling in criminal investigations, and the more technically literate criminals are likely to find ways to get around or subvert the DNA procedure and, as evidenced by the UK Pitchfork case, the potential exists for "expert criminals" to plant other people's DNA at a crime scene in order to frame someone else for an offence.[180]

7. DNA and Autonomy: Conclusion

Thus while fears over the new CIAA regime authorising police "assaults" by Q-Tip are largely unfounded, it is deeply regrettable that judicial oversight of DNA collection has been removed at the same time that the regime has been expanded. This lack of independent oversight gives rise to a number of risks associated with the use and misuse of police discretion, the reliability of DNA samples and the operational efficacy of the system.[181] Concerns surrounding the effect

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at either homicide scene and was not the offender, an independent inquiry could not account for the false positive results – cited by the Australian Law Reform Commission, above n 74, at 1094.

[178] Nuffield Council on Bioethics, above n 20, at 22.

[179] See Greg Newbold *Crime in New Zealand* (Dunmore Press, Palmerston North, 2000) at 241-243.

[180] Walker & Cram, above n 116; Human Genetics Commission, above n 13, at 94. This also constitutes an offence under s 77(2)(b) of the Act punishable by up to 3 years' imprisonment to "knowingly provide[] false information with the intent that it should be stored on a DNA profile databank").

[181] The Labour opposition sought to introduce an amendment to provide for judicial oversight during the Committee of the Whole House stage, but the

of the regime's expansion on the right against unreasonable search and seizure, the presumption of innocence and citizens' autonomy could be greatly allayed if the requirement for prior judicial approval were to be reintroduced, and statistics from past practice indicate that such a measure would not be prohibitively expensive in terms of time or cost incurred. Ultimately, as the Attorney-General noted, "intrusive search regimes require express, external and prior safeguards" in order to satisfy the courts, targeted suspects and the public that they are operating fairly and lawfully.[182] Anything less sets a dangerous precedent in respect of State incursions into personal autonomy and privacy, as expressly protected by s 21 of the NZBORA, with no reasonable justification.

E. Equality: Impact on Minorities and Young Offenders

The final human rights issue which arises in respect of the new CIAA regime concerns equality. Evidence from New Zealand and overseas research indicates that the impact of DNA collection will not fall proportionately on all groups in society. The Human Rights Commission, in an oral submission to the Justice and Electoral Select Committee, observed that the new DNA regime "increases the possibility of discrimination on the grounds of race and family status".[183] Proponents of the CIAA frequently cite the adage that no one who is innocent of a crime has any need for concern about the police holding their DNA profile – the "nothing to hide, nothing to fear" attitude– but what this ignores is the potential distress and stigma that being listed on the DNA database can engender.[184] Inclusion on

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amendment was defeated – see 2009 JHR 531 (Criminal Investigations (Bodily Samples) Amendment Bill).

[182] Attorney-General's Report, above n 7, at 7.

[183] "HRC and Privacy Concerned About Increased Police DNA Sampling" Guide2.co.nz: Politics (May 14 2009) <http://www.guide2.co.nz/politics/news/hrc-and-privacy-concerned-about-increased-police-dna-sampling/11/7855>.

[184] See, e.g., (10 Feb 2009) 652 NZPD 1128 (David Garrett) and 1131 (Richard Worth); (14 Oct 2009) 658 NZPD 7502 (Simon Bridges). The Nuffield Council also suggests that the "nothing to hide, nothing to fear" argument also

the databank marks one as a person of interest to the police – one of the first groups of people the police will turn to as likely suspects every time a crime is committed – and thus, as Dr Ruth McNally of the ESRC Centre describes, creates a distinct category of "pre-suspects" automatically placed under suspicion whenever an offence is committed.[185] Because in most cases a person's DNA will be held permanently on the NDD, that person is effectively branded for life – identified, as the HGC puts it, as in an official, "intentional" relationship with police.[186] An individual's ability to counter this social stigma may prove difficult – the suspicion that there is often "no smoke without fire" may be hard to overcome.[187] This stigmatisation effect may even prove counterproductive to the overall aims of the database by encouraging offending amongst those pre-judged and classified as offenders. The effect is exacerbated under the new regime by the wide range of offences for which individuals can now be placed on the database: drawing the line for DNA sampling at all imprisonable offences "effectively labels as criminals people charged with trivial lawbreaking".[188] The average New Zealander, would not consider himself a criminal because he dropped a piece of litter, but inclusion on the NDD for such an offence would effectively label him

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cannot be used *per se* to justify the regime because the starting point must still be the presumption of innocence – Nuffield Council on Bioethics, above n 20, at 34. Similarly, the Privacy Commissioner observes that "some might say that people with nothing to hide have nothing to fear – I would turn that round. If a person has done nothing serious wrong, then the Police don't need his or her DNA" – Privacy Commissioner, above n 6, at 7.

185 Cited by the Human Genetics Commission, above n 13, at 48.

186 Ibid at 48. The applicants in *S & Marper* complained of just such a stigmatisation effect – see *S & Marper v United Kingdom*, above n 55, at [21]-[22], [122]. In the Court of Appeal hearing, Waller LJ observed that "persons who have been acquitted and have their samples taken can justifiably say this stigmatises or discriminates against me – I am part of a pool of acquitted persons presumed to be innocent, but I am treated as though I was not" – see *R v Chief Constable of South Yorkshire Police/Secretary of State for the Home Department (ex parte S & Marper)* [2002] EWCA Civ 1275, [2002] 1 WLR 3223 at [66] per Waller LJ.

187 Human Genetics Commission, above n 13, at 48.

188 Privacy Commissioner, above n 6, at 4.

as one.[189]

1. Diminished Rights and Rehabilitation

In respect of convicted serious offenders this concern is perhaps less of an issue – a distinction is made with these offenders because of the severity of the offences they have committed. With serious offending, when one violates the laws of the State and a criminal conviction results, one abdicates one's unqualified entitlement to enjoy individual legal rights such as privacy – conviction is "accepted as justifying a greater level of interference" with privacy rights.[190] Thus the holding of a convicted serious offender's DNA profile on the NDD seems an analogous intrusion on these "social contract" grounds – individual rights are only protected so long as the individual complies with the agreed rules and responsibilities of society. Under the new regime, however, as noted above many people who have committed only minor offences nevertheless subject to a *maximum* sentence of imprisonment, as well as those who are merely suspected and never charged or convicted, may now be targeted for inclusion on the NDD, and thus subject to the social stigma and diminished privacy rights of having one's genetic information kept on file by the government. Moreover, even in respect of convicted serious offenders, the ongoing intrusion into their rights by retention of their DNA post-imprisonment represents a continuing social discrimination and interference with anonymity even after the offender is considered to have fulfilled his punishment.[191] The ability to be rehabilitated, as the Privacy Commissioner noted in her submission on the CIAA, "is a key component of the justice system and should not be lightly discarded".[192] The Criminal Records (Clean Slate) Act 2004 regime, represents a move in this direction by allowing a person's record of conviction to be removed for certain minor offences after a

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[189] Ibid at 7.
[190] Human Genetics Commission, above n 13, at 33; Nuffield Council on Bioethics, above n 20, at 44.
[191] Nuffield Council on Bioethics, above n 20, at 29.
[192] Privacy Commissioner, above n 6, at 6.

"rehabilitation period" of 7 years.[193] The stated aim of that legislation is to "limit the effect of an individual's convictions" to enable law-abiding citizens to live free from the adverse effects of historical criminal records. Yet the expansion of the DNA regime runs counter to this goal by permanently recording the details of convicted offenders.[194]

2. Effect on Māori Biases

The stigma effect is of particular concern because of its potential to impact disproportionately on certain ethnic and vulnerable minority groups and thus aggravate existing social tensions.[195] The Māori Party, for instance, has raised concerns that DNA sampling may unfairly target Māori. Although the DNA regime is in theory "colourblind", by giving the police discretion in choosing to compel DNA samples the DNA regime risks aggravating existing police biases or the "overscrutiny" of Māori by police.[196] Research into systematic biases in

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193 Criminal Records (Clean Slate) Act 2004, ss 7 & 14.

194 Ibid, s 3.

195 Human Genetics Commission, above n 13, at 51.

196 See (10 Feb 2009) 652 NZPD 1129 (Te Ururoa Flavell); (27 Oct 2009) 658 NZPD 7495 (Rahui Katene). The use of DNA profiling on Māori subjects calls for a particular sensitivity by police because many Māori see the taking of bodily samples as a "breach of their spiritual belief systems and therefore as a moral and cultural offence". Māori, as well as many Pacific Island groups, consider bodily samples – even hair and fingernails – to be tapu. Their sacredness arises from the Māori belief in the sanctity and respect for life, and that because every part of a person's body contains their life force – or wairua – it can even be used to cause harm to that person under the process of mākutu. This cultural sensitivity is also reflected in the aversion amongst Māori to the practice of familial and ethnic profiling. Whakapapa – ancestry and geneological connections – are considered to be particularly sacred taonga in Māori culture – see W Hemara *Tikanga Māori, Mātauranga Maori & Bioethics: A Literature Review* (report for the Toi te Taiao, NZ Bioethics Council, Aug 2006) at 31-32. As long ago as 1993, the Indigenous People's Council on

the criminal justice system has indicated that Māori are indisputably overrepresented in police arrests, charges and convictions: a 2007 study by the Department of Corrections, in fact, found that overrepresentation of Māori in the criminal justice system was, in part, one of the "unintended consequences of discretion", reflective of an "institutional racism" and "biases" among the police.[197] A 1993 New Zealand study indicated that Māori are three times more likely to come into contact with the police than non-Māori, and police statistics show Māori are more likely, for instance, to be arrested and convicted of cannabis offences – one of the new imprisonable offences for which police will soon be able to compel a DNA sample.[198] The more that Māori are targeted (unconsciously or otherwise) by the DNA regime, the greater the risk that Māori will be "labelled" and stigmatised as criminal offenders. Ultimately the assumption that Māori are more predisposed to being arrested for criminal offending may become a reality through police practice by reinforcing racial assumptions of their propensity to criminality.[199] If Māori see themselves branded as criminal offenders on the databank, and police treat them as pre-supposed suspects – risking premature "tunnel vision" in investigations – then increased rates of Māori criminal offending risk becoming a self-fulfilling prophecy.[200]

This fear is borne out by evidence from the UK, where there exists an undeniable overrepresentation of black men on the NDNAD – over 30% of all black males have profiles on the NDNAD, compared with

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Biocolonialism was established to oppose such bioprospecting or "biopiracy", such as research into the supposed Māori 'warrior gene' several years ago.

[197] Department of Corrections Policy, Strategy and Research Group *Overrepresentation of Māori in the Criminal Justice System: An Exploratory Report* (Sept 2007) at 7.

[198] DM Fergusson, LJ Horwood & MT Lynskey "Ethnicity and Bias in Police Contact Statistics" *Australian and New Zealand Journal of Criminology* (Vol. 26, No. 3, 1993) at 202-203; Ibid at 14.

[199] Nuffield Council on Bioethics, above n 20, at 20.

[200] Ibid at 81.

only 10% of white males and Asian males.[201] The risk, the UK Equalities and Human Rights Commission notes, is that such overrepresentation "is creating an impression that a single race group represents an 'alien wedge' of criminality" by stereotyping black men as criminal suspects.[202] This has the potential to result in a disproportionate number of arrests, charges and convictions for members of certain ethnic groups such as Māori, whereas others who commit similarly serious crimes may not be convicted. It may also serve to further alienate Māori from the criminal justice system by undermining their confidence in receiving fair and equal treatment. The Māori Party has expressed concerns that young Māori may fight back against police if confronted for the taking of a DNA sample. Māori Party MP Rahui Katene suggests that "they [young Māori] already distrust the police and [if] the police want to take a swab, they're not going to know what is going on at all".[203] A recent report by the UK Home Affairs Select Committee found that "it is hard to see how [such an] outcome can be justified on grounds of equity or public confidence in the criminal justice system".[204]

On the other hand, it should be borne in mind that DNA evidence also has the potential to exonerate Māori offenders as well as inculpate them. The US Innocence Project, for example, reported that 70 per cent of those exonerated by DNA testing in the US were members of minority groups.[205] DNA has the potential to impact positively or

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[201] Cited by the Human Genetics Commission, above n 13, at 53.

[202] Ibid at 54. In London, 55% of the total number of innocent people on the NDNAD (i.e. those suspected but never convicted) are black or Asian, even though they constitute only 29% of the London population – Nuffield Council on Bioethics, above n 20, at 56.

[203] Greer McDonald "DNA Bill Raises Maori Party Concerns' *Dominion Post* (Wellington, 29 Oct 2009) at 1. It should be borne in mind, however, that the vast majority of DNA samples were taken by consent rather than force – see Police Annual Report 2008/09, above n 124.

[204] Home Affairs Select Committee, UK House of Commons *Young Black People and the Criminal Justice System* (Second Report of Session 2006-2007, Vol. 1, June 2007) at 15.

[205] "Facts on Post-Conviction DNA Exonerations" The Innocence Project, <http://www.innocenceproject.org/Content/351.php>.

negatively on ethnic groups such as Māori; how the technology is used in practice will determine whether it serves to counteract or exacerbate existing systemic biases. The government's response has been to require police to include information in their annual report on the proportion of DNA samples taken from ethnic minority groups.[206]

3. Risk to Young Offenders: The Need to Maintain Protections

Finally, the DNA regime also raises concerns in respect of young offenders. New Zealand is a signatory to the UN Convention on the Rights of the Child, which recognises that children and young people are especially vulnerable and require special treatment by legal systems in a manner which "takes into account the child's age and the desirability of promoting the child's reintegration" (they also have an additional right to privacy under art 16 of that instrument).[207] In light of the above-mentioned concerns about stigmatisation and rehabilitation, young offenders ought to be subject to especial protections to protect their rights, yet the Police Association was eager to expand the regime to fully encompass youth offenders as well. The Police Association submitted to Select Committee that the limitations on the arrestee regime for youth offenders were too narrow "given known patterns of youth offending";[208] they wished to remove the "arbitrary limitation" which restricts DNA sampling to "serious" youth offenders. The Police Association even opposed the CIAA's "clean slate" provision for the removal of youth DNA profiles from the databank after 4-7 years on the grounds that "this arbitrary youth regime is unnecessary".[209] In fact, however, research by the ESCR Genomics Network has indicated that low-level offending behaviour is relatively common in young people but rarely carried on into adulthood, which means that "in most cases, indefinite or prolonged retention of DNA profiles obtained from young people is ... unlikely to

[206] See Criminal Investigations (Bodily Samples) Act 1995, s 76.
[207] See United Nations Convention on the Rights of the Child, arts 16, 40.
[208] New Zealand Police Association, above n 32, at 2.
[209] Ibid at 8.

have much forensic utility in future".[210]

Fortunately, however, the Justice and Electoral Select Committee made a number of amendments in relation to the process for taking a DNA sample from young persons, limiting the range of offences for which a sample can be taken to the more serious "relevant offences" rather than all imprisonable offences and providing for the same protections in respect of DNA sampling as young persons enjoy generally under New Zealand's existing care and protection legislation whilst in custody.[211] This seems entirely reasonable given the particular vulnerability of children and the need to promote their rehabilitation before their behaviour hardens into a repeat pattern of offending.[212] The Privacy Commissioner told Select Committee that the removal of minor offenders' information from the NDD after a suitable period of time would provide a "small but notable incentive towards law-abiding behaviour".[213] Children and youth offenders should not be treated in the same fashion as adults given the potential for the above human rights issues to affect them more severely, and thus any move to include them in the general adult DNA scheme should be resisted. That the period of retention be limited in relation to the age of the suspected person was also one of the recommendations of the ECtHR in *S and Marper*, , and already the UK has taken steps to remove the DNA of children under the age of 10 (estimated at around 70 profiles) from the NDNAD, although an estimated 39,000 profiles from children and young people remain.[214]

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[210] Cited by the Human Genetics Commission, above n 13, at 51.

[211] See Criminal Investigations (Bodily Samples) Act 1995, s 24K, and Children, Young Persons and Their Families Act 1989.

[212] See Children, Young Persons, and Their Families Act 1989, s 208 on the principles of youth justice, which provides that proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter "unless the public interest requires otherwise".

[213] Privacy Commissioner, above n 6, at 4.

[214] UK Home Secretary "Protecting Rights, Protecting Society" (speech to the Intellect Trade Association, 16 Dec 2008); *S & Marper v United Kingdom*, above n 55, at [124] – "the court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors

Conclusion

The new Criminal Investigations (Bodily Samples) Amendment Act regime has the potential to assist police in the fight against serious criminal offending. Breakthroughs in DNA technology, even since the original DNA legislation was passed in 1995, are astounding – but also give cause for considered reflection on the capacity for the technology to be misused or abused, or to erode some of New Zealand's long-established human rights protections. On the one hand, some of the alarmist fears raised by opponents of the CIAA – the risk of gross informational privacy violations, or the supposed authorisation of physical "assaults" by police – are exaggerated. On the other hand, we must ensure that adequate protections remain in place to oversee the lawful and proper application of the legislation, and to ensure that it operates in a way proportionate to the goals it seeks to achieve. Police are granted considerable discretion under the new regime to target suspects for DNA samples. As with any such discretionary power – particularly in the field of law and order– the greater the power granted the more potential for that power to be abused. Whether DNA profiling is used to the benefit or detriment of New Zealand society depends on ensuring that the police utilise this powerful new tool in an appropriate and proportionate manner. Any increase in police powers should be accompanied by a corresponding increase in oversight of that system to ensure that the potential for abuse and harmful consequences is minimised.

Of the three key human rights issues considered above, the impact on informational privacy rights is the least concerning, even though it is the issue that springs most readily to mind in the public discourse. The system as it is designed to operate contains little potential risk for the disclosure or misuse of private genetic information. DNA profiles extracted from bodily samples are highly technical and contain negligible information of an intimate or personal nature. Effectively a

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such as the first applicant, given their special situation and the importance of their development and integration in society".

DNA profile operates in the same manner as a fingerprint profile, using a small number of unique markers in a given sample to distinguish an individual from the population as a whole, while discarding the broader range of private information that a genetic sample can potentially reveal. Only if the sample itself is retained is the risk to informational privacy increased, and the legislative regime is designed to ensure that sample destruction takes place soon after the DNA profile is extracted – largely addressing the concerns of the ECtHR in *S and Marper* in respect of the unwarranted retention of DNA samples. The only real concern is that, by placing the responsibility for ensuring sample destruction fully in the hands of the police themselves, the government is effectively asking us to trust the police that this will actually occur. It is to be hoped, however, that the range of existing protections under the Privacy Act and the Criminal Investigations (Bodily Samples) Act 1995 itself will help reassure the public that avenues of redress are available should the police fail to discharge their statutory obligation. Strengthening the ability of the Privacy Commissioner to oversee and audit this process, as she suggested in her Select Committee submission, should be considered as a means of further strengthening those contingency protections.

In respect of the issue of equality, particular care must be taken to ensure that the impact of the legislation does not fall disproportionately on Māori and young people, given the particular vulnerability of these groups in society. It is reassuring therefore to see that youth offenders will continue to be subject to a separate regime in recognition of the need to protect vulnerable youth and promote their rehabilitation. The potential for the DNA regime to exacerbate existing systemic biases against Māori – resulting in their being subjected to increased suspicion or persecution by police – is a real risk, but ultimately the issue of institutional racism runs much more deeply than DNA profiling. DNA technology can work for or against Māori interests, exonerating as well as implicating Māori as criminal offenders, and which way it goes in practice depends entirely on whether the police are willing to address any underlying systemic disparities in their treatment of Māori offenders. In this respect, the

requirement of ethnic statistics in DNA profiling in the police annual report is heartening recognition that an issue does exist here which needs to be monitored.

1. The Outstanding Issue: The Continued Need for Judicial Oversight

It is the broad human rights issue of autonomy and due process that gives the greatest cause for reservation. In light of the considerable expansion of police powers that the CIAA represents, it is all the more important for independent judicial oversight of the process to be maintained. As the HGC puts it, our responsibility is to provide the "practical conditions for its ethical acceptability and responsible development in the future".[215] New Zealand risks running against the international trend and our own Bill of Rights Act legislation in discarding the role of the judiciary in the DNA collection process, and overseas examples like the UK provide a salutary example of the consequences under international law if a country is seen to overstep the "margin of appreciation" in its international human rights obligations. The present lack of independent judicial oversight in our system may not be looked kindly upon by the UN Human Rights Council.

The simple addition of a requirement for police to seek prior judicial authorisation before compelling a DNA sample in the absence of consent would go a long way to addressing these concerns. A system of judicial oversight has operated in respect of the DNA regime in the past, and continues to operate in respect of police seeking search and seizure warrants generally, with little indication that the system is overburdened or intolerably inefficient. Judicial oversight is not only an important rights issue, but also ensures that the DNA collection process is sufficiently robust and reliable to allow the databank system to function efficiently and to withstand evidential challenges at trial. An independent oversight committee of the DNA profiling regime, as

[215] Human Genetics Commission, above n 13, at 104.

operates in many jurisdictions overseas, is a further measure that should be given serious consideration.

Without those protections, however, it remains to be seen what consequences occur in practice, and how the police choose to use the powerful new tool which has been given to them. Informational privacy concerns may have been somewhat overstated, and equality issues have at least been recognised as an issue worthy of further investigation, but the question of autonomy and oversight remains the outstanding issue: the CIAA as it stands at present may come to haunt the police and the government with unanticipated challenges at a domestic and even international level. It is to be hoped that this issue is recognised and addressed before such an eventuality comes to pass.

NEW ZEALAND'S ORGAN TRANSPLANT LAWS: ANY HINTS FOR IMPROVEMENT FROM SINGAPORE?

JOANNE LEE

Introduction

For people with end-stage organ failure, transplantation offers the only effective treatment.[1] Not only does it improve medical outcomes for the individual, it also reduces the healthcare burden on society as a whole.[2] However, almost invariably, need for organs will far exceed availability, and most measures to increase supply in any healthcare system are fraught with controversy.

This paper explores the laws governing organ donation in New Zealand and Singapore and considers the strategies implemented by the two governments to increase organ donation rates. Singapore has changed to an opt-out system which has increased the rate of donation[3] whereas New Zealand has retained an opt-in system but with enhanced recognition of the donor's wishes. Because of certain features that cause difficulty in implementation of organ donation at the individual level, it is likely that New Zealand will remain unable to significantly increase organ availability. This paper explores the two systems, and asks if adopting certain aspects of the Singaporean system might possibly increase organ donation rates in New Zealand.

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[1] World Health Organization "Human Organ Transplantation" (2010) <www.who.int>.

[2] Ingvar Karlberg and Gudrun Nyberg "Cost-Effectiveness Studies of Renal Transplantation" (1995) 11 International Journal of Technology Assessment in Health Care 611.

[3] (16 March 1989) 53 Singapore Parliamentary Debates 297.

I.
1. New Zealand

New Zealand is a country located in the south-western Pacific Ocean with two main islands (North and South) that cover approximately 255 200km^2. With a population of 4.37 million people,[4] New Zealand's distinct culture has been described as a complex mixture of "human and physical geography…developed historically through the iterative interplay of beliefs and behaviour in reaction to events."[5] A series of key moments in New Zealand's history has shaped the constitutional culture of the country.

As a representative democracy, the move from a First-Past-the-Post to a Mixed-Member Proportional (MMP) Voting System in 1993 has created a Parliament where no single party holds the majority of seats in the House. The MMP system gives smaller parties greater say,[6] which has made the legislative process more complex; creating new law now requires extensive inter-party negotiation in order to secure enough votes to pass a Bill.[7] In effect, getting adequate support on controversial topics is made more difficult by the need to seek consensus across cultures.

The culture of New Zealand is shaped by the different ethnicities that inhabit the country. As the indigenous people of New Zealand, the Māori play a significant role in influencing the culture and norms of New Zealand. In addition, a steady stream of immigrants has changed the population's ethnic mix.

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[4] Statistics New Zealand "National Population Estimates: June 2010 quarter" (2010) <www.stats.govt.nz>.
[5] Matthew Palmer "New Zealand Constitutional Culture" (2007) 22 NZULR 565 at 568.
[6] Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) at 34.
[7] Ibid, at 40.

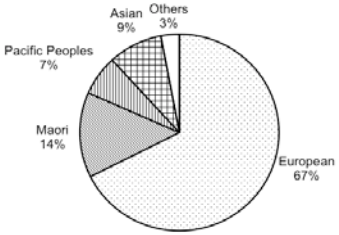

Figure 1.Ethnic Mix of Population from New Zealand Census 2006.[8]

Like other developed countries, New Zealand struggles with a high prevalence of diseases such as diabetes and hypertension. Type 2 diabetes incidence is attributed to the prevalence of obesity which most severely affects the Māori and Pacific ethnic groups.[9] Diabetes incidence is expected to double between 2006-2011,[10] and the number of deaths attributed to diabetes in 2011 is forecasted to exceed 2100.[11] As many diabetes and hypertension sufferers eventually experience kidney failure, the demand for these organs for the purposes of transplant will increase.

Unfortunately, as in many other countries, the supply of organs for transplant in New Zealand outstrips the population's requirement. The Ministry of Health reported that "even if organs were retrieved from every potential deceased donor, the supply of organs (especially kidneys) would still fall well short of the demand for them."[12] In 2007, New Zealand's organ donation rate stood at 9 donors per million people, well below Britain (13.2), the United States (24.6), France

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[8] Statistics New Zealand "2006 Census" (2006) <www.stats.govt.nz>.
[9] Ministry of Health *Diabetes in New Zealand: Models and Forecasts 1996-2011* (2002) at 3.
[10] Diabetes New Zealand "Diabetes Awareness Week 2008 Fact Sheet" (2008) <www.diabetes.org.nz>
[11] Ministry of Health, above n 9, at 7.
[12] Cabinet Paper "Review of the Regulation of Human Tissue and Tissue-based Therapies: Paper Two" (March, 2006) at 2.

(24.7) and Spain (34.3).[13]

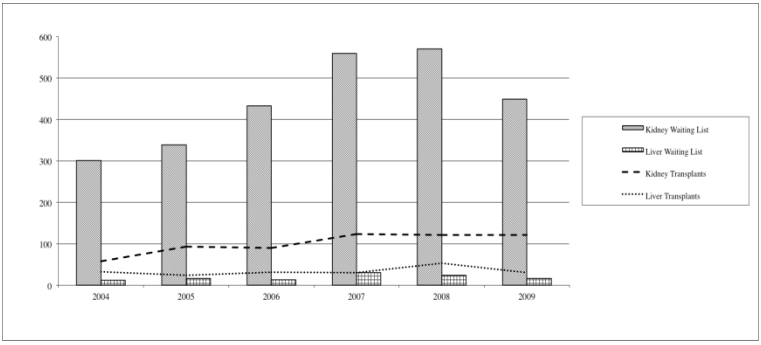

Figure 2. Live and cadaveric organ supply and demand in years 2004-2009.[14]

In New Zealand, organs usually transplanted include the heart, lungs, liver, kidney, and pancreas.[15] Of these organs, the kidney and liver are the only ones that can be obtained from both living donors and cadavers. In addition, tissue donors within the Auckland region are able to donate their heart valves and skin; and anyone in New Zealand may donate corneas and sclera (of their eyes).[16] All living organ donations are regulated according to the provisions of the Code of Health and Disability Services Consumers' Rights 1996. Cadaveric organ donations fall under the Human Tissue Act 2008, which replaced the Human Tissue Act 1964.

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[13] Organ Donation New Zealand "International Donor Rates" Organ Donation New Zealand <www.donor.co.nz>

[14] Compiled from: Australia and New Zealand Organ Donation Registry Annual Reports 2005-2010.

[15] Organ Donation New Zealand *Annual Report 2009* (2009) at 12.

[16] Ibid.

A. Living donor transplants

1. Informed consent

The removal of organs from living donors is a health care procedure in New Zealand and thus governed by the provisions of the Code of Health and Disability Services Consumers' Rights 1996 (the "Code"). Right 7(10) of the Code specifically forbids "any body part[s] or bodily substance[s] removed or obtained in the course of a health care procedure" from being "stored, preserved or used" without the informed consent of the consumer.[17] "Informed consent", according to the Health and Disability Commissioner Act 1994 is consent that "is freely given" and in accordance with the requirements under the Code.[18] The expectations of informed consent under the Code comprise three elements: the right to effective communication (Right 5); the right to be fully informed (Right 6); and the right to make an Informed Choice and give Informed Consent (Right 7).[19] In addition, Right 7(7) states that every consumer has the right to refuse services and to withdraw consent to services. This is consistent with s 11 of the New Zealand Bill of Rights that states that "everyone has the right to refuse to undergo any medical treatment."[20]

Thus, under the Code, every patient has the right to be informed of all the risks and benefits of a living organ donation before giving consent. The Code demands a high standard of communication to ensure that all risks and benefits of the procedure are fully understood by the donor.

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[17] The Code of Health and Disability Services Consumers' Rights 1996.
[18] Health and Disability Commissioner Act 1994, s 2
[19] The Code of Health and Disability Services Consumers' Rights 1996.
[20] New Zealand Bill of Rights Act 1990, s 11.

2. Payment for organs

Given the demand for organs, and the difference they make to the recipient, it would be easy to imagine a market for them. However, trading in human tissue is an offence under the Human Tissue Act 2008[21] except where an exemption has been given by the Minister.[22] No person is permitted to "require or accept, or offer or provide, financial or other consideration for human tissue."[23] Similarly, advertisements relating to the sale or purchase of human tissue are forbidden.[24] This rule upholds the generally favoured view that the "gift" status of human tissue and blood be recognised[25] and that organ and tissue donation by deceased donors is an unconditional and anonymous act.[26]

The prohibition on trade does not preclude the payment of compensation to living donors. The government, through Work and Income New Zealand, offers financial assistance to living donors to assist with loss of income or extra childcare costs incurred.[27] The age and marital status of the donor determine the size of "loss of income" assistance and the maximum amount ranges from approximately $130 to 320 per week for up to 12 weeks as well as childcare costs.[28]
However, in actual practice, living donations are a very limited source of organs because living donors have substantial risk to life and health. Thus, significant increase in donations is more likely to come from deceased persons.

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[21] Human Tissue Act 2008, s 56.
[22] Ibid, s 60.
[23] Ibid, s 56.
[24] Ibid, s 61.
[25] Cabinet Paper "Review of the Regulation of Human Tissue and Tissue-based Therapies: Paper Three" (2004) at 11 – 12.
[26] Ministry of Health *Review of Human Tissue and Tissue-based Therapies: Submissions Summary* (Ministry of Health 2004) at 93.
[27] Work and Income New Zealand "Financial Assistance for Live Organ Donors" <www.workandincome.govt.nz>.
[28] See Appendix 1

B. Cadaveric organ transplants

1. Human Tissue Act 1964: a historical perspective

The 1964 Act dealt solely with the post-mortem use of bodies and body parts and gave statutory status to the "no property" common law rule that dated back to the 18th century.[29] While no person can own a corpse, certain persons have limited property rights in the body, such as executors for purposes of burial and coroners for the purposes of autopsies.[30] The Human Tissue Act 1964 introduced the concept of a "person lawfully in possession" of a body and authorised that person to determine whether bodies could be used for anatomical examination or organ transplantation.[31] This paper will address only the parts of the Act relating to organ donation.

(a) Who could give consent?

The 1964 Act gave the "person lawfully in possession" of a body (PLPB)[32] the power to make decisions about the use of a corpse. Section 2(2) defined the PLPB to include the person in charge of a hospital if a person died within the facility,[33] the person in charge of a mental health facility if the deceased's body was on its premises,[34] and the prison manager of a deceased's prisoner.[35] Generally speaking, because organ donation is only possible from individuals that have passed away in hospital, the PLPB of potential organ donors – by virtue of s 2(2)(a) – was the person "for the time being in charge" of

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[29] See generally P.D.G. Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Thomson Brookers, 2006) at 574.
[30] Peter Skegg "The Removal and Retention of Cadaveric Body Parts: does the Law Require Parental Consent?" (2003)Otago Law Review 10(3) 425 at 428.
[31] Human Tissue Act 1964, s 3(1).
[32] Ibid, s 2(2).
[33] Ibid, s 2(2)(a).
[34] Ibid, s 2(2)(b).
[35] Ibid, s 2(2)(c).

the hospital.[36]

Under s 3(1), a PLPB could authorise the removal of body parts for therapeutic purposes if the deceased had expressed such a request "either in writing at any time or orally in the presence of 2 or more witnesses during his last illness"[37] and that request had not subsequently been withdrawn.[38] The PLPB was not obligated to consult or gain the approval of family members. In practice, however, medical practitioners would consult family members and not proceed against their wishes.[39]

If the deceased had not consented, under s 3(2) the PLPB could authorise the removal of body parts if "having made such reasonable inquiry as may be practicable", the PLPB had no reason to believe that neither the deceased nor the "surviving spouse, civil union partner, de facto partner, or any surviving relative of the deceased" objected to such use of the deceased's body.[40] This "lack of objection" threshold meant that rather than gaining consent, all that was required was an enquiry into whether there was objection before the proposed tissue harvest could proceed. Problematically, "any surviving relative" was extremely broad and meant that any relative – no matter how far removed – had the power of veto.[41] In contrast to the potentially large number of relatives to whom such an enquiry had to be addressed, the time following death that any organ could be harvested as donated

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[36] Human Tissue Act 1964, s 2(2)(a) and P D G Skegg "The Removal and Retention of Cadaveric Body Parts: Does the Law Required Parental Consent?" (2003) 10(3) Otago L. Rev. 426 at 429.
[37] Human Tissue Act 1964.
[38] Ibid, s 3(1).
[39] Jennifer Ngahooro & Grant Gillett "Over my dead body: the ethics of organ donation in New Zealand" (2004) 117 New Zeal Med J 1051, at 1053. This practice was validated by the official website for organ donation in New Zealand: Organ Donation New Zealand "Talk to your family" (2008) <www.donor.co.nz>.
[40] Human Tissue Act 1964.
[41] Ibid, s 3(2)(b).

tissue, is extremely limited.

(b) Repealing the Human Tissue Act 1964

The limited scope of the Act proved insufficient to address issues that arose relating to the use of human tissue, particularly that of organ donation.[42] In the meantime, waiting lists of potential recipients continued to grow[43] with donor rates plummeting in 2006.[44]

The dire shortage of organs led to the presentation of the 2002 petition of Andy Tookey and 1, 169 others to Parliament.[45] At the time, there were many concerns with the current system such as the lack of public education or advertising regarding organ donation; the failure of some doctors to approach potential donor families; the ability of families to override the wishes of a potential donor; and problems created by tying the driver licence system to organ donation such as the driver licence not meeting accepted requirements for obtaining informed consent.[46] The Health Committee had similar concerns and recommended that the government take proactive steps" by creating an environment that facilitates donation."[47] Specifically, with respect to "DONOR" indications on a driver licence, the Health Committee reported in 2003 that the introduction of synthetic paper licences severely limited the ability of holders to update information on organ donation because licences did not need to be renewed until the holder's 71st birthday. Even after the switch to the current 10-yearly cycles of licence renewal, it was still risky to rely on a licence as an accurate reflection of the holder's current wishes.

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[42] Cabinet Paper "Review of the Regulation of Human Tissue and Tissue-based Therapies: Paper One" (2004) at 1.
[43] The waiting list for organ donations (Campbell Live, 20 February 2007).
[44] Organ Donation New Zealand "Number of deceased organ donors in New Zealand" (2008) <www.donor.co.nz>.
[45] Petition 2002/25 of Andy Tookey and 1,169 others (26 November 2003).
[46] Ibid, at 3 and 7.
[47] Ibid, at 8.

In May 2006, Dr Jackie Blue introduced a Member's Bill to the House.[48] The Human Tissue (Organ Donation) Amendment Bill sought to establish a register on which people could register legally binding wishes to be organ donors or state their desire not to.[49] Despite the pressure to reform human tissue laws in New Zealand, the Bill did not pass its second reading. The Select Committee did not support the establishment of a register, because it would be costly[50] and there was no evidence that it would improve the rate of donation.[51]

A national consultation process conducted in 2004 revealed a widely held belief that tissue and tissue donors should be treated with respect; the importance of individual consent and individual autonomy; the need for respect for families/whānau and cultural differences; and the need for legislation that was practical to implement.[52] In November 2006, the government introduced the long-awaited Human Tissue Bill to the House[53] which received royal assent in April 2008 and became the Human Tissue Act 2008.

2. Human Tissue Act 2008

The Human Tissue Act 2008 (HTA) regulates the use of human cadaveric tissue and tissue-based therapies. The Ministry of Health's objective was to streamline legislation relating to tissue which was

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48 (3 May 2006) 630 NZPD 2748.
49 Human Tissue (Organ Donation) Amendment Bill 2006 (33-1).
50 Cabinet Paper, above n 12, at 9
51 Human Tissue (Organ Donation) Amendment Bill 2006 (33-1) (Health Committee Report) at 2. Note also that while the Committee felt it was unnecessary at this time, it recommended an amendment to the Human Tissue Bill so as to allow for the set up of a register at a later time. This amendment was accepted and is s 78 of the Act.
52 Ministry of Health *Review of Human Tissue and Tissue-based Therapies: Submissions Summary* (2004) at 10 – 13.
53 (14 November 2006) 635 NZPD 6467.

"comprehensive", "easily understood", but still flexible enough to respond to future as-yet-unpredicted advances in science.[54] While the Act may be comprehensive, it is unlikely to be easily understood or practical to implement against the realities of clinical practice settings. This paper will address only the parts of the Act relating to organ donation.

The "lack of objection" threshold in the 1964 Act was replaced by the requirement of informed consent, which is consistent with the Code. However, the consent process in the HTA is very complex. When an individual has passed away, the following scenarios may arise: prior to death, the deceased consented or objected to the removal of organs; alternatively, the deceased expressed neither objection nor consent.

(a) Informed consent/objection by the deceased

The 2008 Act recognises far greater autonomy of the deceased and permits a physician to act on the deceased's consent even if it does not accord with the wishes of the family. Consent is valid only if it was "informed" which the Act defines as "given freely" and "in light of all information that a reasonable person, in that person's circumstances" needs.[55] "Informed objection" is similarly defined.[56] Unlike living organ donations, "informed consent" and "informed objection" for cadaveric organ donation is completely different. There are no risks to the deceased; rather, a potential donor requires information such as the process for determining brain death, how a recipient is matched to donor organs and how donation will affect funeral arrangements.[57] Consent and objection must either be "in writing (with or without witnesses)",[58] or "orally and in the presence of 2 or more witnesses

[54] Cabinet Paper, above n 42, at 3.
[55] Human Tissue Act 2008, s 9(1).
[56] Ibid, s 9(2).
[57] Organ Donation New Zealand "What happens? – Organ Donation" (2008) <www.donor.co.nz>.
[58] Human Tissue Act 2008, s 43(1)(a).

present at the same time."[59]

Under the old Act, the PLPB could not authorise organ removal if the deceased had expressed objection.[60] The new requirement of "informed objection" under the HTA means that objection based on the grounds of misinformation cannot qualify as "informed objection." This is significant as unless people are educated and misinformation is clarified, an objection may be disregarded because it was not informed. Misinformed beliefs include the inability of organ donors to have an open casket, the fear that the medical team will not try their best to save lives of potential donors, and delays in funeral arrangements.[61]

Both informed consent and objection can be stated in a person's will,[62] even if the will is invalid.[63] However, a significant obstacle to consent or objection in a will is that organ procurement takes place in the limited time after brain death but before heart death. This is a serious impracticality as the will reading of a person will usually occur long past organ viability.[64] Contrary to popular belief, an agreement to be a donor on one's driver licence is merely indicative and not legally binding because it does not constitute informed consent.[65] This is because it is considered too difficult to prove if a person had full information of what they were agreeing to and whether agreement was given willingly.[66] The different standards for consent given in a will as compared to one given on a driver licence highlights a significant discrepancy in the law of informed consent as a will – which may be

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[59] Ibid, s 43(1)(b).
[60] Human Tissue Act 1964, s 3(2)(a).
[61] Organ Donation New Zealand "Questions about donation" (2008) <www.donor.co.nz>.
[62] Human Tissue Act 2008, s 43(2).
[63] Ibid, s 43(3)(a).
[64] Jennifer Ngahooro & Grant Gillett, above n 39.
[65] Human Tissue Act 2008, s 9(1)(a).
[66] NZ Transport Agency "Organ and tissue donation" (2010) <www.nzta.govt.nz>.

no better informed than a driver licence indication – is taken as valid informed consent for organ donation while the driver licence is not.

Section 14 imposes a duty on any person proposing to collect tissue (in this instance, the "physician") to ascertain whether relevant informed consent has been given.[67] In addition, the physician must consult the "responsible person"[68] who is legally obliged to help establish informed consent (or lack thereof).[69] The "responsible person" is defined in s 12 as "the person lawfully in possession of the body" and often, in the case of potential organ donors lying in hospital, this "responsible person" is "the person for the time being in charge of a hospital."[70] Unlike the 1964 Act that armed a PLPB with power to authorise organ donations, the 2008 Act merely requires the PLPB to assist the physician in ascertaining informed consent.

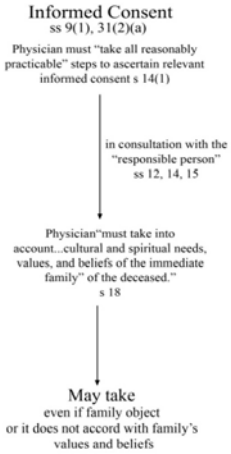

Figure 3. Process of ascertaining informed consent.

[67] Human Tissue Act 2008, s 14(1).
[68] Ibid, s 14(2).
[69] Ibid, s 15.
[70] Human Tissue Act 2008.

The physician must take into account the "cultural and spiritual needs, values, and beliefs of the immediate family" of the deceased.[71] "Immediate family" includes members of the "individual's family, whānau, or other culturally recognised family group" who were either "in a close relationship with the individual" or had "responsibility for the individual's welfare and best interests" in accordance with the customs and traditions of the community the deceased identified with.[72] While the physician must seek information regarding the values and needs of the immediate family, that information does not need to be obtained from family members. Provided the physician has obtained reliable information regarding the needs of the immediate family and taken them into account, the duty will be deemed to have been satisfied. This means that family members do not have a right under the Act to object to organ donation where the deceased gave informed consent. In practice, while organ donation may proceed even with the objection of family members, it is highly unlikely to happen against the wishes of grieving family members because current practice emphasises the importance of the best interests of grieving families, even if it means ignoring the Act and the deceased's express wishes. This practice is validated by the official website for organ donation in New Zealand that states that "the family's wishes will always be respected and organs and tissues will not be retrieved if the family has any objection."[73]

Thus, recognition of a deceased's informed consent has been granted under the HTA. A physician can take the organs of a deceased even if it does not accord with the spiritual beliefs and needs or a family. This is an exception to the general rule and a clear departure from the old Act. While the beliefs and needs of a family may weaken consent, nobody – not even family or the PLPB – can override a deceased's

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[71] Human Tissue Act 2008, s 18.

[72] Ibid, s 6.

[73] Organ Donation New Zealand "Talk to your family" (2008) <www.donor.co.nz>.

informed consent once it has been established. However, giving informed consent does require a person to consider the subject of death and take positive steps to give valid informed consent. When enforced, this new system has the potential to raise organ donation rates.

(b) No informed consent or objection from the deceased

The process of acquiring informed consent becomes most complicated when there is no informed consent or objection from the deceased. This is not uncommon for reasons including the fact that there is no established organ donor register in New Zealand, the often mistaken belief that having "DONOR" on one's driver licence is informed consent and the practical difficulties of checking for consent in a person's will immediately after death and before organs become non-viable. These issues persist in the new Act and are obstacles to increasing organ donation rates in New Zealand.

(i) Nominees

The law permits a person prior to death to delegate decision-making to one or more nominees who are then able to give consent or raise objection to organ donation on behalf of the deceased.[74] Where there are two or more nominees, informed consent or objection must be given collectively by all nominees who are available and willing to give them. [75] Anyone may be a nominee and little formality is required on the part of the person delegating decision-making to another; nominations need only be made with the nominee's written consent and this is revocable with a written notice by the nominee to the nominator.[76] A nomination may also be made in a person's will,[77] even

[74] Human Tissue Act 2008, s 31(2)(b).
[75] Ibid, s 39(5).
[76] Ibid, s 39(4).
[77] Ibid, s 43(2).

if the will is not valid.[78]

The Act permits anyone to be a nominee. The nominee does not have to be the executor or a member of the family who would ordinarily be responsible for disposal of the body. However, a nomination may be "made, amended, revoked, or revoked and replaced" by persons authorised by other laws to give consent on a person's behalf.[79] For example, before a person's death, nominations may be revoked by the person's welfare guardian or by someone with power of attorney.[80] After a child's death, nominations may be revoked by the parent or legal guardian of the child.[81] Thus, the nominees of a deceased are armed with decision-making powers and, subject to certain persons overriding their status, may give binding informed consent or objection on behalf of the donor. In giving informed consent or raising objection, the only obligation a nominee(s) has is to take into account the cultural and spiritual needs, values and beliefs.[82] However, the nominee(s) is given the discretion to "decide what weight…to give to" such wishes and is not obligated to give effect to them.[83]

By permitting a person to have nominees, the Act allows people to elevate the decision-making status of specific people who are able to give binding consent or objection. The potential – through nominations – to reduce the scope of persons able to have a say on the issue simplifies the decision-making process and may increase organ donation rates.

(ii) "Immediate family"

If there are no nominees or if they have not consented or objected

[78] Ibid, s 43(3)(b).
[79] Ibid, s 39(2).
[80] Ibid, s 38(3)(b)-(c).
[81] Ibid, s 38(3)(a)
[82] Ibid, s 42.
[83] Ibid, s 42.

after some time,[84] the decision falls upon a member of the deceased's "immediate family."[85] "Immediate family" is given a very broad definition under the HTA and includes – at its most broad – "culturally recognised family."[86] Section 40 obliges the family member giving informed consent or raising informed objection to take "all reasonably practicable steps to consult members" of the individual's "immediate family" where all of the different interests within the family are represented.[87] However, the Act does not cloak any specific persons with the responsibility of representing the family. Thus, with complex family structures rife in New Zealand, time may be wasted choosing the representative and conflict may arise.

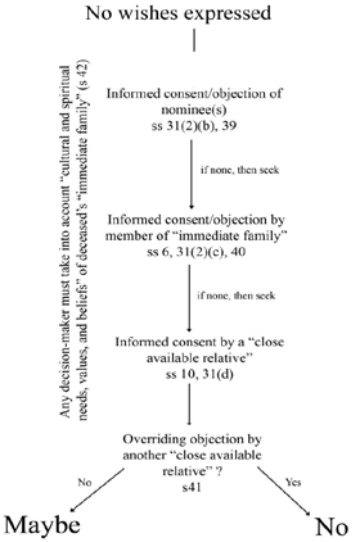

Figure 4. Process of obtaining consent from family.

[84] Ibid, s 35.
[85] Ibid, s 31(2)(c).
[86] Ibid, s 6.
[87] Ibid, s 40(a).

Under the old Act, the PLPB was required to make "such reasonable inquiry as … practicable" to ensure that the deceased, "surviving spouse, civil union partner, de facto partner, or any surviving relative of the deceased" did not object.[88] This has now been replaced with a new obligation to consult the deceased's "immediate family" with the "view to achieving general agreement on the matter."[89] Notably, "immediate family" is much larger in scope than "any surviving relative."

At this stage in the decision-making process, there are 3 possible outcomes: first, everyone in the family consents to organ donation and the removal of organs proceeds; second, everyone in the family object to organ donation and organs cannot be removed; and third, the immediate family is divided. In the first two instances, informed consent or objection given on behalf of the immediate family is deemed not to have been given if the physician is uncertain as to its unanimity.[90] This is because s 40 requires that the member of the immediate family believe "on reasonable grounds that *all* capable members" would give the consent/objection if personally consulted.[91] The decision falls upon a "close available relative" where the immediate family is divided.[92]

(iii) "Close available relative" and overriding objection

For a child under the age of 16 who has died, a "close available relative" is considered in this order of availability: a parent of the child, the guardian of the child immediately before death, or a sibling of the child if the sibling is over 16 years.[93] If the deceased was over 16 years old, the "close available relative" is considered in this order of

[88] Human Tissue Act 1964, s 3(2).
[89] Human Tissue Act 2008, s 40.
[90] Ibid, s 36.
[91] Ibid, s 40(c) (emphasis added).
[92] Human Tissue Act 2008, s 31(2)(d) and 36.
[93] Human Tissue Act 2008, s 10(2).

availability: a "spouse, civil union partner, or de facto partner of the individual immediately before" death; any child of the deceased if he or she is over 16 years; the parent of a deceased; or the sibling of the deceased if he or she is over 16 years.[94] A person who is dead, unknown, missing or not capable is deemed to be "not available" under the Act.[95] While the Act is silent on how much effort must be undertaken to locate family members, it appears that unless they are considered unavailable under the Act, all attempts must be made to find relatives before the person next in hierarchy may step in to make the decision. However, the expectation to exhaust every option before the next available relative is sought seems impracticable against clinical realities.

The HTA gives first priority to "immediate family" to come to a "general agreement" before close relatives are sought. However, because a close relative falls within the definition of "immediate family", a close relative who is available and who objects can negate the consent of the immediate family and can override the consent of any other close relatives. [96] Conversely, if all close available relatives consent, the immediate family's objection will only prevail if there is general agreement to the objection.[97]

(iv) Respect for families/whānau and cultural differences

The person giving the consent or raising an objection must also take into account the cultural and spiritual needs, values and beliefs of the deceased's immediate family and weight them accordingly.[98] This is consistent with the principles of the Treaty of Waitangi and the expectation that the Crown will actively protect the treaty rights of

[94] Ibid, s 10(1).
[95] Ibid, s 11.
[96] Ibid, s 41(2).
[97] Ibid, s 40(b).
[98] Ibid, s 42.

Māori.[99] This obligation "guarantees the right of Māori to determine how body parts are treated… [ensuring they are in accordance] with Māori values, customs and cultural practices."[100] The holistic approach in obtaining consent or objection accords with Māori culture that places important emphasis on the collective process of whānau decision-making.

The support of Māori and the public in general is vital to the success of this Act. Although there are many provisions that impose duties to take into account the immediate family's cultural and spiritual needs, values and beliefs, this was felt to be insufficient by the Māori Party. As noted in the opposition of the Bill by the co-leader of the Māori Party during its Third Reading in Parliament, the Bill (and now, the law) "is by no means sufficient to accommodate the views of whānau decision-making processes."[101]

Despite having such a strong cultural presence, a survey commissioned by the Ministry of Health found that there is no universally recognised cultural authority within the Māori or Pacific communities from whom a ruling or pronouncement as to the acceptability of transplantation and the donation of organs would settle the matter.[102] This lack of authority within the communities distinguishes it from other religions (such as Islam) that recognise religious figureheads as capable of making religious rulings by which believers then live.

In summary, when there is no informed consent or objection from the deceased, reaching a general agreement on organ donation can be an

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[99] Treaty of Waitangi Act 1975.

[100] Ministry of Māori Development *Hauora o te tinana me ōna tikanga : a guide for the removal, retention, return and disposal of Māori body parts and organ donation* (1999) at 10.

[101] (8 April 2008) 545 NZPD 15428.

[102] Mauri Ora Associates *Maori Pacific Attitudes Towards Transplantation: Professional Perspectives*(prepared for the Ministry of Health for Renal Services) at 9.

extremely time-consuming and stressful process involving a large number of parties who often base their decision on little or no background information. When brain death occurs, the optimal organ procurement period is highly time-sensitive and requires the co-ordination of a number of critical care experts.[103] Hugely impractical and oftentimes impossible when balanced against clinical realities, such a lengthy consultation process does little to encourage organ donation rates in New Zealand.

C. New Zealand Conclusion

At present, organ demand and supply is supported by an organ sharing agreement with Australia. The Trans Tasman Arrangements for the Exchange of Organs and Blood Products is the organ sharing agreement of the Transplant Society of Australia and New Zealand. With this informal inter-governmental agreement, it is hoped that organ availability will be maximised in and between both countries with a distribution of organs that is "equitable and affords transplant candidates in both countries equal consideration and opportunity."[104] This agreement is similar – although less extensive – to other existing exchange programs such as the Eurotransplant Kidney Allocation System.[105] While it appears in Figure 5 that there are more organs going to Australia than those entering New Zealand, the significance of this difference is lessened by the small number of organs available for exchange and complicated by the huge number of clinical factors that must be taken into account when matching donor organs with recipients. Organs from New Zealand are only sent to Australia where

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[103] O'Connor K.J., Wood, K.E. & Lord, K. "Intensive Management of Organ Donors to Maximize Transplantation" (2006) 26 Critical Care Nurse at 94.

[104] Members of the Standing Committee of TSANZ "Trans Tasman Exchange Principles" (2002) The Transplantation Society of Australia and New Zealand <www.tsanz.com.au>.

[105] Eurotransplant International Foundation "About Eurotransplant" <www.eurotransplant.org>.

there are no suitable recipients[106] and through this agreement, New Zealand has access to a wider pool of organs and there is efficient use of organs.

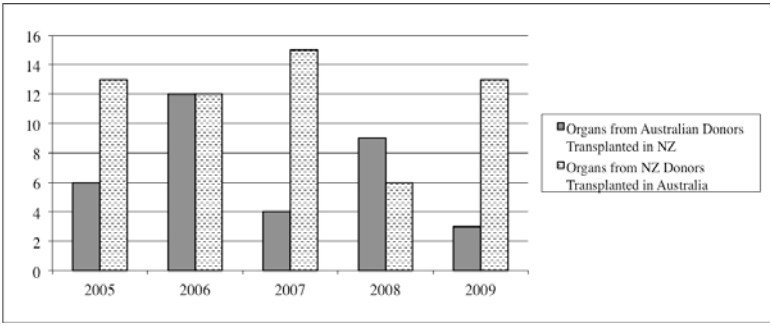

Figure 5.Total number of organs (liver, heart, lungs and kidneys) donated under the trans-Tasman organ sharing agreement.[107]

Despite the long gestation period of the present Act, consent for organ donation under the HTA is more confusing than it used it to be and certainly a far cry from the original goal of being "easily understood."[108] Legislature's attempt to create a more comprehensive Act has led to a highly complex Act that is likely to reduce the organ donation rate than increase it.

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[106] Australia and New Zealand Organ Donation Registry Annual Report 2010 at 25.

[107] Organ Donation New Zealand *Annual Report 2009* (2010), at 9.

[108] Cabinet Paper "Review of the Regulation of Human Tissue and Tissue-based Therapies: Paper One" (2004) at 4.

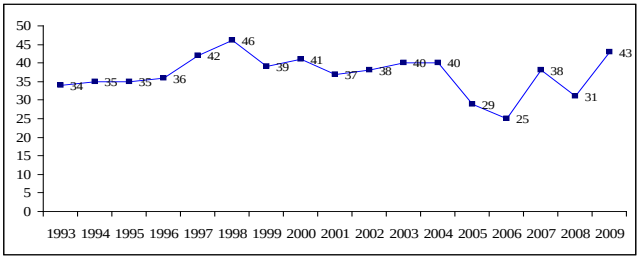

Figure 6. Number of Cadaveric New Zealand Donors 1993-2009.[109]

From Figure 6, there has been an increase in organ donors since the HTA came into force on 1 November 2008. However, this increase is still less than the donor peak in 1998. New Zealand now has an Act with multiple hurdles to organ donation and is so complicated it could even discourage potential donors – thus also defeating another objective of promoting "public good."[110] The reason for this compromise could be due to the influence of Māori in Parliament, and the need for the government to strike a balance between the two extreme positions of family decision-making and individual autonomy lest it loses public favour. The need to sift through numerous subparts to establish consent under the Act has not only made the job of physicians much harder, it has also made organ donation laws inaccessible to the ordinary New Zealander.

Thus, organ demand is a global issue and many countries have had to implement various strategies to more effectively address this public health burden. If New Zealand is serious about increasing its rate of organ donation, it may have to look to a different system. One possibility worth considering is the opt-out system recommended by the Council of Europe[111] and adopted by Singapore.[112]

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[109] Australia and New Zealand Organ Donor Registry *Annual Report 2010 Appendix II* (2010) at 2.

[110] Ministry of Health *Review of the Regulation of Human Tissue and Tissue-based Therapies: Discussion document.* (Ministry of Health 2004) at 1.

[111] Council of Europe *Resolution 78(29) on Harmonisation of legislation of member states to removal, grafting and transplantation of human substances. Adopted by the Committee of Ministers of the Council of Europe* (11 May 1978).

II.

Singapore

Singapore is a 710km² island with a population of nearly 5 million people.[113] Since its independence from Malaysia in 1965, Singapore's politics has been dominated by the People's Action Party – the state's ruling political party since 1959.[114] This party has been central to Singapore's rapid political, social and economic development, but it has also come under heavy criticism by observers who have described its politics as "paternalistic."[115] However, despite any disgruntled feelings one may have towards tight political control by the government, it is hard to ignore the economic successes that Singapore has enjoyed despite its limited resource. This is attributed by many to the "overwhelming emphasis" placed on efficiency-based policies and economic fundamentals on all facets of its government.[116]

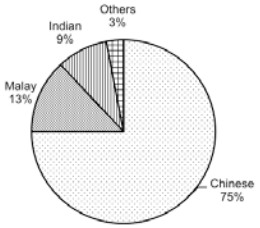

Figure 7. Singapore resident pop by ethnic group as of June 2009.[117]

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112 (9 December 1986) 48 Singapore Parliamentary Debates 866.

113 National Population Secretariat, Prime Minister's Office and others. *Population In Brief 2010* (2010) at 1.

114 People's Action Party "Party Milestones" (2010) People's Action Party <www.pap.org.sg>.

115 RS Milne and DK Mauzy *Singapore: The Legacy of Lee Kuan Yew* (Westview Press, Boulder (Colorado) 1990) at 90.

116 Ho Khai Leong "Citizen Participation and Policy Making in Singapore: Conditions and Predicaments" (2000) 40(3) 436 at 438.

117 Singapore Department of Statistics *Monthly Digest of Statistics Singapore, July 2010* (2010) at 2.2.

With an estimated 7.3 people aged 15-64 years old per elderly person aged 65 years and over,[118] Singapore is considered one of the fastest ageing societies in the Asia-Pacific region[119] with the current 8.5% of residents aged 65 years or older projected to increase to 19% by 2030.[120] A significant need of a country with increased life expectancy is a corresponding demand for transplants from organ failure. Quality healthcare and life-preserving treatment has meant that people can be sustained for longer while awaiting an organ transplant, but ultimately organs are still needed unless death occurs first.

Singapore has the fifth highest incidence of kidney failure in the world[121] and the National Kidney Foundation is responsible for the management of 24 different dialysis centres across the island to meet the needs of kidney patients.[122] Organ demand has continually outstripped supply and in 2006, twenty-two patients died while waiting for an organ in Singapore.[123] In 2009, there were 460 kidney patients with end-stage organ failure in Singapore awaiting a transplant, and only 66 patients received new kidneys.[124] It can be said that Singapore, with its vision to "increase the yield of cadaveric organs as well as to facilitate living organ donation",[125] takes a very utilitarian approach in addressing the need for organs. At present, two separate Acts govern

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118 Ibid at 1.

119 S Vasoo, T Ngiam and P Cheung "Singapore's ageing population" in DR Phillips (ed) *Ageing in the Asia-Pacific Region: Issues, policies and future trends* (Routledge, New York, 2000) 174 at 174.

120 WHO *Western Pacific Country Health Information Profiles 2009 Revision* (WHO Regional Office for the Western Pacific, Manila, 2009) at 394.

121 National Kidney Foundation Singapore "Did you know…?" (2009) National Kidney Foundation Singapore <www.nkfs.org> .

122 National Kidney Foundation Singapore "NKF Dialysis Centre Location" (2009) National Kidney Foundation Singapore <www.nkfs.org> .

123 Ministry of Health *Public Consultation Paper on Proposed Amendments to the Human Organ Transplant Act* (2008) at 5.

124 National Organ Transplant Unit from Chin Kwong Cheong.

125 Ministry of Health *Public Consultation Paper on Proposed Amendments to the Human Organ Transplant Act* (2008) at 5.

the procurement of organs to address this demand: the Medical (Therapy, Research and Education) Act 1972 and the Human Organ Transplant Act 1987.

A. The Medical (Therapy, Research and Education) Act 1972

The common law rule of *Williams v Williams,*[126] stating that a property right cannot exist in the dead body of a human being, applied fully and without exception, in Singapore.[127] The adoption of the Medical (Therapy, Research and Education) Act 1972 (MTERA) created the legal right for persons to, during their lifetimes, donate parts of their body to any approved hospital, medical or dental school, college or university for "medical or dental education, research, advancement of medical or dental science, therapy or transplantation" or to "any specified individual for therapy or transplantation needed by him."[128] This Act is more similar to New Zealand's Human Tissue Act 1964 than it is to the 2008 Act and this paper will address only the parts of the MTERA relating to organ donation.

1. Consent

Revised in 1985 with amendments in 1998, 2008 and 2010, the MTERA permits any person over the age of 18 years and of sound mind to donate any part of their body for therapeutic purposes after his or her death.[129] If a person has not expressed any clear wish to donate his organs, relatives may consent to their removal after death or immediately before death.[130] However, this may only proceed if there is no contrary indication expressed by the deceased and if family members in an identical class or in a class with higher priority have not

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126 *Williams v Williams* (1882) 20 Ch D 659

127 KSH Terry "Rights, Ethics and the Commercialisation of the Human Body" (2000) Sing. J. Legal Stud. 483 at 497.

128 Medical (Therapy, Education and Research) Act 1972, s 7.

129 Ibid, s 3.

130 Ibid, s 4.

lodged opposition.[131] Unlike New Zealand law that has a fairly broad definition of family, relatives under the MTERA are restricted to a small number and prioritised in this order: the spouse, an adult son or daughter, either parent, an adult brother or sister, a guardian of the deceased at the time of death, and any person authorised or under obligation to dispose of the deceased's body.[132]

Similar to the old law in New Zealand under the HTA 1964, written consent can be given at any time, but oral consent is valid only if given in the presence of two or more witnesses and *during a last illness*.[133] The donor may revoke consent at any time either in writing or by an oral statement in the presence of at least two other people.[134]

Finally, consent under the MTERA is not given a definition. The Act merely states that a person "may give all or any part of his body" with no reference to how much information the donor possessed at the time of giving consent. In contrast, the law in New Zealand for living and cadaveric organ donations require that "informed consent" – and nothing less – be given before organ removal may take place.

2. Lack of donations and the need for change

Despite "favourable legal provisions"[135] designed to facilitate the donation and use of organs for transplant and other medical purposes, organ supply remained deficient and the MTERA was considered a "dismal failure."[136] Between 1970 and 1987, there were only 85 cadaveric kidney transplants[137] with none performed between 1979

131 Ibid, The Schedule of Authorised Persons.
132 Ibid, The Schedule of Authorised Persons.
133 Ibid, s 8 (emphasis added).
134 Ibid, s 9.
135 (2 June 1972) 31 Singapore Parliamentary Debates 1343.
136 (9 December 1986) 48 Singapore Parliamentary Debates 865.
137 Eugene Shum and Arthur Chern "Amendment of HOTA" (2006) 35 Ann Acad Med Singapore 428 at 429.

and 1981.[138] In 1986, 14 years after its introduction, only 27 000 organ pledges had been received – about 3% of Singapore's needs – and not a single kidney had been available from the pledges.[139] Thus, encouraged by the recommendation of the Council of Europe in 1976 to its member states to modify organ donation laws towards the presumed consent system,[140] the Singapore government passed the Human Organ Transplant Act in an attempt to meet the demand for kidney donations. Kidney transplants had become routine and successful treatment for kidney failure. The passing of this Act created two separate parts to the Singaporean law governing organ transplantation: one an opt-out system for kidney donation under the Human Organ Transplant Act 1987 and, for all other organs, an opt-in system under the MTERA.

B. Human Organ Transplant Act 1987

1. Introduction

The HOTA provides an opt-out system that presumes the consent of an individual with respect to organ removal. This is in contrast to New Zealand that has an opt-in system. A deceased is presumed to have consented to organ donation unless he or she registered an objection with the National Organ Transplant Unit prior to death.[141] Unlike New Zealand law that respects the objection of family where no consent or objection has been received, family members in Singapore have no right to object.

The opt-out system applied to all Singaporean citizens and permanent residents other than Muslims. From 1987 to 2004, Singaporeans and

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138 Valerie Chew "Human Organ Transplant Act (HOTA)" (2008) Singapore Pages/Singapore Infopedia, National Library Board Singapore <infopedia.nl.sg >

139 (9 December 1986) 48 Singapore Parliamentary Debates 873.

140 (9 December 1986) 48 Singapore Parliamentary Debates 866.

141 See Appendix 3.

permanent residents of the Muslim faith were automatically considered objectors to the HOTA because of the religious belief that the removal of organs after death was a desecration of the deceased and that consent of the *waris* (paternal next-of-kin) is necessary in culture before organs could be donated.[142] However, Muslims were still able to opt-in under the HOTA or pledge their organs under MTERA with no right of next-of-kin to override the pledge.[143]

When first introduced, any Singapore citizen or permanent resident who was of sound mind, between twenty-one and sixty years of age, and not Muslim was presumed to be a donor unless he or she had registered dissent prior to death.[144] The removal of organs cannot be authorised if the circumstances surrounding a death are suspicious and within the jurisdiction of a coroner,[145] or if there is reason to believe that the deceased was "mentally disordered" and consent has not been given from the parent or guardian of the individual concerned.[146]

As presumed consent was a relatively new concept, the government was rigorous in its public education so as to ensure widespread understanding, ease fears and overcome reluctance. Public concerns included fears that organs would be removed before a person was truly dead, a reluctance to donate because of superstition as well as suspicion of the government.[147] However, despite these concerns, only a small number of people chose to opt-out under the Act once it was passed in 1987.[148] The small number of objections could be due to the

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142 Ministry of Health "Summary of Feedback Received" (2007) Ministry of Health <www.moh.gov.sg>.

143 Revocation of such a gift was limited to statements made by the donor only. See: Medical (Therapy, Education and Research) Act 1972, s 9.

144 To opt-out of the HOTA, a person must fill out an opt-out form and send it to the National Organ Transplant Unit. See Appendix 3.

145 Human Organ Transplant Act 1987, s 6(1).

146 Ibid, s 5(2)(e).

147 (9 December 1986) 48 Singapore Parliamentary Debates 868 and 874.

148 Khaw Boon Wan, Minister for Health "MOH Budget Speech (Part 2) – Transforming Healthcare" (speech to Parliament, Singapore, 6 March 2007).

social disincentive introduced alongside the HOTA – those who opted out of the system were immediately placed low in priority for an organ donation together with Muslims who had not opted in, with foreigners seeking an organ transplant placed last in the queue.

The impact of the HOTA on organ supply in Singapore was seen rapidly. Organ procurement was initially confined to the kidneys of those who had died accidental deaths. In 1988, there were 16 kidneys acquired and a further 15 kidneys in 1989.[149] Together with organ pledges under the MTERA, kidney transplants increased from 15 and 16 transplants in 1986 and 1987, respectively, to a total of 23 transplants in 1988 and 26 in 1989. However, this increase in organs coincided with an increase in the number of patients diagnosed with end-stage kidney failure. In 2003, only 34 of 675 end-stage kidney failure patients received new kidneys; in general, only 5-10% of kidney failure patients were receiving a kidney transplant annually in Singapore.[150]

[149] Bernard Teo "Organs for Transplantation The Singapore Experience" 21(6) The Hastings Center Report 10 at 10.

[150] A Vasthsala "Twenty-five facts about kidney disease in Singapore: A remembrance of World Kidney Day" (2007) 36 Ann Acad Med Singapore 157 at 159.

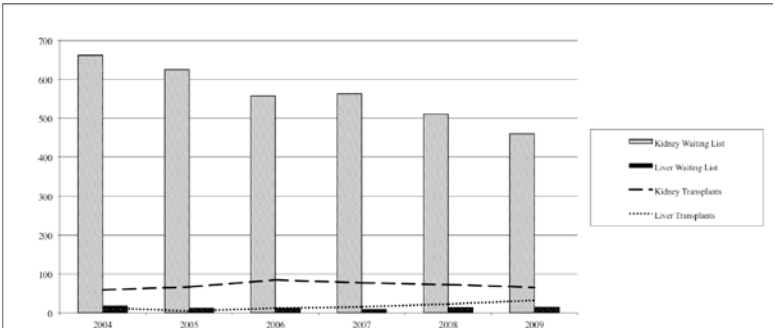

Figure 8. Live and cadaveric organ supply and demand in years 2004-2009.[151]

2. Living donor transplants

In 2004, provision was made for living donor organ transplants in the Act. Prior to that, laws governing organ donation related wholly to cadaveric donors. Unlike New Zealand, where the only requirement is informed consent, all living donor transplants in Singapore – whether related or not –[152] require the written authorisation of a hospital ethics committee. Every hospital that performs transplants has an ethics committee that screens the eligibility of living donor organ transplants under the Act.[153] This is intended to protect donors from exploitation and ensure that organs are not obtained illegally.

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[151] National Organ Transplant Unit from Chin Kwong Cheong.

[152] Under the draft Amendment Bill, written authorisation from the ethics committee was only required for living unrelated organ transplants. However, pursuant to a recommendation by the Singapore Academy of Law, the requirement for a written authorisation was extended to include living related organ transplants as it was felt that the risk of pressure and undue influence was possibly even greater in living related organ transplant scenarios. (see Ministry of Health "Public Consultation on the Human Organ Transplant (Amendment) Bill – Summary of feedback received" (2003) Ministry of Health <www.moh.gov.sg>).

[153] Human Organ Transplant Act 1987, s 15A(2).

During the public consultation period, several people expressed a preference for a central ethics committee over hospital-specific committees to ensure "uniformity in standard" as well as independence of the committee.[154] However, the Ministry of Health felt that leaving ethics committees responsible for individual assessments and decisions was "more appropriate" since the final responsibility for the care and well-being of the donor and recipient lay with the transplant team. Additionally, the Ministry felt that the rules and procedures laid out under the HOTA were sufficient in safeguarding the interests of all involved.[155] Finally, while statutory declarations are not mandatory for potential recipients, the court has recently alluded to the fact that such a requirement would be "prudent" and would "better equip [transplant ethics committees] to carry out their tasks."[156]

Thus, Singapore takes a very serious approach in governing living donor organ transplants. While there is no standard requirement of "informed consent" like in New Zealand, the rigorous process of interviews with ethics committees ensures that anyone wanting to donate his or her organs is fully aware of the risks and benefits of the procedure, and consent when given, is fully informed This standard imposed by the HOTA arguably affords more protection for the donor as safeguards are in place to ensure that such transplants are completely altruistic in nature and not a result of coercion or duress.

3. Increasing the pool of donors

Over the years, Singapore has introduced several amendments to increase the organ donation rate. These include widening the type of organs available for donation; the removal of the Muslim exemption

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[154] Ministry of Health "Public Consultation on the Human Organ Transplant (Amendment) Bill – Summary of feedback received" (2003) Ministry of Health <www.moh.gov.sg>.
[155] Ibid.
[156] *Public Prosecutor v Tang Wee Sung* [2008] SGDC 262 [45]

under the HOTA; and the removal of the upper age limit for donation. These amendments successfully increased organ donation rate in Singapore.

(a) 2004 Amendment to widen the pool of organs

In 2004, the HOTA (Amendment) Act was passed by Parliament introducing provisions to extend the donation of organs to include not just the kidneys but also the liver, heart and corneas. Lungs have not been brought under the HOTA as it is felt that lung transplants are not yet fully established.[157] In addition, HOTA's confinement to accidental causes of death was extended to include all causes of death. The success of the 2004 Amendment is reflected in the numbers: in 2007 alone, cadaveric organs were used to perform 46 kidney transplants, 12 liver transplants, 4 heart transplants and 253 cornea transplants.[158]

(b) The removal of the exemption for Muslims

In 2007, the Ministry of Health revealed that 21% of the patients on the kidney waiting list were Malay despite them making up only 14% of the total resident population.[159] This disproportionate burden did not bode well for Muslims who, as non-organ pledgers under MTERA and presumed objectors under HOTA, were low in priority for an organ under the HOTA allocation scheme. Following discussions with the Muslim Kidney Action Committee and the Ministry of Health, the Fatwa Committee of the Islamic Religious Council of Singapore[160] issued a religious ruling permitting Muslims to come under the HOTA. The HOTA was amended to remove the Muslim exclusion[161] and the "vast majority" of Muslims has since chosen to remain under the

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[157] Ministry of Health, above, n 154.
[158] National Organ Transplant Unit from Chin Kwong Cheong.
[159] Ministry of Health "Public Consultation on the Human Organ Transplant (Amendment) 2007" (2007) Ministry of Health <www.moh.gov.sg>.
[160] *Majlis Ugama Islam Singapura* – Islamic Religious Council of Singapore
[161] Human Organ Transplant Act 1987, s 5(2)(f) prior to amendment.

HOTA, with reports stating that four Muslim donors have since donated organs to benefit 15 people.[162]

Organ donation was a very sensitive topic that was avoided amongst Muslims because of belief that it did not align with religious and cultural beliefs that place value on an intact body. While there was significant potential for many Muslims to be offended by including them under the opt-out system, this obstacle was overcome through thoughtful process between religious leaders, health professionals and policy-makers. Through awareness of the need for organs and teaching by Islamic leaders, Muslims have grown to accept organ donation and the organ donation rate has increased.

(c) Removal of the upper age limit

Previously, the HOTA did not apply to deceased persons over 60 years old. Any person over 60 years who wished to donate his organs needed to have pledged them under the MTERA. However, the Health Ministry removed Singapore's upper age limit in 2009 so as to further increase the pool of organs. By removing this limit, Singapore now shares similar practice with Norway, Spain, United Kingdom and the United States that assess transplantable organs for medical suitability and do not impose an upper age limit for cadaveric organ donation.[163] In addition, the removal of the upper age limit more than 20 years after the adoption of the HOTA gave many older Chinese Singaporeans, whose beliefs are steeped in Confucian ethics that place value on upholding the integrity of one's body,[164] time to warm to the

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162 "More muslims get transplants since organ donor law change" *The Straits Times* (Singapore, 11 February 2009).

163 Ministry of Health *Public Consultation Paper on Proposed Amendments to the Human Organ Transplant Act* (2008) at 6.

164 John Gilman "Religious Perspectives on Organ Donation" (1999) 22(3) Critical Care Nursing Quarterly 19.

common goal of saving lives through organ donation.[165]

4. Payment for organs

Like New Zealand, it is strictly forbidden for anyone to enter into a contract to supply or receive an organ for monetary consideration in Singapore. However, the laws were amended in 2009 to allow donor reimbursement. Beyond that, trade is prohibited and the penalties for organ trading have become more severe to discourage the activities of middlemen and organ syndicates.

(a) Donor Reimbursement

Donor reimbursement was introduced to "better protect…welfare and ensure that [live donors] do not suffer…because of their altruistic acts."[166] Prior to the Amendment in 2009, donors bore any losses incurred from missed work or lost insurance coverage. This view was considered "outdated", "unfair to the donors" and irregular against current accepted practices overseas.[167]

Thus, in light of the significant risks undertaken by altruistic donors for the benefit of others,[168] the government permitted reimbursements to "defray" any costs incurred relating to such a living organ donation.[169] The National Kidney Foundation is responsible for the 'Donor Support Programme' which offers several benefits including a reimbursement to donors for loss of income of up to $5 000.[170]

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165 Email from Pheng Soon Lee to Joanne Lee regarding Chinese culture towards organ donation (9 September 2010).
166 (23 March 2009) 85 Singapore Parliamentary Debates 3426.
167 Ibid.
168 Ministry of Health *Public Consultation Paper on Proposed Amendments to the Human Organ Transplant Act* (2008) at 8.
169 Human Organ Transplant Act 1987, s 14(3)(c).
170 National Kidney Foundation "Kidney Live Donor Support Programme" (2009) <www.nkfs.org>.

However, unlike New Zealand that limits financial assistance to those received from Work and Income New Zealand, reimbursements over and above any reimbursements received from the 'Donor Support Programme' is permitted and is at the discretion of organ recipients who wish to assist organ donors with expenses incurred as a result of their altruistic act.[171]

(b) Increased penalties for syndicated organ trading and the case of Tang Wee Sung

In September 2008, retail magnate Tang Wee Sung was found guilty of attempting to buy a kidney from Indonesian Sulaiman Damanik and making a false declaration under the Oaths and Declarations Act 2000 confirming that no money or financial gain had been paid to procure the organ and that the prospective donor, Sulaiman Damanik, was a relation.[172]

Mr Tang, who had been given one to two years to live without a transplant from a live donor, sought to procure the kidney through a "middle-man" and was prepared to fork out $300,000 to see the deal through. However, suspicions were raised and the illegal contract was eventually discovered and reported. When deciding on an appropriate sentence, the district court judge highlighted that society's main disapproval is "focused on the middlemen who profit from illicit organ trading and not the dying patient in need of a transplant or the poor"[173] as seen by the stance of the Ministry of Health to "take a sympathetic approach to the plight of the exploited donors and the basic instinct of kidney failure patients to try to live."[174]

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171 Ministry of Health "Amending HOTA to save more lives" *Health Scope* (Singapore, April 2009).
172 *Public Prosecutor P v Tang Wee Sung* [2008] SGDC 262
173 Ibid, at [20].
174 (21 July 2008) 84 Singapore Parliamentary Debates 17.

Despite the fact that criminal culpability for offenders under the HOTA is not distinguished between the different roles played by offenders under the Act, the district court judge took a sympathetic approach towards the plight of Tang and, in recognising that an extended jail term would cause a disproportionate toll on Tang's health,[175] found it appropriate to invoke the doctrine of judicial mercy.[176] Tang was sentenced to a mandatory penalty of one day's imprisonment and a $10 000 fine under the Oaths and Declarations Act 2000 and a $7 000 fine under the HOTA. At the time of sentencing and prior to the 2009 Amendment, the maximum penalty under the HOTA for entering into such a contract was $10 000 fine and/or 12 months imprisonment.[177]

Indonesian Sulaiman Damanik was similarly given a relatively light sentence of 2 weeks imprisonment and a fine of $1 000 for illegal organ supply in contravention of s 14(2) of the HOTA as well as making a similar false statutory declaration under the Oaths and Declarations Act 2000. The district court judge took sympathy towards the dire financial situation of the accused and agreed with the view that a person in such a vulnerable position receiving a similar sentence to that of the "ringleader" would "undoubtedly offend the innate sense of justice of the reasonable man."[178]

Conversely, the High Court upheld the sentence of 14 months imprisonment imposed by the District Court for Wang Chin Sing's role as middleman for two kidney transplants.[179] In March 2008, Wang successfully brokered the sale of a kidney from an Indonesian to another Singaporean, Juliana Soh, for a fee of $8 000.[180] In May 2008, Wang began the process of procuring an organ on behalf of Tang.

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175 *Public Prosecutor P v Tang Wee Sung*, above n 172, at [51

176 Ibid, at [49].

177 Human Organ Transplant Act 1987, s 14(2), prior to amendment in 2004.

178 *Public Prosecutor v Sulaiman Damanik and Another* [2008] SGDC 175 at [28].

179 *Wang Chin Sing v Public Prosecutor* [2008] SGHC 215

180 *Public Prosecutor v Wang Chin Sing* [2008] SGDC 268 at [13].

Aware of his wealth, Wang quoted a fee five times the amount paid by Juliana Soh.[181] For his elaborate role in orchestrating the illegal supply of an organ, exacerbated by his 'cavalier manner in…fabricating several overlaying shrouds of deceit to ensure the success of his "trade"',[182] the High Court found him "fixed with the lion's share of the stigma of culpability."[183] Two months after this event, the HOTA was amended with the intention to impose heavier penalties – a fine not exceeding $100,000 or up to 10 years imprisonment or both – [184]on "middlemen" and organ trading syndicates.

While the HOTA may appear draconian, it seems that in practice it is administered with due regard to the needs and interests of grieving families. Recognising that good relationships between healthcare workers, the general public and the government are vital to the common goal of saving lives through organ donation, the transplant unit places an emphasis on education over the exercise of enforcement powers. In addition, it is highly unlikely that the government will make it a statutory duty to harvest organs as this can create zeal amongst doctors and create a conflict of interest that can potentially jeopardize doctor-patient relationships. Thus, understanding the importance of the roles of the multiple stakeholders in this highly sensitive arena ensures that there is good balance struck between increasing organ donation to save lives and ensuring the best possible process for the donor family.[185]

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[181] Ibid, at [39].
[182] *Wang Chin Sing v Public Prosecutor*, above n 179, at [4].
[183] Ibid, at [5].
[184] Human Organ Transplant Act 1987, s14(2A).

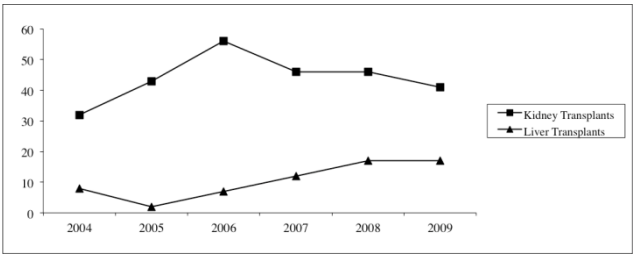

Figure 9. Number of Cadaveric Singaporean Donors 2004-2009.[186]

III.

Would an opt-out system be a better option for New Zealand?

Organ donation laws have continuously evolved in Singapore. Driven by a desire to maximise self-sufficiency in kidney donation,[187] Singapore is constantly hunting for ways to increase organ donation rates. Since 2004, the law has been repeatedly amended to accommodate the perceived needs of Singapore, namely the rising demand for organs as a result of organ failure. The success of such a policy may be judged in several ways including clinical outcomes, the increase in donor rates and public acceptance of the law.

When assessed purely on improved clinical outcomes for organ failure patients, the HOTA is a success. By taking steps to increase donation rates, more patients have been able to receive organs. However, as seen in Figure 9, the success of HOTA is not necessarily reflected in increased numbers. This could be due to many factors – both clinical and social – including the number of deaths that vary annually[188] and the viability of organs for transplantation. On the other hand, if success of the HOTA is assessed by the measure of public acceptance

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[186] National Organ Transplant Unit from Chin Kwong Cheong.
[187] Ministry of Health *Public Consultation Paper on Proposed Amendments to the Human Organ Transplant Act* (2008) at 3.
[188] "Deaths from Non-Natural Causes" *Singapore Statistics Newsletter* (Singapore, September 2002) at 21.

of the law, it is undoubtedly a success. This is largely attributed to the Singapore's staged implementation of the HOTA and the pro-active steps taken by the government to increase awareness. By initially excluding groups that were most likely to object to organ donation (namely Muslims and older Chinese), the government allowed them time to warm to the idea of organ donation for the greater public good. In addition, there have been many active steps towards the widespread dissemination of educational material through various media so as to increase awareness.

All things considered, it can be said that Singapore has successfully implemented a law that can only improve organ donor rates. However, this approach is not extraordinary – Singapore's move to an opt-out system was triggered in part by a recommendation by the Council of Europe to its member states, many of which are similar in culture to New Zealand.[189] Regardless, whether such bold utilitarian moves by a country to address organ demand should be lauded and replicated in New Zealand is not as straightforward. This is so for many reasons including the emphasis on Māori and Treaty principles, the emphasis on the 'gift' status of organs, and the strong culture of informed consent in healthcare.

First, death and grieving are highly significant events amongst Māori and there is deep familial interest in the sanctity of an intact body. It is likely that any law that deprives a family of the right to contribute to such a significant decision will offend their identity as *tangata whenua* ("people of the land").

Second, because of cultural beliefs, there are few Māori donors despite a disproportionate number of Māori on organ waiting lists. Singapore's allocation scheme that prioritises by donation status and medical need

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[189] Council of Europe *Resolution 78(29) on Harmonisation of legislation of member states to removal, grafting and transplantation of human substances. Adopted by the Committee of Ministers of the Council of Europe* (11 May 1978).

is likely to stir up controversy in New Zealand. This is because many Māori will find themselves low in the priority queue because of their beliefs and regardless of medical need. Such an arrangement also conflicts with many New Zealanders who believe that donated organs are an "unconditional gift" that should "be allocated to those with the greatest need for them" and that alternatives would "raise serious distributive issues."[190]

The political structure within New Zealand is such that minority parties now have a larger say than ever before. As such, any political party that attempts to advance a policy that is unfavourable towards the beliefs and values of any group is likely to suffer significant political repercussions. This is even more so when the Crown is obliged under the Treaty of Waitangi to protect the well-being of Māori.[191] This commitment is reflected in the Ministry of Health that emphasised the importance of ensuring Māori are "given the opportunity to experience the same health status as non-Māori."[192]

Third, informed consent is so entrenched in the New Zealand healthcare system that a move to introduce an opt-out system is unlikely to be received wholeheartedly. While the old standard of "lack of objection" is quite similar to presumed consent and thus not unfamiliar, the move from "lack of objection" to informed consent under the new Act was executed intentionally in order to align with current healthcare standards under the Code. The history of medical procedures and experiments on non-consenting patients that mars New Zealand's medical history caused public outrage. This outrage was appeased only by an inquiry and eventually a full statement of

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[190] Ministry of Health *Review of the Regulation of Human Tissue and Tissue-based Therapies: Submissions Summary* (Ministry of Health 2004) at 93.

[191] Ministry of Māori Development *Hauora o te tinana me ōna tikanga : a guide for the removal, retention, return and disposal of Māori body parts and organ donation* (1999) at 10.

[192] Ministry of Health *Review of the Regulation of Human Tissue and Tissue-based Therapies: Discussion document.* (Ministry of Health 2004) at 5.

patient rights that enshrined informed consent in New Zealand. Thus, a law change essentially reversing the standard from that of the widely-accepted informed consent to presumed consent is likely to confuse people, cause great unease and also raise suspicion.

Finally, there is no guarantee that organ donation rates in New Zealand will improve significantly enough to make the cost worthwhile for New Zealand. This is because while greater organ donation rates certainly means that fewer lives will be lost, the Singaporean approach does come with political and social costs that may not be beneficial to New Zealand in the long run. The different political and social structures of New Zealand as compared to Singapore mean that introducing such a controversial law is likely to cause public upset and have great political cost for the government.

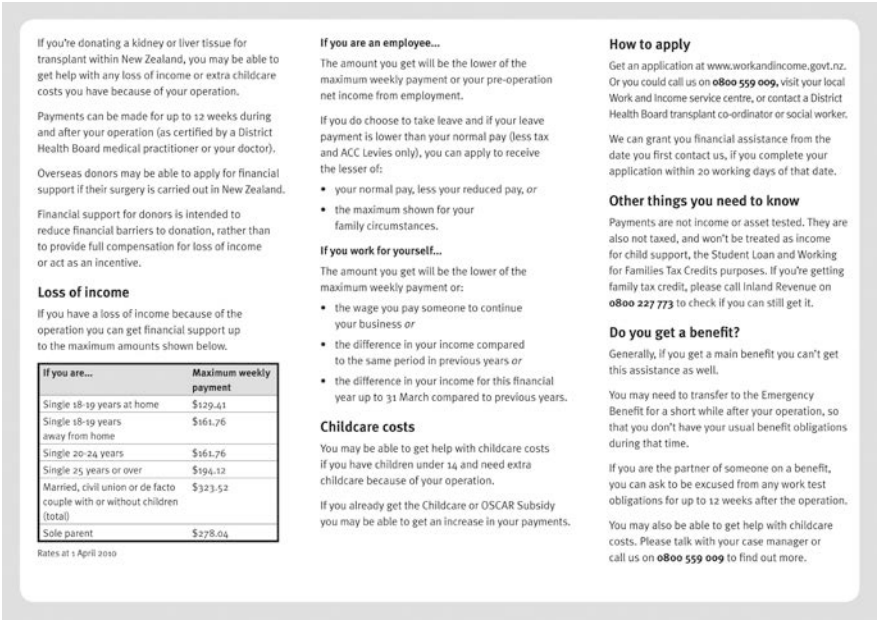
While an opt-out system may not be beneficial for New Zealand to adopt, a key strategy that has succeeded in Singapore is educating the public on organ donation and demystifying cultural and societal misconceptions surrounding it. As a multi-ethnic and multi-religious country, there are many mindsets and superstitions surrounding death and organ donation. However, these have been clarified and put at ease through extensive discussion and education targeted at different groups in society. By emphasising the greater public good of organ donation and drawing on the altruistic nature of people, Singapore's utilitarian approach has led to a greater number of organs for transplant.

Conclusion

Organ demand has always outstripped supply and both New Zealand and Singapore have taken very different approaches in their attempts to increase organ donation rates. New Zealand has an opt-in system and has enhanced recognition for the wishes of a deceased. However, it is complex and highly time-consuming, particularly where a

deceased's wishes are unknown. The law has created multiple hurdles for potential donors to overcome and it may not have the desired outcome of increasing organ donation rates. On the other hand, Singapore has an opt-out system that presumes the consent of individuals unless they have registered an objection in their lifetime. In doing so, it can be said that the government takes advantage of a donor's reluctance to broach the matter of death and organ donation and essentially decides for him or her. Through this system, Singapore has garnered public acceptance of the law and successfully increased organ donation rates.

In conclusion, it is not guaranteed that an opt-in system such as in Singapore will prosper in another country. In New Zealand, history as well as the difference in cultures and national opinion has created a climate unfavourable towards an opt-out system that presumes consent. However, the approach taken by Singapore demonstrates that it is possible to implement strategies to increase the organ pool while still being sensitive to the needs of different cultures. While an opt-out policy may not necessarily work in New Zealand, Singapore's success with HOTA shows that thoughtful policy making and vigorous public education can make a difference in increasing organ donation rates. If improvement in education and awareness is coupled with an effective management of an opt-in system, such that prior-registered informed donation can be verified during the period of organ viability, improvement can possibly be achieved under the current legal framework.



If you're donating a kidney or liver tissue for transplant within New Zealand, you may be able to get help with any loss of income or extra childcare costs you have because of your operation.

Payments can be made for up to 12 weeks during and after your operation (as certified by a District Health Board medical practitioner or your doctor).

Overseas donors may be able to apply for financial support if their surgery is carried out in New Zealand.

Financial support for donors is intended to reduce financial barriers to donation, rather than to provide full compensation for loss of income or act as an incentive.

Loss of income

If you have a loss of income because of the operation you can get financial support up to the maximum amounts shown below.

If you are...	Maximum weekly payment
Single 18-19 years at home	$129.41
Single 18-19 years away from home	$161.76
Single 20-24 years	$161.76
Single 25 years or over	$194.12
Married, civil union or de facto couple with or without children (total)	$323.52
Sole parent	$278.04

Rates at 1 April 2010

If you are an employee...

The amount you get will be the lower of the maximum weekly payment or your pre-operation net income from employment.

If you do choose to take leave and if your leave payment is lower than your normal pay (less tax and ACC Levies only), you can apply to receive the lesser of:

- your normal pay, less your reduced pay, *or*
- the maximum shown for your family circumstances.

If you work for yourself...

The amount you get will be the lower of the maximum weekly payment or:

- the wage you pay someone to continue your business *or*
- the difference in your income compared to the same period in previous years *or*
- the difference in your income for this financial year up to 31 March compared to previous years.

Childcare costs

You may be able to get help with childcare costs if you have children under 14 and need extra childcare because of your operation.

If you already get the Childcare or OSCAR Subsidy you may be able to get an increase in your payments.

How to apply

Get an application at www.workandincome.govt.nz. Or you could call us on **0800 559 009,** visit your local Work and Income service centre, or contact a District Health Board transplant co-ordinator or social worker.

We can grant you financial assistance from the date you first contact us, if you complete your application within 20 working days of that date.

Other things you need to know

Payments are not income or asset tested. They are also not taxed, and won't be treated as income for child support, the Student Loan and Working for Families Tax Credits purposes. If you're getting family tax credit, please call Inland Revenue on **0800 227 773** to check if you can still get it.

Do you get a benefit?

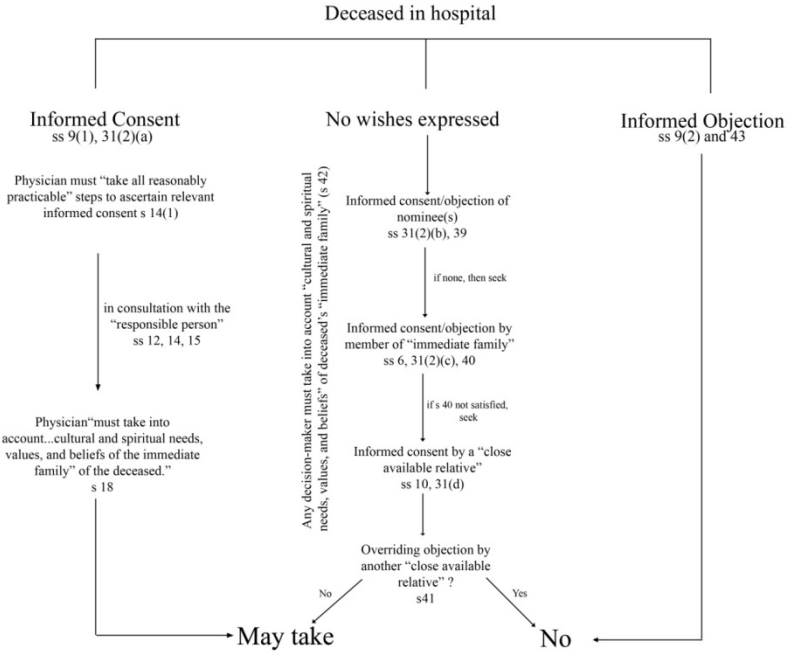
Generally, if you get a main benefit you can't get this assistance as well.

You may need to transfer to the Emergency Benefit for a short while after your operation, so that you don't have your usual benefit obligations during that time.

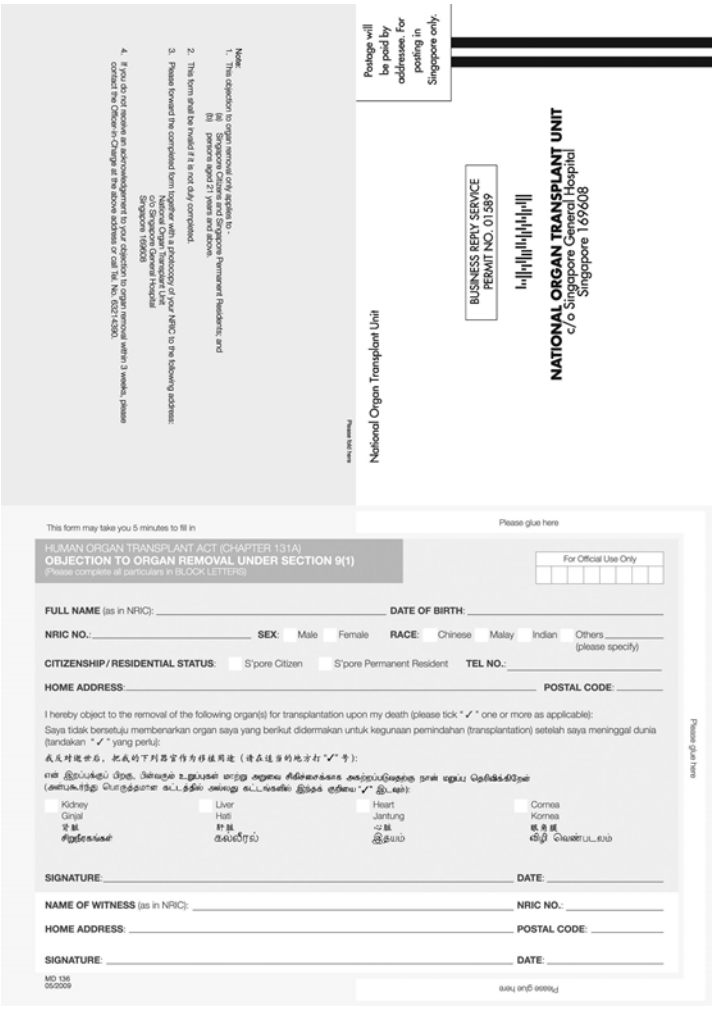
If you are the partner of someone on a benefit, you can ask to be excused from any work test obligations for up to 12 weeks after the operation.

You may also be able to get help with childcare costs. Please talk with your case manager or call us on **0800 559 009** to find out more.

Appendix 1. Work and Income New Zealand Financial Assistance for Live Organ Donors



Appendix 2. Decision-making process under the Human Tissue Act 2008



Postage will be paid by addressee. For posting in Singapore only.

BUSINESS REPLY SERVICE
PERMIT NO. 01589

NATIONAL ORGAN TRANSPLANT UNIT
c/o Singapore General Hospital
Singapore 169608

National Organ Transplant Unit

Please Stick here

Please glue here

This form may take you 5 minutes to fill in

HUMAN ORGAN TRANSPLANT ACT (CHAPTER 131A)
OBJECTION TO ORGAN REMOVAL UNDER SECTION 9(1)
(Please complete all particulars in BLOCK LETTERS)

For Official Use Only

FULL NAME (as in NRIC): _____ **DATE OF BIRTH**: _____

NRIC NO.: _____ **SEX**: Male Female **RACE**: Chinese Malay Indian Others _____ (please specify)

CITIZENSHIP / RESIDENTIAL STATUS: S'pore Citizen S'pore Permanent Resident **TEL NO.**: _____

HOME ADDRESS: _____ **POSTAL CODE**: _____

I hereby object to the removal of the following organ(s) for transplantation upon my death (please tick "✓" one or more as applicable):

Saya tidak bersetuju membenarkan organ saya yang berikut didermakan untuk kegunaan pemindahan (transplantation) setelah saya meninggal dunia (tandakan "✓" yang perlu):

我反对取出我，把我的下列器官作为移植用途（请在适当的地方打"✓"号）：

என் இறப்புக்குப் பிறகு, பின்வரும் உறுப்புகள் மாற்று அறுவை சிகிச்சைக்காக அகற்றப்படுவதற்கு நான் மறுப்பு தெரிவிக்கிறேன் (அவசுகூறிது பொருத்தமான கட்டத்தில் அல்லது கட்டங்களில் இருக்கக் குறியை "✓" இடவும்):

Kidney	Liver	Heart	Cornea
Ginjal	Hati	Jantung	Kornea
肾脏	肝脏	心脏	眼角膜
சிறுநீரகங்கள்	கல்லீரல்	இதயம்	விழி வெண்படலம்

SIGNATURE: _____ **DATE**: _____

NAME OF WITNESS (as in NRIC): _____ **NRIC NO.**: _____

HOME ADDRESS: _____ **POSTAL CODE**: _____

SIGNATURE: _____ **DATE**: _____

MD 136
05/2009

Please glue here

Please Stick here

Please Stick here

Note:
1. This objection to organ removal only applies to -
   (a) Singapore Citizens and Singapore Permanent Residents; and
   (b) persons aged 21 years and above.
2. This form shall be invalid if it is not duly completed.
3. Please forward the completed form together with a photocopy of your NRIC to the following address:
   National Organ Transplant Unit
   c/o Singapore General Hospital
   Singapore 169608
4. If you do not receive an acknowledgement to your objection to organ removal within 3 weeks, please contact the Officer-in-Charge at the above address or call Tel. No. 6321 4380.

Appendix 3. Official opt-out form under the Human Organ Transplant Act 1987

HOME DETENTION AS A STAND-ALONE SENTENCE

DAVID BULLOCK*

Introduction

In 2007, the Government introduced a raft of new non-custodial sentences with the express aim of reducing New Zealand's increasing prison population.[1] At the heart of these changes was the establishment of home detention as a stand-alone sentence.[2] Before then, judges acted only as a "gate-keeper", determining whether leave to apply for home detention should be granted – the final decision rested with the parole board.[3] Home detention could be 'front ended' for offences receiving less than two years imprisonment; applications were able to be made immediately after sentencing.[4] For longer

* David Bullock, Victoria University of Wellington. Submitted as part of the LLB(Hons) programme.

1 Criminal Justice Reform Bill 2006 (93-1) (explanatory note) at 1. New Zealand's rate of imprisonment is greater than the OECD average, see *OECD Factbook 2008: Economic, Environmental and Social Statistics* (OECD, 2008).

2 Sentencing Amendment Act 2007; Sentencing Act 2002, ss 80A–80ZI.

3 *R v D* [2008] NZCA 254 at [36]. Despite bureaucratic misgivings and a less than successful pilot programme, home detention was introduced as a form of parole in New Zealand shortly before the 1999 general election. Regarding the pilot programme, see A Church and S Dunstan *Home Detention: The Evaluation of the Home Detention Pilot Programme 1995-1997* (Ministry of Justice, Wellington, 1997).

4 D King and A Gibbs "Is Home Detention in New Zealand Disadvantaging Women and Children?" [2003] 50 Probation Journal 115 at 115. Under the pre-2007 system home detention could potentially be granted for essentially the entirety of a sentence, although offenders would typically have to serve one or two months in prison before a decision was reached. In exceptional

offences, application could be made for home detention within the final three months before release to parole. The new stand-alone sentence of home detention, which repealed and replaced the old 'front end' model, was designed to be an alternative to short sentences of imprisonment,[5] giving greater flexibility to sentencing judges.

The advantages of home detention are much lauded. Politicians from both sides of the political divide have been attracted by the fiscal advantages of home detention compared to imprisonment and the possibilities of encouraging rehabilitation and reducing recidivism.[6] In this paper I address the nature and operation of the stand-alone sentence of home detention. I further consider how the courts have interpreted and applied the sentence before concluding on the overall efficacy of the new sentence and outstanding policy issues.

A. Features of Home Detention as a Stand-alone Sentence

Home detention is a "hybrid" sentence.[7] It is not defined as a community sentence,[8] nor is an offender subject to home detention

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circumstances a sentencing judge had the discretion to delay the activation of prison sentences so that probation reports could be made to determined eligibility for home detention without the offender needing to spend time in prison.

[5] Criminal Justice Reform Bill 2006 (93-1) (explanatory note) at 5. Home detention ranks directly below imprisonment in the hierarchy of sentences in s 10 of the Sentencing Act 2002.

[6] The level of bi-partisan support of home detention is unusual for criminal justice policy in New Zealand. The initial home detention schemes were introduced by the then National-led government in 1999, shortly before the general election. Successive Labour-led governments retained the schemes, expanding home detention to a stand-alone sentence in 2007. Although the enacting legislation was opposed by National, then Justice spokesperson, Simon Power, said in debate on the Second Reading of the Bill that the party was "warmly enthusiastic" about the introduction of home detention as a stand-alone sentence: (19 June 2007) 640 NZPD 9983.

[7] *R v D*, above n 3, at [65].

[8] It is not listed in the Sentencing Act 2002, s 44.

regarded as "in custody".[9] A sentence of home detention, of between 14 days and 12 months,[10] may be imposed for any offence punishable by imprisonment, or where home detention is expressly provided for.[11] The 12 month maximum means that home detention is generally not available in cases where a term of imprisonment of greater than two years is justified.[12] This disparity is explained by the requirement that a sentence of home detention be served in full. Thus, a sentence of home detention is regarded as roughly equivalent to half the length of a sentence of imprisonment,[13] though this is not an automatic computation.[14]

A sentence of home detention is available only if a less restrictive sentence cannot achieve the relevant purposes of sentencing, and a "short term" sentence of imprisonment is otherwise appropriate.[15] A relevant pre-sentence report considering the suitability of the proposed residence, the safety and welfare of the occupants and the offender's consent to the conditions of detention is required.[16] The occupants of the residence must be informed of the offender's past and current offending and their consent obtained.[17] Home detention is versatile and may be combined with a sentence of a fine, reparation, or community work.[18] This is valuable as it not only enables a wide application of home detention but it also aids the court in ensuring the least restrictive sentence is imposed.

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[9] Sentencing Act 2002, s 80A(5).
[10] Ibid, s 80A(3).
[11] Ibid, s 80A(1).
[12] *R v Iosefa* [2008] NZCA 453 at [41].
[13] *Savage v Police* HC Whangarei CRI-2008-488-1, 14 February 2008 at [27].
[14] *Golding v Police* HC Whangarei CRI-2008-488-3, 14 February 2008 at [16].
[15] Sentencing Act 2002, s 15A. As noted, a "short term" of imprisonment is interpreted as a sentence of imprisonment of less than two years.
[16] Ibid, s 26A(2).
[17] Ibid, s 26A(3). This consent may be withdrawn at any time. The residence must also be located in an area where a home detention programme is operated.
[18] Ibid, s 19.

It is a popular misconception that home detention entails incarceration-like constant restraint. A detainee must not leave their residence unless authorised; this typically involves approval from a probation officer,[19] or on special conditions imposed by the court.[20] Approved absences may include working, attending rehabilitative or restorative activities, or any other specifically approved activity.[21] Special conditions may be imposed where there is a significant risk of further offending, standard conditions are insufficient, or to make use of rehabilitative or reintegrative programmes.[22] Compliance is enforced through monitoring by the Probation Service or contractors and use of an electronic anklet is frequently made, although not a requirement.[23] It is an offence to breach home detention conditions, post-detention conditions or to refuse entry to a parole officer.[24]

Once the sentence is completed the offender may remain subject to post-detention conditions, typically for a further 12 months.[25] Standard conditions are automatically imposed on sentences of more than six months and may be imposed on shorter sentences by the Court.[26] Standard conditions involve reporting to a probation officer, not changing residence without permission, and refraining from specific activities or associations.[27] Special conditions similar to those that may be imposed during home detention can also be used post-detention.[28]

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[19] Ibid, s 80C(2). The only cases where approval is not required in the case of urgent medical or dental treatment, or where there is a serious risk of death to the offender or any other person.
[20] Ibid, s 80D.
[21] Ibid, s 80C(3).
[22] Ibid, s 80D.
[23] Ibid, ss 80C(2) and 80E.
[24] Ibid, ss 80S, 80U and 80T.
[25] Ibid, s 80N.
[26] Ibid.
[27] Ibid, s 80O.
[28] Ibid, s 80P.

B. Application in the Courts: Legal Issues

1. The approach to sentencing

The courts consider the decision to grant home detention as a two stage process.[29] The first stage involves setting a sentence of imprisonment and determining whether it is "short" (less than two years). If this is the case, the second step is whether to commute that sentence to home detention. At the first stage, a judge should not consider home detention, to ensure that home detention commuted at stage two is "reserved for those who would truly otherwise have been imprisoned".[30] This is important to reduce so called "net-widening"; where an offender who should have received a lesser sentence is given home detention due to a mischaracterisation of the sentencing hierarchy by the judge.[31]

Purposes of sentencing, such as denunciation and deterrence, are best accounted for at the first stage. These purposes do not logically control the stage two decision as to home detention.[32] The stage two decision is appropriately based, for the most part, on the personal circumstances of the offender and their circumstantial suitability for home detention.[33] That is not to say that principles and purposes of sentencing cannot be considered in the second stage, and that judges

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[29] *R v Vhavha* [2009] NZCA 588 at [31] per William Young P. It is important to note that while the President was dissenting as the ratio decidendi in *Vhavha* the majority accepted his framing of a two-stage test at [20]. The President's test was also accepted unanimously by the Court of Appeal in the later decision of *Osman v R* [2010] NZCA 199 at [20]. It now seems settled that this two-stage approach is appropriate for the decision to commute sentences of imprisonment to home detention.

[30] *R v Vhavha*, above n 29, at [31].

[31] See Geoffrey G Hall *Sentencing: 2007 Reforms in Context* (LexisNexis New Zealand Ltd, Wellington, 2007) at 345.

[32] *R v Vhavha*, above n 29, at [45].

[33] Ibid, at [33].

cannot prefer imprisonment to home detention on the grounds that home detention would not send the "right message", but judges should be "cautious" when doing so.[34] Two offenders may have the same culpability for an offence and receive an equal starting sentencing of imprisonment, yet one may have their sentence commuted to home detention and the other may not due to differing personal characteristics. The balancing of home detention and imprisonment through the s 8(1)(g) and s 16 tests is crucial; home detention is to be preferred unless imprisonment is demonstrably necessary.[35] The courts have accepted that home detention is a "real alternative to imprisonment",[36] and can sometimes be better for society's interests than imprisonment.[37]

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[34] Ibid, at [36]. An example of a case where this approach was appropriate was *Connolly v R* [2010] NZCA 129. In that case a police officer was convicted of inducing a sex worker to have sexual connection with him with her consent being induced by a threat. He was sentenced to two years imprisonment. The Court of Appeal upheld the sentencing judge's decision not to commute the sentence to one of home detention, despite the offender's characteristics otherwise being suited to this, because, at [82], "the sentencing purposes of denunciation and general deterrence called for nothing less than a sentence of imprisonment in the circumstances of this case".

[35] *R v D*, above n 3, at [66]. Section 8(g) of the Sentencing Act 2002 requires a court to impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in s 10A. Section 16(1) requires the court, when considering the imposition of a sentence of imprisonment for any particular offence, to have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.

[36] *R v D*, above n 3, at [60]; R v Iosefa, above n 12, at [41].

[37] *R v Hill* [2008] NZCA 41 at [33]. One such case was *R v Faithfull* HC Auckland CRI-2007-044-007451, 14 March 2008. In *Faithfull*, a man pleaded guilty to attempting to murder his terminally ill wife. The Court held that this was a case where it was not in society's interest to send the offender to prison and a sentence of 12 months home detention was sufficient. In *R v Hall* [2008] NZCA 207 the Court took a similar approach with a young man who was convicted as a party to an aggravated robbery. The Court held that given his

2. Selection of offenders

There is some debate about what offenders should be sentenced to home detention. Rackmill notes a number of United States' guidelines which state that home detention is not appropriate for violent offenders, offences involving firearms, drug use or dealing, or "predatory property offenders".[38] In other jurisdictions, persons with specified convictions are barred from receiving home detention.[39] In New Zealand, less rigid tests are applied to determine suitability for home detention.[40] Much depends on the pre-sentence report provided by a probation officer and the level of family support available to the offender.[41] A further consideration is the likelihood of reoffending and, to the extent that reoffending is possible, how effective will home detention be in incapacitating the detainee.

Home detention is occasionally used for serious violent offending, but typically only where the circumstances of the offending or offender are particularly unusual, such as where an offender had low culpability, had shown a significant, self motivated attempt at rehabilitation, or their

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good previous record and positive prospects for rehabilitation it would be in society's interest to impose a sentence of eight months home detention.

[38] Stephen J Rackmill "An Analysis of Home Confinement as a Sanction" [1994] 58 Fed Probation 45 at 48. While dated, Rackmill's paper provides an interesting perspective on home detention as at the time of writing he was serving as Chief United States Probation Officer, Eastern District of New York.

[39] See for example the Australian state of Victoria where convictions for various types of sexual offending, firearms offending, stalking and a number of other specified offences permanently statutorily bar an offender from receiving home detention: Sentencing Act 1991 (Vic), s 18ZV.

[40] *Savage v Police*, above n 13, at [20]. The Court noted, "it is clear that the legislature intended to confer a broad discretion and the weight to be given to relevant factors will be a matter for the sentencing Judge".

[41] *Golding v Police*, above n 14, at [12] and [15].

violence was out of character.[42] Home detention had been used for a wide spectrum of offending (see Table 1). This is largely due to the two stage approach set out in *Vhavha* which examines the suitability of the offender separately from the offence. Home detention can also be used where imprisonment would create undue hardship on an offender,[43] or their family.[44]

Offence	**Percentage**	**Number**
Homicide and related offences	0.2%	6
Acts intended to cause injury	13.1%	387
Sexual assault and related offences	3.0%	90
Dangerous or negligent acts endangering persons	2.4%	70
Abduction, harassment, offences against the person	1.1%	33
Robbery, extortion	4.4%	131

[42] *Smith v Police* HC Rotorua CRI-2009-463-000110, 18 December 2009; *R v Faithfull*, above n 37.

[43] *R v Riri* [2008] NZCA 441. In *Riri* an offender was sentenced to two years and three months imprisonment for possession of methamphetamine for the purpose of supply. Riri was severely paraplegic man who required 24 hour nursing care. The Court of Appeal quashed his sentence of imprisonment as it concluded the prison system could not meet his needs. A sentence of six months home detention was substituted.

[44] *Garnett v R* [2010] NZCA 173. The Court noted that while mothers of young children are not exempt from sentences of imprisonment, the appellant's difficult family circumstances could not be overlooked. The appellant was the mother of very two young children, one with serious health problems. A sentence of home detention was found to be appropriate in those circumstances.

etc		
Unlawful entry/burglary, break and enter	8.5%	252
Theft etc	5.6%	167
Fraud, deception etc	9.9%	292
Illicit drug offences	13.1%	388
Prohibited and regulated weapons/explosives offences	0.8%	23
Property damage etc	2.5%	75
Public order offences	0.6%	18
Traffic and vehicle regulatory offences	28.6%	846
Offences against justice procedures, Government security and Government operations	5.3%	158
Miscellaneous offences	0.9%	26
Totals	**100.0%**	**2962**

Table 1: Home Detention by Offence Type 2009 (source: Statistics New Zealand)

3. Sentencing Principles

(a) Deterrence and Denunciation

The Courts have grappled with the new sentence of home detention in a number of immigration fraud cases. In *R v Hassan* the Court of Appeal noted that the importance of maintaining the integrity of a country's immigration system meant that deterrence was an "important sentencing principle in this area" and that "those who dishonestly challenge the immigration system can expect deterrent sentences and can expect to be sent to prison".[45] This proposition was approved in *R v Chatha* and *R v Vhavha*.[46] The majority in *Vhavha* noted that home detention was a "more relaxed" regime that may undermine deterrence of those seeking to commit immigration fraud.[47]

These sentiments ran contrary to an earlier decision which held that home detention provided, "in considerable measure, the principles of deterrence and denunciation", albeit less than imprisonment.[48] Further, William Young P, dissenting in *Vhavha*, was sceptical as to whether there was any marginal increase in deterrence between a short prison sentence and a sentence of home detention.[49] As the Court of Appeal later rhetorically questioned in *Osman v R*, "how would refugees in a tent camp in Africa be deterred by a short sentence of imprisonment vis-à-vis home detention?"[50] In light of the Court of Appeal's unanimous decision in *Osman* it would seem that the position as to the deterrent effect of home detention is now settled. Home detention can be a deterrent sentence and does have the effect of holding offenders to account.[51]

(b) Incapacitation

[45] *R v Hassan* [2008] NZCA 402 at [27] per Ronald Young J.
[46] *R v Vhavha*, above n 29; R v Chatha [2008] NZCA 547.
[47] *R v Vhavha*, above n 29, at [23] per Chisholm and Priestley JJ.
[48] *R v Iosefa*, above n 12, at [41].
[49] *R v Vhavha*, above n 29, at [40].
[50] *Osman v R*, above n 29 at [23].
[51] Ibid, at [25].

Home detention entails a level of incapacitation, enhanced by electronic monitoring and surveillance.[52] However, home detention has a lesser incapacitative effect than imprisonment; offenders can easily violate their detention and commit further crimes before they are picked up by monitors.[53] Two points can be made in this regard. First, there is a risk of reoffending whenever an offender receives a community based sentence; there will typically be little difference in the nature of offenders serving a community sentence and those serving home detention.[54] So long as the sentencing judge makes a sufficient inquiry into the circumstances and nature of a particular offender (including this risk to the community), risk of reoffending is minimised. Secondly, the level of incapacitation that characterises imprisonment is a poor comparator for home detention; home detention is not designed to provide complete incapacitation but it does nevertheless have an incapacitating effect for many detainees.[55]

(c) Rehabilitation

Home detention has strong rehabilitative potential. If detainees are motivated to reform themselves, home detention can both facilitate this rehabilitation and foster a sense of self-responsibility. It enables detainees to remain in society (to some extent) and provides access to employment and rehabilitative programmes that is unmatched in a custodial environment.[56] Home detention has the added advantage of

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52 Fred L Rush Jr "Deinsitutional Incapacitation: Home Detention in Pre-trial and Post-conviction Contexts" (1987) 13 N. Ky. L. Rev. 375 at 393.

53 Ibid, at 394. However, with improvements in monitoring technology it is now becoming harder for detainees to abscond.

54 Rebecca Checketts "Should Big Brother Be Watching? An Assessment of Home Detention in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2005) at 29.

55 Rush, above n 52, at 394.

56 Randy R Gainey, Brian K Payne and Mike O'Toole "The relationships between time in jail, time on electronic monitoring, and recidivism: An event history analysis of a jail-based program" (2000) 17 Justice Quarterly 733 at 737.

keeping young offenders out of prison, away from the influence of seasoned criminals. It is likely that rehabilitation occurring in the offender's own community has a greater chance of success.[57] However, rehabilitative potential is highly dependent on rehabilitative programmes being adequately funded, otherwise the sentence risks becoming one of "mere surveillance".[58]

C. Policy Issues

1. By the Numbers[59]

Home detention appears to be an underutilised sentence, possibly as it is still only a new sentencing option, comprising only some 2.9 per cent of total sentences.[60] However, its use is likely to grow in coming years as greater pressure is put on prison capacity.[61] The data reveals other insights. The statistical description of an "average" person serving home detention is a male European over 30 years of age convicted of traffic or vehicle related offences, minor assaults or drug related offending.[62] As a proportion of relevant total sentences, men

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[57] Joan Petersilla "Exploring the Option of House Arrest" [1986] Fed. Probation 50 at 53.

[58] Dorothy K Kagehiro "Psycholegal issues of Home Confinement" (1992) St Louis U L J 647 at 656.

[59] Data on the nature of offenders and the use of home detention is my own analysis of Statistics New Zealand's unprocessed data on sentencing in New Zealand. See Statistics New Zealand <www.stats.govt.nz>, under the "Table Builder" tool.

[60] This may also be due to some reluctance by the judiciary to apply new sentences as alternatives to imprisonment. This has been the experience in some Australian states where "the courts are, both in principle and practice, reluctant to depart from the use of the prison." See N Keay "Home Detention - an alternative to Prison?" (2000) 12 Current Issues Crim Just 98 at 98.

[61] The Ministry of Justice forecast (to 2013) shows a slow but steady increase in home detention. See Ministry of Justice *2009-2017 Criminal Justice Forecast Report* (Ministry of Justice, Wellington, 2009) at 6.

[62] These characteristics are very similar to the findings of Whitfield who described the typical home detainee as male, over 30 years of age, few previous

and women received an approximately equal number of home detention sentences, while more Maori than European, and more young (10-16) than old offenders received home detention (see Table 2).[63]

Age group	10-16	7-19	20-24	25-29	30-39	40+	Unknown	Total
Number	32	434	596	443	711	736	10	2962

Table 2: Home Detention by Age Group 2009 (source: Statistics New Zealand)

A pre-2007 study of home detention found it had a very low reconviction rate of only 27 per cent after 12 months.[64] Data shows

convictions, employed and typically convicted of a property related offence. See D Whitfield D *Tackling the tag: The electronic monitoring of offenders* (Waterside Press, Winchester, 1997); Whitfield D *The magic bracelet: Technology and offender supervision* (Waterside Press, Winchester, 1997) cited in A Gibbs and D King "The Electronic Ball and Chain? The Operation and Impact of Home Detention with Electronic Monitoring In New Zealand" (2003) 36 The Australian and New Zealand Journal of Criminology 1 at 3.

[63] While this data is broadly indicative it is not as useful as it could be. The best comparative data would have compared sentences of home detention as a proportion of those offenders eligible for home detention (i.e. facing sentences of less than two years imprisonment). Unfortunately such data was not readily available for this paper.

[64] A Gibbs and D King "Alternatives to Custody in the New Zealand Criminal Justice System: Current Features and Future Prospects" (2002) 36 Social Policy and Administration 392 at 397. This compares favourably to imprisonment which has an 80 per cent reconviction rate and community service with 52 per cent However, reconviction rates alone may tell a misleading story. There are many relevant factors not controlled for in such statistics – the variation in reconviction statistics is likely to be due in large part to the nature of the offenders subject to a particular sentence; those subject to home detention sentences are less likely to reoffend regardless of their sentences. There is likely to be an element self-selection bias in this data. See Hall, above n 31, at 344.

some 27 percent of detainees breach conditions.[65] However, it is likely many of these breaches are minor, such as returning home late from an approved absence. Home detention is a double-edged cost saver for governments – not only is it cheaper to administer than imprisonment, it also saves the cost of creating new prison capacity.[66] It was estimated in 2006 that a stand-alone sentence of home detention would save some 310 prison beds.[67] This gives the potential for significant fiscal savings. The cost of monitoring a person sentenced to home detention is $21,640 per annum, compared to $59,170 for a minimum-security prisoner.[68] Further, if an offender remains working the Government retains tax revenue.[69]

(a) Effect on offenders

Home detention enables offenders to be rehabilitated aided by the maintenance of employment and family relationships.[70] Many detainees find that the experience of home detention creates positive changes in their attitude and self-discipline, and embrace the ability to attend rehabilitative programmes.[71] A New Zealand study found that men who have been subject to home detention learn to be more self-responsible.[72]

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[65] NZPA "Home detention breached by 27% of offenders" *The Dominion Post* (Wellington, 3 September 2010) at 4.
[66] Rackmill, above n 38, at 47.
[67] "Effective Interventions" Cabinet Policy Committee Paper 7: Home Detention. Ministry of Justice at 1.
[68] Hall, above n 31, at 344.
[69] Ronald P Corbett and Ellsworth AL Fersch "Home as Prison: Use of House Arrest" [1985] 49 Fed Probation 13 at 16.
[70] Hall, above n 31, at 344.
[71] Gibbs and King, above n 64, at 10.
[72] King and Gibbs, above n 4, at 123.

Public perceptions of home detention often see it as a "soft" or "easy" option.[73] However, home detention is the next most restrictive sentence to imprisonment.[74] Studies of detainees show than many face similar pains to imprisonment.[75] Detainees often struggle to avoid the temptations that a non-custodial sentence brings.[76] A detainee faces a significant curtailment of their liberty and autonomy; they may only leave their house as approved, their home may be inspected as required by a probation officer and if subject to electronic monitoring their location can always be found.[77] This adds to the significant boredom, stress and frustration felt by detainees. Home detention may entail significant financial consequences for detainees; this can be compounded by difficulties in obtaining or retaining employment due to the need to involve the employer in the monitoring process and the infeasibility of monitoring some jobs. This is unfortunate as it may limit the rehabilitative advantages of home detention. Although home

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[73] Nicola Shepheard "Conflict over 'soft' home detention option" (2008) New Zealand Herald <www.nzherald.co.nz>; This is fuelled by the comments of groups like the Sensible Sentencing Trust who lobby for 'tougher' sentences. See, Beck Vass "Home detention for teacher who 'groomed' boys" (2010) New Zealand Herald <www.nzherald.co.nz>; Sensible Sentencing Trust "Home Detention a Sham Says Watchdog" (press release, 2 May 2008).

[74] Gibbs and King, above n 64, at 402. This has also been recognised in the Sentencing Act 2002, s10A and by the High Court in Beedell v MSD HC Wanganui CRI-2010-483-000009, 11 February 2010, at [15], where Dobson J noted that the prisoner was "not under any illusion that a sentence of home detention is easier to serve than a term of imprisonment. Particularly for home detention sentences near the upper end of the 12 month limit, there is no doubt that the constraints whilst living in the community make them difficult sentences to complete in a range of domestic situations."

[75] Brian K Payne and Randy R Gainey "A Qualitative Assessment of the Pains Experienced on Electronic Monitoring" [1998] 42 International Journal of Offender Therapy and Comparative Criminology 149 at 153.

[76] Ibid.

[77] Ibid, at 154; Gibbs and King, above n 64, at 402. Payne and Gainey cite a number of revealing comments of detainees featured in their study: "this is jail inside your home", "the only thing this lacks is the bars on the windows", "the only difference between this and jail is that I'm not in a cell, I'm in a house".

detention can be difficult, most detainees compare it favourably to imprisonment.[78] Interestingly, many offenders believed some time in prison was necessary to fully appreciate home detention.[79] This is something lost when home detention is used as a stand-alone sentence, rather than in conjunction with imprisonment.

(b) The Home as a Prison

Home detention arguably turns homes into pseudo-prisons or "surrogate prisons".[80] George notes that, consistent with other governmental cost-shifting measures, home detention essentially "seconds private homes into public prison space" with the cost of running this "prison" being borne by families.[81] This may somewhat overstate the point. Sponsors must consent to their homes being used for home detention and the state still provides monitoring – but it is certainly true that families, and offenders, bear a substantial cost.

Some scholars have argued that home detention is inherently inequitable; the nature of the house and home life affect the quality of detention.[82] It could be argued that a detainee sentenced to live in a lavish abode has a vastly different experience to one who must reside in comparative squalor. However, as Rush notes, this issue is only really concerning from a 'just deserts' or retributive perspective;[83] it has little bearing on other purposes on sentencing.

(c) Effect of Home Detention on families

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[78] Gibbs and King, above n 64, at 10.
[79] Ibid.
[80] K Heggie *Review of the NSW Home Detention Scheme* (NSW Department of Corrective Services, Australia, 1999) at 60.
[81] Amanda George "Women and Home Detention – Home Is Where the Prison Is" (2006) 18 Current Issues Crim Just 79 at 80.
[82] Rush, above n 52, at 380.
[83] Ibid, at 381.

Home detention can have a major impact on sponsors' lives. The majority of home detention sponsors are women,[84] and many are willing to sacrifice their quality of life to help a co-residing detainee.[85] To this end, women are potentially vulnerable as they often feel "more obliged than men to sponsor home detainees, to be responsible for the welfare of the children and for harmony within the household".[86] This results in women "bearing the main burden and stress associated with home detention".[87] Given these factors there is a risk that the consent procedures provided for are "disingenuous",[88] sponsors would usually always rather see their family member avoid prison, so arguably they have little choice at all.[89]

Martinovic argues that in many instances co-residents are penalised along with detainees.[90] Sponsors often feel obliged to help detainees comply with conditions of detention;[91] this may involve limiting their own freedom and paying for essential requirements of the detention

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[84] A Aungles "Three Bedroomed Prisons in the Asia Pacific Region: Home Imprisonment and Electronic Surveillance in Australia, Hawaii and Singapore" [1995] 2 Just Policy 32 at 35.

[85] Martinovic, above n 89 at 93.

[86] King and Gibbs, above n 4, at 120.

[87] Ibid

[88] George, above n 81, at 84.

[89] Marietta Martinovic "The Punitiveness of Electronically Monitored Community Based Programmes" (Paper presented at the Probation and Community Corrections: Making the Community Safer Conference convened by the Australian Institute of Criminology and the Probation and Community Corrections Officers' Association Inc and held in Perth, September 2002) at 8. See also King and Gibbs, above n 4, at 119. Most women reported that they felt they had a "choice" but nevertheless felt "a sense of obligation because they were keen to have their loved one out of prison".

[90] Martinovic, above n, at 89.

[91] A Gibbs and D King "Home Detention with Electronic Monitoring: the New Zealand Experience" (2003) 3 Criminal Justice 199 at 208.

scheme.[92] All family members are disrupted by monitoring regimes and surveillance strategies (such as phone calls at all hours of the day, or inspections), this often causes distress and upset,[93] compounded by a feeling of lost privacy.[94] There is also a risk that the confines of home detention can create a 'pressure cooker' environment.[95] This may strain relationships and lead to conflict. There is a concern that when this manifests in violence or other abuse, sponsors may be afraid to report it as they do not want to be responsible for a revocation of the detainee's home detention.[96]

A New Zealand study of detainees and their families found that, on the whole, periods of home detention either had little effect, or had a positive effect, on the relationship between detainees and their sponsors (typically parents or partners).[97] However, a significant minority of sponsors thought that the confinement created by home detention caused more tension and arguments.[98] In some cases respondents were particularly positive about their detainee partners being able to spend more time with their children than had previously been possible However, some were concerned about social stigmas being attached to their children,[99] and themselves,[100] as a result.

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[92] Martinovic, above n 89, at 95. This may include paying to maintain a "suitable residence", paying for a telephone connection and electricity (required for monitoring) and paying for transport to and from rehabilitative programmes.
[93] See generally, Martinovic, above n 89, at 95; Church and Dunstan, above n 3, at 57; Heggie, above n 80, at 70.
[94] George, above n 81, at 84, 86 and 87.
[95] Martinovic, above n 89, at 98.
[96] King and Gibbs, above n 4, 120.
[97] Ibid.
[98] Ibid, at 121.
[99] Ibid, at 122.
[100] Martinovic, above n 89, at 98.

King and Gibbs (2003) pose some potential solutions to the burden faced by women as sponsors and co-residents of detainees.[101] They suggest that greater support needs to be provided to sponsors by Corrections staff. Given the implicit understanding that sponsors have a role to play in supervising detainees, this may include some form of financial allowance to reimburse sponsors for extra costs the detention entails.[102] Finally, the authors suggest a relaxation of home detention rules to allow for "family outings" or "time out" may ease some of the stresses home detention creates.

(d) Comparison and Interaction with other sentencing options

Home detention is only one of a number of non-custodial sentencing options in the Sentencing Act 2002. The sentence of community work – where offenders are required to perform so form of community service – has long been a widely utilised sentencing option. The 2007 sentencing reforms introduced a number of other options into the sentencing matrix forming a "hierarchy" of sentences based on restrictiveness.[103] These were the sentences of community detention and intensive supervision.

Community detention essentially entails a curfew – periods when an offender is required to be a home – but at other times the offender is free to do as they chose.[104] This is involves less restrictiveness than a sentence of home detention which requires an offender to be in their approved residence unless they have otherwise been allowed to leave. Community detention looks to the causes of an offenders offending, at least in a temporal sense, and seeks to restrict their behaviour to

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[101] King and Gibbs, above n 4, at 123. Martinovic, above n 89, at 100 makes similar suggestions.
[102] It should be noted that both detainees and sponsors can still be eligible for the unemployment and emergency benefits "Home Detention/Habilitation programmes" < www.workandincome.govt.nz>.
[103] Sentencing Act 2002, s 10A.
[104] Ibid, ss 69B–69M.

prevent them being in situations where they are likely to offend. For example, an offender who typically offends when they drink may have a curfew placed on them at night. This is an effective sentencing option as it enables the offender to remain, for the most part, part of society, while taking them away from situations likely to trigger their offending. For many offenders this sentence will be more effective than home detention and may invoke positive change in offenders. However, home detention will be more appropriate where there is no clear pattern or situational trigger to an offender's offending or where high levels of deterrence or incapacitation are thought to be warranted for community protection or denunciation.

Intensive supervision expands on the pre-existing sentence of supervision.[105] Intensive supervision enables the court to grant a wider range of special conditions than are currently possible under a sentence of supervision while maintaining a probation officer focus. It also allows the court to impose a sentence of up to two years (ordinary supervision is limited to between six months and one year).

The introduction of these new non-custodial sentences has been complemented with a greater flexibility for judges to combine different sentences. This enables judges to more easily tailor sentences to meet the characteristics of a particular offender. However, only general comparisons can be made with home detention. Community detention and intensive supervision sit at the same level in the sentencing hierarchy, directly below home detention. Further, community detention and intensive supervision are targeted at offenders who require little incapacitation compared to those serving a sentence of home detention.

Conclusion

[105] Ibid, ss 54B–54L.

On the whole, home detention is a valuable alternative to imprisonment in New Zealand. The state benefits fiscally and offenders benefit through an easier road to rehabilitation, able to attend programmes and maintain work and family ties. The introduction of a stand-alone sentence of home detention, combined with New Zealand's increasing prison population, is likely to see home detention becoming more widely utilised.

Of course, home detention has its flaws. In some cases, the ostensible benefits of home detention may belie a darker reality. Home detention may not only create similar pains to imprisonment for some detainees but may also pass these to innocent sponsors – often spouses and parents – through family tension, disruption and loss of privacy.

For these reasons, despite home detention being preferable to imprisonment for many offenders, it must be remembered that it is only one solution to over-imprisonment and recidivism; there are numerous other, less restrictive sentences or combinations of sentences that may be even more effective.[106] So long as this is kept in perspective, home detention as a stand-alone sentence is likely to form useful part of the sentencing matrix in New Zealand. However, given the relative infancy of this new sentence, a final verdict on its effectiveness may still be a number of years away.

[106] George, above n 81, at 88.

SHOULD AN INNOCENT HALF-TRUTH BE AN ACTIONABLE MISREPRESENTATION UNDER THE CONTRACTUAL REMEDIES ACT 1979?

EMMA BIGGS*

Introduction

A vendor, in an attempt to procure a sale, accurately states that the property is let, but omits the further fact that the tenants have recently given notice to quit. Should the vendor be liable to the reliant purchasers for damages as a consequence of this unqualified statement?[1] Furthermore, should liability attach despite the vendor, or their agent, being ignorant of the issue of a notice to quit?

Liability for inadvertent, or innocent, half-truths is an unsettled issue in New Zealand law. The position is governed by the Contractual Remedies Act 1979, which offers little direction on the matter. In *Ladstone Holdings v Leonora Holdings Ltd*, [2] Potter J of the High Court purported to exclude the possibility of liability for such innocent half-truths. However, it is submitted that such a conclusion is inherently misguided.

This paper addresses Potter J's reasoning, and focuses on the policy behind the enactment of the Contractual Remedies Act ("the Act"). Additionally, a large body of law from various jurisdictions is examined, as there is no definitive law on this issue in New Zealand. Analogy is also drawn to the Fair Trading Act 1986 and Trade Practices Act 1974 (Cth), in an attempt to clarify the correct position

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[1] See *Dimmock v Hallet* (1866) 2 Ch App 21.

[2] *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211 (HC).

under the Contractual Remedies Act 1979.

A. Nature of a Misrepresentation Cause of Action

In connection with the formation of contracts, an action for misrepresentation must be brought under the Contractual Remedies Act 1979. This legislation deals with the effect of pre-contractual statements. Any misrepresentation inducing entry into a contract is redressable in damages as of right, as if the false statement were a term of the contract that has been broken.

A misrepresentation may be broadly defined as an erroneous statement of fact made to one contracting party, at a time prior to that party's entry into the contract, regarding some existing fact or past event. A claimant must show that such a misrepresentation was made; that it was made by the other contracting party or his agent; that it was made to the claimant (or intended to be received by him or her); and that the misrepresentation induced the claimant to enter into the contract. [3]

This requirement for inducement is does not demand that the misrepresentation was the sole reason for the plaintiff entering into the contract. Rather, the misunderstanding created by the misrepresentation must have been one of the reasons that induced the plaintiff to contract. This is assessed objectively.[4] A representation will not be actionable if it was of a kind that no reasonable person in the position of the plaintiff would have relied on it.[5] Additionally, there is no "inducement" unless the representor intended the representee to be induced, or used language that would induce a normal person.[6]

For the purposes of this discussion, the issue of inducement is

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[3] J F Burrows, J Finn, and S M D Todd, *Law of Contract in New Zealand* (2nd ed, LexisNexis, Wellington, 2002) at 326–336.
[4] *Edgington v Fitzmaurice* (1885) 29 Ch D 459.
[5] J F Burrows, J Finn, and S M D Todd, *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at [11.2.4].
[6] *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145.

irrelevant. The focus is primarily on the first requirement, which is the existence of a misrepresentation. The element of intention, as required by the need for inducement, does not apply when determining whether a statement was a misrepresentation. The foremost issue is falsity. Was the statement, objectively assessed, untrue? The Oxford English Dictionary defines "false" as erroneous, not true or correct. Such a definition must be taken into consideration when determining liability, as falsity may exist regardless of knowledge. The enquiry into falsity is made at the time of reliance; that is when the false statement induces entry into the contract.[7]

B. Categorisation of half-truths

The general rule is that mere silence cannot amount to a misrepresentation.[8] Parties to a contract are under no obligation to ensure that the opposing parties are fully informed as to any aspect of the transaction. Thus, in *Spooner v Eustace*,[9] a vendor's failure to point out the encroachment of a building onto a neighbouring property did not amount to a misrepresentation.

However, an exception exists where the representor is under a "duty to disclose". Such a duty is imposed on contracts uberrimae fidei (contracts of utmost good faith), and where there exists a fiduciary relationship between the contracting parties. These are two very narrow exceptions, and apply primarily in narrow circumstances such as insurance contracts and in partnership agreements.

It is a conceptual mistake to treat liability for half-truths as connected to the rule against silence, or to view it as analytically dependent on the "duty of disclosure" exception. Despite popular academic and judicial commentary to the contrary, the subject matter of "half-truths" does not fall under the heading of "exceptions" to the general rule that

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[7] *With v O'Flanagan* [1936] Ch 576, 1 All ER 727.
[8] *Fox v Mackreth* (1788) 2 Cox Eq Cas 320 at 320 and 321, per Lord Thurlow.
[9] *Spooner v Eustace* [1963] NZLR 913 (SC).

silence is not a misrepresentation. Nor are half-truths to be considered "partial non-disclosure".[10] Admittedly, half-truths mislead because of what they omit to say, rather than what they do say, and thus they do involve an element of "non-disclosure" or "silence" on the part of the representor. It is arguable that the plaintiff's error is the result of the defendant's failure to speak.[11] But this does not relate to any failure of the representor to adhere to an imposed "duty of disclosure".[12]

As Bigwood argues, the objection to half-truths does not lie in an alleged "breach" of a duty to disclose sufficient information to the representee.[13] As I have previously stated, this duty to disclose applies in extremely limited circumstances. This is confirmed by Spencer Bower, Turner and Sutton, who state: "This situation is not one which involves a duty to disclose … [T]he proper place for its discussion is therefore in a work on Actionable Misrepresentation, and not in one on Non-disclosure."[14] The only operative obligation in a half-truth case is the normal obligation on all parties in pre-contractual negotiations, namely, not to mislead by their factual statements or conduct. This duty is of course imposed by s 6 of the Contractual Remedies Act.

Therefore, in all half-truth cases, the representor's statement must be viewed as itself a misrepresentation. It is not a true statement that gave rise to a duty to disclose further information. It is not an omission. Rather, the representor's omission, whether innocent or fraudulent, renders the initial statement objectively false.[15] The statement is false and misleading because it is incomplete and therefore does not tell the

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[10] Rick Bigwood "Reflections on Partial-Truths, Supervening Falsification, and Pre-Contractual Misrepresentation"(2004) 10 NZBLQ 124 at 157.
[11] Ibid.
[12] Rick Bigwood "The full truth about half-truths"?" [2006] NZLJ 114 at 116.
[13] Ibid.
[14] G Spencer Bower, A K Turner, and R J Sutton, *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in Relations of Confidence, Influence, and Advantage* (2nd ed, Butterworths, London, 1990) at 205.
[15] Ibid.

full story. The statement itself is the operative representation and, given that it is false, it constitutes an actionable misrepresentation, providing the falsity induced the contract in question.

When considering a half-truth and a purely false statement, their practical effect cannot be differentiated. Their natural effect is to unambiguously mislead or deceive the representee, or to lead them into error.[16] Both the purely false statement and the half-truth are false, and this is the essential determination for this paper.

C. Fraudulent half-truths

It is settled law that an accurate statement may nonetheless be misleading if the representor intends to mislead, and no mention is made of matters that qualify or alter the truth of the statement actually made. The half-truth creates a misleading impression because of what is unsaid – by concealing known facts, whose effect would be to make the initial statement false. Although the party to the contract may have been legally justified in remaining completely silent on the fact, by venturing to make a representation upon the matter, such a representation must be a full and frank statement, and not a partial and fragmentary account.[17]

This is illustrated by the English case of *Dimmock v Hallet*,[18] where it was held that if a vendor chooses to state that the farm for sale is let, they must not omit the further fact that the tenants have given notice to quit. This principle remains settled under the Act. In *Wakelin v RH* and EA Jackson Ltd,[19] a prospective purchaser of a lunch bar was told, by the vendor's agent, and in response to a direct question, that the nearest competition was "half a mile away", and that the council could no longer grant permission for additional lunch bars in the area. This

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[16] Bigwood, above n 10, at 129.
[17] *Oakes v Turquand* (1867) LR 2 HL 325 at 342-343.
[18] *Dimmock v Hallet,* above n 1.
[19] *Wakelin v RH and EA Jackson Ltd* (1984) 2 NZCPR 195 (HC).

statement was literally true, but nonetheless misleading, as the agent knew that nearby premises were being converted to house a competing lunch-bar business. The Judge stated: "In my opinion this is a typical case where an answer given to a specific question, although theoretically true, constitutes a misrepresentation for the reason that it does not indicate the true position." [20] The representor had painted an erroneous picture to the plaintiffs.

In the recent decision of *Thompson v Vincent*,[21] the Court of Appeal discussed half-truths. In this case the Thompsons sold a motel business, comprising a 20-year lease of a newly constructed block of units. The motel complex was marketed as having 24 units, when in fact there was planning consent for only 12. The purchasers (the Vincents) alleged misrepresentation. The Court stated: [22]

> We leave open the question whether, in absolute terms, this was a situation of duty to speak. If the vendors had said nothing whatsoever as to unit numbers, caveat emptor principles might apply. The present was not a case of complete silence. Nor was it a contract uberrima fides. It was, quite simply, a situation of half-truth, silence as to the other half rendering what was said deceptive. It was a half-truth to say the complex had 22–24 units without going on to say there was planning consent for only 12 of that number. There was, as the point sometimes is put, a "material distortion". A half-truth is an untruth. What was said was wrong.

It is thus evident that a half-truth is an actionable misrepresentation because what was said is wrong. This is settled law. However, the role of fraud in a half-truth case is yet to be determined.

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[20] Ibid at 197.
[21] *Thompson v Vincent* [2001] 3 NZLR 355 (CA).
[22] Ibid at [70].

D. Innocent half-truths – should fraud be a requirement for liability?

In the vast majority of half-truth cases the representor knew of the existence of a fact, and failed to disclose it, presumably in an act of deliberate concealment. In other words, most half-truths involve an element of fraud.[23] But is fraud a necessary requirement before a half-truth can be deemed an actionable misrepresentation under the Act?

Fraud is deemed as such by Potter J in *Ladstone Holdings v Leonora Holdings Ltd.*[24] In that case a property was represented as "presently available for development".[25] After contract formation it was discovered that there was a privately owned ceramic tunnel running under the land. The purchaser had not been told of the existence of the tunnel, as the vendor was unaware of it. The purchaser alleged, inter alia, that "presently available for development" constituted a misrepresentation, because it was made untrue by the omission of the existence of the drain.

It was held that the undisclosed facts regarding the drain did not render the initial representation untrue.[26] Redevelopment would be hampered and delayed by the drain, but the property was still available for redevelopment.[27] There was no misrepresentation at all. However, Potter J went on to discuss liability for misrepresentation and half-truths. She stated: [28]

> It is arguable that because under s 6 of the Contractual Remedies Act a misrepresentation can be innocent or fraudulent, then if the representor's statement is in fact false it is irrelevant whether or not the representor knew of the

[23] Burrows, Finn, and Todd, above n 5, at [11.2.1].
[24] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2.
[25] Ibid at [33].
[26] Ibid at [51].
[27] Ibid at [43].
[28] Ibid at [53].

> undisclosed facts (see Law of Contract in New Zealand at p 333). I do not accept that argument.

Various aspects of Potter J's reasoning will be examined in turn.

1. The Purpose of the Act and the Common Law

Potter J reached her conclusion by stating: [29]

> It would not serve… the policy of the Act…if non-disclosure of facts unknown to the representor could constitute a misrepresentation, whether innocent or fraudulent, under s 6.

Therefore, the policy and reasoning behind the Contractual Remedies Act 1979 must be investigated, to determine whether in fact Potter J's conclusion is correct.

(a) The Position at Common Law

The current liability for innocent misrepresentations differs greatly from the previous position. At common law, misrepresentations were governed by a complicated and strange amalgam of law and equity, and of contract and tort.[30] If a statement could be treated as forming part of the contract, the representee could sue for damages for breach of contract. Additionally, the misrepresentation might be treated as forming a collateral contract, and therefore damages were available for its breach. If the representation had been made fraudulently, the representee could have a claim for damages under the tort of deceit, and would be allowed to rescind the contract at common law or in equity. If the representation had been made negligently, relief could be sought under the tort of negligent misstatement. [31]

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[29] Ibid at [55].
[30] Burrows, Finn, and Todd, above n 3, at 324.
[31] *Hedley Byrne v Heller* [1964] AC 465 (HL).

If the representation was innocent, that is, made without negligence or fraud, the remedy lay in equity only. The representee could not recover damages; instead, they had to choose whether to rescind the contract or perform it, without compensation for the loss arising from the misrepresentation.[32] The Court of Chancery could order rescission regardless of whether the misrepresentation was innocent or fraudulent. As stated in *Derry v Peek*: [33]

> Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.

The availability of rescission was justified either because the representor should have found out the full truth before speaking his fragmentary words, or else he acted "morally delinquently" by resisting the claim after discovery of the true position.[34]

However, rescission was not always an adequate remedy. It could be lost in several ways, for instance if it was no longer possible to restore the parties to their original position. A precondition to rescission being available was that performance of the contract could in fact be reversed. As such, the representee must have been able to return to the representor whatever he received under the contract.[35] Additionally, rescission ceased to be available for a non-fraudulent representation if the representee delayed too long after the time of the contract before claiming the remedy.[36] Such a lapse of time could be taken as evidence of affirmation of the contract, or it could be a defence to rescission in

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[32] F Dawson and D W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) at 3.
[33] *Derry v Peek* (1889) 14 App Cas 337 at 359 per Lord Herschell.
[34] Bigwood, above n 10, at 156.
[35] J Cartwright *Misrepresentation, mistake and non-disclosure* (2nd ed, Sweet & Maxwell, London, 2007) at 107
[36] Ibid at 104.

its own right.[37] The right to rescission for innocent misrepresentation was also severely limited by the rule in Seddon's case, which barred rescission if the contract was executed on both sides. Such a rule was arguably unfair, as often the representee would not discover the falsity of the representation until after the contract had been executed.[38]

Additionally, rescission could impose a liability upon the representor that was disproportionate to the importance of his assertion. This led to the anomaly that the remedy of rescission was available for a minor innocent misrepresentation, when damages would have been more appropriate. The 1967 Contract and Commercial Law Reform Committee argued that financial adjustment would bring about a more proper settlement.[39]

(b) Philosophy behind the Contractual Remedies Act 1979

The Act implemented the 1967 Contract and Commercial Law Reform Committee report on Misrepresentation and Breach of Contract. The Committee recommended that damages should be recoverable for both innocent and fraudulent misrepresentation, whereas previously damages had only been available for fraudulent misrepresentation. Such recommendation was adhered to 11 years later in the Committee's further report on misrepresentation and breach of contract, where they concluded that the intervening years had not affected the need for reform.[40]

Where a person has made a representation that induces another to contract with him, he should be responsible for the accuracy of the

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[37] N C Seddon and M P Ellinghaus *Cheshire and Fifoot's Law of Contract* (9th ed, LexisNexis Butterworths, Chatswood (NSW), 2008) at 527.
[38] Ibid, at 539.
[39] Contracts and Commercial Law Reform Committee *Misrepresentation and Breach of Contract: Report* (2nd ed, Govt. Print, Wellington, 1978) at [7.1(c)]
[40] Contracts and Commercial Law Reform Committee "Further report on misrepresentation and breach of contract" in *Misrepresentation and Breach of Contract: Report* (2nd ed, Govt. Print, Wellington, 1978) at [3] and [4].

representation, regardless of fault.[41] This was the philosophy behind the statutory liability for innocent misrepresentation. The Contract and Commercial Law Reform Committee was strongly opposed to the intrusion of negligence. They stated:[42]

> It is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given. It seems to us that the proper as well as the traditional approach is to look not a whether there was any fault on the part of the representor but at the expectations of the representee that naturally arise from the undertaking.

Under the heading "damages for innocent misrepresentation", the 1967 report stated "we are all agreed that innocent misrepresentation should be remediable by an award of damages".[43] The reasoning behind this conclusion was twofold. First, the drastic nature of rescission was considered inappropriate, as unwinding the contract was not always the aggrieved party's preferred remedy,[44] and, as discussed, often too extravagant a penalty upon the misrepresentor. Secondly, an award of damages "is a more business-like solution to many cases".[45]

In the explanatory note to the Contractual Remedies Bill 1978 it is stated that the proponents of the Act hoped to rationalise and simplify the law, by giving substantially the same remedies for an inducing misrepresentation as for breach of contract.[46] The principal effects of the Bill are listed; the first being that damages may be claimed for innocent misrepresentation as well as fraudulent.[47] It appears evident, then, that the inclusion of innocent misrepresentations was to be

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[41] Dawson and McLauchlan, above n 32, at 12.
[42] Contracts and Commercial Law Reform Committee, above n 39, at [9.4.3].
[43] Ibid at [13.1].
[44] However it was the only remedy available.
[45] Contracts and Commercial Law Reform Committee, above n 39, at [9.4.3]. The Committee does not expand on this concept of "business-like".
[46] Explanatory note to the Contractual Remedies Bill 1978
[47] Ibid.

considered as a substantial change in the law.

Therefore, in 1979, the Contractual Remedies Act was passed, with s 6(1) expressly stating that the same remedies are available for breach of an innocent misrepresentation, as for a fraudulent one. Since the enactment of the Contractual Remedies Act there has been a further development, the passing of the Fair Trading Act 1986. This makes alternative remedies available for misrepresentation, and thus is a useful analogy, as I will discuss later. Issues as to liability under the Fair Trading Act will often arise in tandem with, or intermingled with, enquiries as to liability under the Contractual Remedies Act 1979.

(c) The Position under the Act

The enactment of the Contractual Remedies Act 1979 means that the law on remedies for pre-contractual statements is thus governed substantially by statute in New Zealand. The main statutory remedy for both fraudulent and innocent misrepresentations is now damages, with the misrepresentation to be treated as if it were a term of the contract that has been broken. The common law availability of damages for deceit or negligence is removed.[48] This means the type of misrepresentation is irrelevant when assessing liability. Dawson and McLauchlan state that if a representor deliberately fails to tell the full truth, this is a case of fraudulent misrepresentation.[49] If they did not know that which they failed to disclose, and did so innocently, it is a case of innocent misrepresentation. In other words, the intention to deceive determines "not the fact of misrepresentation, but the type of misrepresentation. Of course, in the view of s 6, the latter issue is no longer important."[50]

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[48] Ibid at clause 6. At least as between the parties to the contract in question.
[49] Providing they intended to mislead.
[50] Dawson and McLauchlan, above n 32, at 23. Note that this is taken from a discussion of subsequent falsifying events (which is grouped with half-truths) but is equally applicable in a half-truth situation.

(d) What was Potter J referring to?

Given the reasoning and philosophy behind the Act, the "policy of the Act" cannot be said to deem inadvertent half-truths non-actionable. It rather suggests otherwise. It is possible that Potter J was instead referring to Parliament's intention to preserve the pre-Act conception of an actionable "misrepresentation".[51] Unlike s 7, s 6 does not purport to be a code. It is generally accepted that the common law remains relevant to determine whether a statement amounts to a misrepresentation under the Act. [52] As the Court of Appeal has stated:[53]

> It is only partly true that the Act "sweeps away" the previous common law. In significant areas it builds upon it, as can be seen by the continued use of common law concepts such as "misrepresentation".

Furthermore, the 1967 report, under the heading "damages for innocent misrepresentation", expressly states that "in this context the terms 'representation' and 'misrepresentation' are intended to have their common law meanings".[54]

If this is what Potter J was referring to, the question therefore becomes, would an inadvertent half-truth, on ordinary common law principles, be an "innocent" misrepresentation and thus have justified rescission of the contract in equity?[55] The purpose of the section was not to create sanctions for pre-contractual misrepresentations where none existed at common law.[56] In other words, one must look to the common law to define "misrepresentation"; although the context of the enquiry is somewhat different, its relevance now in determining

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[51] Bigwood, above n 12, at 114.
[52] *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 537.
[53] *Thompson v Vincent*, above n 21, at [86].
[54] Contracts and Commercial Law Reform Committee, above n 39, at [13.3].
[55] Bigwood, above n 12, at 115.
[56] Contracts and Commercial Law Reform Committee, above n 39, at [13.3].

liability in damages.

Given that half-truths, at least fraudulent ones, are deemed misrepresentations under the common law,[57] Potter J's reasoning is once more sparse, and arguably erroneous.

Conclusion

Potter J's reference to the "policy of the Act" does nothing to bolster her argument against liability for inadvertent half-truths. It does rather the opposite. At common law the sanction of rescission acted to assist victims of wholly innocent representations, and while the sanction now available is widely removed from this position, the Act was not intended to change the meaning of "misrepresentation". The recognition of liability for innocent half-truths is consistent with the reasoning behind the pre-Act remedy for innocent misrepresentation.[58] Likewise, it evident from the 1967 Contract and Commercial Law Reform Committee report that the Contractual Remedies Act was enacted to assist victims of innocent misrepresentations, rather than working to their detriment. [59]

Bigwood is disinclined to determine the question of legal liability for inadvertent half-truths by reference to the spirit of the Act, or to Parliament's intention to distinguish between innocent and fraudulent untruths.[60] Rather, the decisive question is whether such misrepresentation would have justified rescission at common law.[61] Although such a determination is essential, it is submitted that the

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[57] *Oakes v Turquand*, above n 17. The position of innocent half-truths at common law has not been authoritatively settled, but Potter J makes no reference to any such case law.

[58] Bigwood, above n 12, at 115.

[59] See Contracts and Commercial Law Reform Committee, above n 38, at [13.3], assistance by offering a better remedy, that would be more readily available.

[60] Bigwood, above n 10, at 155-156.

[61] Ibid.

intention of Parliament and the 1967 report are a fundamental indication as to how this issue should be resolved. The Committee's determination to provide a more adequate remedy for innocent misrepresentation suggests that liability should attach for inadvertent half-truths. However, the decisive determination is indeed whether a false representation was actually made.

1. Potter J's incorrect application of *Savill v NZI Finance*

Potter J's reasoning also largely rests upon a quote from Hardie Boys J's judgment in *Savill v NZI Finance*:[62]

> Not only must the representation have caused the representee to enter into the contract but also the representor must, either in fact or in contemplation of law have intended to cause him to do so … I cannot think that the legislature intended such a change, which would make the test of inducement a purely subjective one, judged from the point of view of the representee … Therefore I consider that it remains the law that it is not enough for a party to say that a representation caused him to act in a particular way. He must also show either that the representor intended him to do so, or that he "wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did."

However, Potter J's reliance on this quote is misguided. The reference to "the test of inducement" is clear. In the light of this, it appears evident that Hardie Boys J was referring to the element of "inducement", as required by a misrepresentation cause of action. Additionally, the leading textbook on contract law also reproduces Hardie Boys J's quote under the heading "inducement".[63] As I have previously stated, the issue of inducement is separate from the initial

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[62] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2, at [54]; quote is from *Savill v NZI Finance Ltd,* above n 6, at 145.
[63] Burrows, Finn, and Todd, above n 5, at [11.2.1].

enquiry as to whether there is a misrepresentation.

Hardie Boys J's analysis is accurate, as it applies to this separate element of the misrepresentation enquiry. In S*avill v NZI Finance*,[64] the appellants were sued on a guarantee. They claimed they were induced to sign the guarantee by a representation, made by the respondent's solicitor, that he was satisfied with a letter stating that a collateral transaction was unconditional. The issue was whether it could be said that Mr Levin (the solicitor) intended the Savills to act upon his statement, or could be held to have so intended because his words were calculated to have that result. Hardie Boys J held there was no ground for concluding that a reasonable person would have thought that Mr Levin meant for them to execute the guarantee on the strength of what he said.

In the light of this, Potter J's reference to Hardie Boys J's quote must been seen as an assertion that to make innocent half-truths actionable would be inconsistent with the need for intention when assessing inducement. Such an assertion is deeply flawed. Providing it can be shown that the representor intended the representee to rely on the literally true part of the statement to induce entry into the contract (or he wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did), and the representee was induced, Hardie Boys J's concerns are met.[65] For example, in *Thompson v Vincent* a statement that the unit block comprised 24 units was intended to induce the purchasers into entering the purchase agreement. The sellers did not intend to the statement to be misleading, but this was deemed irrelevant.[66]

Therefore, Hardie Boys J's quote does not demand an objective intention to mislead or deceive by one's fragmentary statement as a

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[64] *Savill v NZI Finance Ltd,* above n 6.
[65] Bigwood, above n 12, at 114.
[66] *Thompson v Vincent*, above n 21, at [72].

precondition to liability under s 6 of the Contractual Remedies Act.[67] It is confined to a requirement of intention merely to induce entry into the contract by what was actually stated. In referring to *Savill v NZI Finance*, Potter J has not bolstered the argument in favour of making inadvertent half-truths non-actionable. Rather, by referring to the need for intention in a completely separate enquiry, her reasoning appears, with respect, somewhat awry.

2. Other Case Law

In giving her conclusion, Potter J makes no reference to any other case law that deals with innocent half-truths. It is imperative that a significant body of such case law be discussed because, as mentioned, Parliament, in enacting s 6, did not intend to alter the fundamental nature of liability for misrepresentation.[68] Given that there is no definitive law as to whether an inadvertent half-truth attracts liability, the weight of obiter statements in case law will likely be a significant factor in the determination of this issue.

In *Ware v Johnson*,[69] the purchaser of a failed kiwifruit orchard business alleged that the vendor had made a pre-contractual statement that constituted a misrepresentation by way of a half-truth. The vendor's representative, Mr Johnson, had represented that the vines would produce their first crop in May 1982 (as would be the normal expectation if they were in good health), and had stated that the kiwifruit vines had been sprayed with herbicides normally used on kiwifruit, without saying that Krovar, a harsh herbicide, had also been used.[70] Prichard J concluded that, on the facts, misrepresentation was not made out, but still offered obiter as to the issue of knowledge. The Judge quoted from Spencer Bower and Turner, Actionable

[67] Bigwood, above n 12, at 114.
[68] They merely wished to alter the remedies available.
[69] *Ware v Johnson,* above n 52.
[70] Ibid at 537.

Misrepresentation:[71]

> But there are other cases where in the course of the negotiations the party has let fall something which, whether he so intended or not, he immediately perceives to have a delusive effect on the mind of the representee, and where, by not correcting the delusion, he is deemed to confirm and perpetuate it, and so to misrepresent.

This led Prichard J to conclude:[72]

> It comes back to a question of whether there was a duty to say anything further; and that, in turn, depends upon whether the representor appreciates that what he said, in conjunction with what he has not said, has misled or will mislead the representee unless the necessary correction is made.

However, the impact of this case and its accompanying quote is somewhat lessened by academic criticism. Bigwood notes the discernible inconsistencies in Spencer Bower and Turner's approach to actionable misrepresentation via partial-truths.[73] There is no mention of knowledge in the authors' encapsulation of their discussion dealing with partial-truth-telling. Additionally, Burrows notes the influence of Spencer Bower and Turner on cases, particularly *Ware v Johnson*, and remarks that the requirement of fraud is somewhat alien to the spirit of s 6, and also to the overriding importance of reliance evinced by the other cases.[74]

Other obiter statements also collaborate Potter J's conclusion. In a

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[71] Quote is from Spencer Bower and Turner *"Actionable Misrepresentation"* (3rd ed, Butterworths, London, 1974) at 99-100. Emphasis added.
[72] *Ware v Johnson,* above n 52, at 539. Emphasis added.
[73] Bigwood, above n 10, at 154.
[74] J F Burrows "The Contractual Remedies Act 1979 – Six Years On" (1986) 6 Otago LR 220 at 224.

2010 application for summary judgment it is stated:[75]

> The plaintiffs also invoke the doctrine of misrepresentation by silence or half-truth. They claim that the failure to disclose the Transit proposals meant the express statements were a half-truth i.e. that what was left unsaid (the existence of the Transit proposals) rendered the express statements misleading. For summary judgment purposes, it was accepted the plaintiffs would be required to prove the defendant had knowledge of the undisclosed fact.

Although it has very limited precedential value, this quote is relevant given its recency. However, the Judge, like many academics, appears to have mistakenly equated "knowledge of the undisclosed fact" with fraud. As previously discussed, knowledge is separate from the determination of whether there was an intention to mislead. Therefore, while the Judge's terminology may be mistaken, it suggests that at least some judges believe that a mental state akin to fraud is required. It confirms, at least, the unsettled nature of the law in this area, and emphasises the need for clarification.

Having considered a selection of case law that suggests inadvertent half-truths are not misrepresentations, one must now consider those that suggest otherwise. In *King v Wilkinson*[76] the purchasers of a property brought a claim under s 6 of the Contractual Remedies Act. They claimed that the position of the fence misrepresented the property's boundary, and the Judge held this to be an actionable misrepresentation. However, the Judge, in obiter, also considered a statement made by the defendant's real estate agent. The question of boundaries was raised by the plaintiffs, who asked the agent whether the fence constituted the boundary. The agent replied, pointing at the fence on the eastern boundary, that the fence represented the

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[75] *Draper v Pegasus Town Ltd* HC Christchurch CIV-2008-009-3823, 17 February 2010 at [32].
[76] *King v Wilkinson* (1994) 2 NZ ConvC 191,828 (HC).

boundary. Although this was accurate regarding the eastern fence, the agent's statement needed qualification as to the true position of the southern boundary. As regards this half-truth, the Judge stated, albeit obiter: [77]

> The agent was undoubtedly innocent in saying and indicating that the boundaries of the property were as fenced. That is immaterial because of the provisions of the Contractual Remedies Act 1979.

In *Adele Holdings v Westpac Finance Ltd* [78] it was argued that the presence of a Transcabin on the land for sale was one of the factors that induced the plaintiff to enter into the contract, believing the structure to form part of the land. However, the Transcabin was a chattel. The defendant denied liability on the basis that they had no knowledge of the fact that the cabin was a chattel only. Doogue J stated that "it is clear that it was an innocent misrepresentation, but, in my view, it is nonetheless a misrepresentation".[79] The Judge would have found for the plaintiff on this issue, had it been necessary to do so.

Returning to the case of *Thompson v Vincent*,[80] the Court of Appeal stated:[81]

> The Thompsons are correct that their state of mind in relation to the representation – fraudulent, negligent, or otherwise – is not relevant in light of s 6. The Judge's finding that Mr Thompson "well knew" what he said was wrong is not relevant to the existence or absence of misrepresentation (although not entirely irrelevant to other discretionary matters such as interest and costs).

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[77] Ibid at 191,832-191,833.
[78] *Adele Holdings Ltd v Westpac Finance Ltd* (1988) ANZ ConvR 20 (HC).
[79] Ibid at 22.
[80] *Thompson v Vincent*, above n 21.
[81] Ibid at [72].

This explicit statement from the Court of Appeal in 2001 is arguably detrimental to Potter J's argument. Unlike in *Ladstone Holdings*, the Court in this decision was dealing with a half-truth, and held that there was a misrepresentation as pleaded.[82]

One case that deserves considerable attention is *Clarkson v Whangamata Metal Supplies Ltd.*[83] In that case the purchasers of land alleged misrepresentation, as a structure (a quarry) on the land encroached upon adjoining crown-owned property. The plaintiff purchasers claimed that the encroachment was a breach of an implied term, a breach of the Contractual Remedies Act, and a breach of the Fair Trading Act. Venning J found an implied term that the quarry sold under the agreement for sale and purchase was located on the property described in the agreement.[84] Therefore, the vendor was in breach of this term.

It was therefore strictly unnecessary to consider the alternative causes of action that dealt with encroachment (that is, liability under the Contractual Remedies Act and the Fair Trading Act). However, Venning J continued, in obiter, to conclude on these issues, in deference to counsel's submissions.[85]

The nature of the representation was in dispute. The plaintiff submitted that the representation was by positive conduct, specifically the placement of the pit and of the crushing plant. The defendants treated the representation as one by silence. Venning J held that the pit and crushing plant were described as assets of the property in the sale and purchase agreement, therefore the physical presentation of the property in the agreement constituted a representation that the pit and crushing plant were within the boundaries of those properties.[86] The

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[82] Ibid at [75].
[83] *Clarkson v Whangamata Metal Supplies Ltd* HC Auckland CIV-2003-404-6869, 8 June 2006.
[84] Ibid at [51].
[85] Ibid.
[86] Ibid at [52].

Judge stated: [87]

> In my judgment the representation was made, not by silence, but rather, by positive conduct, as the plaintiff submitted. More accurately the positive conduct was a half-truth: the defendants were silent as to the true boundaries … The defendants' silence can be construed as positively affirming the misconception which the physical presentation of the property formed: *King v Wilkinson* (1994) 2 NZ ConvC 191,828.

Thus, it is clear that Venning J was dealing with a half-truth situation. Additionally, it was an innocent half-truth, as the defendants did not know of the encroachment. The defendants naturally relied on Potter J's judgment in Ladstone to absolve themselves of liability. Venning J did not accept this, and went further to criticise Potter J's reasoning. This quote is essential to the deliberation contained in this paper, and thus is reproduced in its entirety: [88]

> In *Ladstone* Potter J held that the representation by silence generally needs to be a deliberate nondisclosure of the fact known to the representator (see paras 52-55). In reaching that conclusion Potter J referred to the objective approach advocated by Hardie Boys J in *Savill v NZI Finance Ltd* [1990] 3 NZLR 135. The reasoning in *Ladstone* has been criticised: see Professor Bigwood "The full truth about half-truths" [2006] NZLJ 114. In the article Professor Bigwood averts to the fact that the objective approach of Hardie Boys J in *Savill* relates to the inducement aspect of s 6 of the Contractual Remedies Act rather than the representation aspect which was the matter before Potter J and is the matter before this Court. It is strictly unnecessary for this Court to resolve the issue but in my judgment there is force in Professor Bigwood's argument that the reliance by the Judge in *Ladstone* on the objective approach

[87] Ibid.
[88] Ibid at [53].

> was mistaken. Half-truth cases involve both silence and positive representation. Innocent half-truths are not simply representations by silence. The approach taken in Ladstone, that for there to be a misrepresentation by silence would generally require deliberate nondisclosure of a fact known by the representator, may not be applicable to innocent half-truths.

This succinct statement has much to recommend it. The High Court confirms my previous discussion of *Savill* and the requirement for intention in the inducement enquiry. Venning J goes as far as to state that Potter J's reliance on Hardie Boys J's quote in *Savill* was indeed mistaken. The Judge concludes that innocent half-truths may not require deliberate non-disclosure.

It is submitted that Clarkson should be taken as decisive on this matter. The High Court, albeit obiter, offers a well-reasoned opinion suggesting that inadvertent half-truths are capable of attracting liability. The leading contract textbook compares *Ladstone* with Clarkson, and states, in reference to Clarkson, "it is submitted that this view is the preferable one".[89]

Given the discrepancies between the decisions I have discussed, liability in this area remains unsettled. However, the decisions in favour of liability for inadvertent half-truths outweigh the alternative, both in quantity and calibre of reasoning. The culmination of decisions such as *Thompson v Vincent* and Clarkson suggest that any decisive decision on this issue will feasibly purport to create liability for inadvertent half-truths.

3. Fair Trading Act 1986 and Trade Practices Act 1974 (Cth)

Having discussed liability for inadvertent half-truths under the Contractual Remedies Act 1979, it is instructive to consider the position under the Fair Trading Act 1986. Section 9 of the Fair

[89] Burrows, Finn, and Todd, above n 5, at [11.2.1].

Trading Act states: "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."[90] The Act is clearly apt to cover any conduct that could be classified as a misrepresentation for the purposes of the Contractual Remedies Act 1979, and thus it is arguable that inadvertent half-truths are capable of also attracting liability under s 9 of the Fair Trading Act 1986. Thus, the issue of half-truths must be considered under the Fair Trading Act 1986, to assist in determining the position under the Contractual Remedies Act.

In *Des Forges v Wright*,[91] a s 9 claim was brought, as the seller of a distribution agreement (Wright) had failed to inform the purchasers that a major supplier was for sale. Wright had no knowledge of that fact. On appeal it was argued that knowledge is irrelevant for the purposes of a claim under the Fair Trading Act, and thus its absence should not defeat a s 9 claim. Elias J noted that an omission may be misleading or deceptive conduct, and stated "the question whether conduct is misleading or deceptive is substantially a question of fact and degree".[92] Intention to mislead or deceive is irrelevant. However, this is qualified by her statement that no policy of the Act would be served by imposing liability for a wholly unconscious omission.[93] In *Ladstone Holdings*, Potter J heavily relies upon this statement when reaching her conclusion.[94]

Although Elias J's statement regarding a "wholly unconscious omission" may initially seem to deem innocent half-truths as non-actionable, it is essential to note that a half-truth must not be categorised as an omission. A half-truth attaches liability because what is said is misleading, as it has not been qualified. Bigwood notes that Elias J's holding regarding wholly unconscious omissions should only

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[90] Fair Trading Act 1986, s 9.
[91] *Des Forges v Wright* [1996] 2 NZLR 758
[92] Ibid at 764.
[93] Ibid at 766.
[94] *Ladstone Holdings Ltd v Leonora Holdings Ltd,* above n 2, at [67]. Potter J's conclusion is that innocent half-truths are non-actionable.

apply to pure omissions, not half-truths. Because of this, he submits that *Des Forges* should not be followed in a case involving innocent partial-truth-telling.[95] It is submitted that such a conclusion, while in principle accurate, is unnecessary. It is arguable that Elias J did not purport to conclude that a "wholly unconscious omission" included a half-truth. Indeed, *Des Forges v Wright* does not involve a half-truth at all. In obiter Elias J stated: [96]

> It is not suggested by Mr Des Forges in his evidence that Mr Wright made any explicit representation as to the continuation of the business in its present form. If such representation had been made, at least where there was no basis for it, it could well constitute misleading or deceptive conduct even though innocent in the sense that the fact that it was wrong was not known.

Elias J was dealing with a situation of pure silence, and clearly held that no liability should attach. However the above quotation suggests that this is not the case for half-truths. It is arguable that Elias J's reference to an innocent representation, which the representor does not know is wrong, can logically extend to include a half-truth. Admittedly there is a "basis" for half-truths, as that which is said is accurate, but is deemed inaccurate by what is unsaid. However, as discussed, when considering a half-truth and a purely false statement, their practical effect cannot be differentiated. Therefore, Elias J's statement can reasonably extend to include half-truths, as well as baseless innocent representations.

Proceeding on this assumption, an erroneous half-truth creates liability, even if the omitted facts are unknown.[97] However, where no positive representation is made at all, *Des Forges v Wright* naturally shows that there will be no liability. In adherence to the previous assumption,

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[95] Bigwood, above n 12, at 116.
[96] *Des Forges v Wright*, above n 91, at 766.
[97] W Pengilley "Section 52: Can the Blind Mislead the Blind?"(1997) 5 TPLJ 4 at 14.

Potter J's reliance on *Des Forges v Wright* is mistaken. Indeed, Bigwood confirms that Potter J's reliance on Elias J's statement regarding a "wholly unconscious omission"[98] does not lead one to conclude that innocent half-truths are non-actionable. This is confirmed in Clarkson, where Venning J stated: [99]

> In *Des Forges v Wright* [1996] 2 NZLR 758 the Court held that there should be no liability for an omission which is wholly unconscious. Half-truths may sometimes be wholly unconscious but they are not wholly omissions.

Therefore, Venning J found that there was an argument that the defendant's inadvertent half-truth would constitute misleading and deceptive conduct under the Fair Trading Act.[100] Given our previous assumption, such a conclusion was consistent with, rather than contrary to, the decision of *Des Forges v Wright*.

Thus, it is arguable that an inadvertent half-truth is capable of attracting liability under the Fair Trading Act. It is submitted that such a conclusion bolsters the argument for the liability of half-truths under the Contractual Remedies Act. As discussed, mere silence cannot constitute a misrepresentation for the purposes of either Act. Additionally, it appears that an inadvertent half-truth can constitute misleading conduct under the Fair Trading Act, which suggests liability must also attach under the Contractual Remedies Act.

In *Ladstone Holdings v Leonora Holdings Ltd*, Potter J considered Fair Trading Act liability and discussed *Des Forges v Wright*. Her obiter discussion centred on the theoretical possibility that "presently available for development" constituted an inadvertent half-truth.[101] In

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[98] *Des Forges v Wright*, above n 91, at 766.
[99] *Clarkson v Whangamata Metal Supplies Ltd*, above n 83, at [55]-[56].
[100] Ibid at [56].
[101] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2, at [51]. Potter J held that there was no misrepresentation at all, thus this discussion is in obiter.

such an instance, Potter J held that there would be no liability under the Fair Trading Act. As previously explored, this was due to her reliance on Elias J's statement that "no policy of the Act is served by imposing liability for an omission that which is wholly unconscious".[102] As discussed, this quote from *Des Forges v Wright* does not purport to equate inadvertent half-truths with omissions. When coupled with the discussion by Bigwood and the decision in Clarkson, it is evident that Potter J's reliance on this quote is incorrect.

Additionally, when Potter J recites Elias J's "wholly unconscious" point, she changes the wording. Potter J states "while in some circumstances silence can mislead and deceive, conduct cannot properly be regarded as misleading and deceptive which is wholly unconscious".[103] Elias J referred to 'omissions', not conduct. As discussed, the use of the word 'omissions' is the reason why Elias J's statement does not apply to half-truths. A half-truth is not an omission. However, conduct can be viewed as half-truth.[104] This inaccuracy is further proof that Potter J did not fully comprehend what Elias J was purporting to say. Bigwood's conclusion that subsequent courts should be slow to follow *Ladstone* is indeed sound.[105]

One can also argue by analogy to the Trade Practices Act 1974, the Australia equivalent to the Fair Trading Act.[106] Section 52 states that a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[107] As the New Zealand Court of Appeal has stated:[108]

> The category of misleading or deceptive conduct in trade

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[102] Ibid, at [65]; relying on *Des Forges v Wright*, above n 91, at 765-766.
[103] *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 2, at [65].
[104] See *Adele Holdings Ltd v Westpac Finance Ltd*, above n 78.
[105] Bigwood, above n 12, at 116.
[106] (CTH) Trade Practices Act 1974
[107] (CTH) Trade Practices Act 1974 s 52(1). Misleading conduct by *persons* is governed by separate Acts in the individual states.
[108] *Thompson v Vincent*, above n 21, at [71].

> arguably is wider than contractual misrepresentation. However, there remains a close analogy … The Australian approach [in the Trade Practices Act] is a commonsense one. It is common sense which can find equal application here [in a claim under Contractual Remedies Act].

The notion of misleading or deceptive conduct is wider than that of an actionable misrepresentation under the general law. Silence may constitute misleading deceptive conduct, even though it would fail to be considered an actionable misrepresentation.[109] However, it is apparent that silence per se will rarely ground liability under s 52.[110] Rather the majority of cases that find liability for "silence" are situations of half-truths.[111] Therefore, one can clearly breach s 52 by failing to disclose the whole truth, thus creating an erroneous position by what has been disclosed. [112] As Gilles notes, such conduct will often be able to be viewed in conventional terms as positive conduct that misleads or deceives.[113]

But is knowledge of the undisclosed facts required? Section 52 imposes strict liability, as no intention to mislead or deceive needs to be proven. It is sufficient if the conduct is objectively misleading.[114] It would therefore appear that the assumption formed from *Des Forges v Wright* applies, creating liability for inadvertent half-truths.[115] Pengilley states that such a conclusion would be consistent with all Australian authority.[116] However, the application of *Des Forges v Wright* to Australia is complicated by s 4(2)(c)(i) of the Trade Practices Act. This

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[109] *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 202.
[110] P Gilles "Non-disclosure: Trade Practices Act, s 52" (2004) 78 ALJ 653 at 664.
[111] As previous stated, half-truths are not situations of silence.
[112] Pengilley, above n 97, at 5.
[113] Gilles, above n 110, at 664. Emphasis added.
[114] Ibid at 661.
[115] See *Gregg v Tasmanian Trustees Ltd* (1997) 73 FCR 91 at 106. This is proceeding on the assumption that Elias J did not intend to make half-truths non-actionable. See previous discussion.
[116] Pengilley, above n 97, at 14.

states that refraining to do an act may constitute conduct, but such conduct must not be inadvertent. While this statutory indication is possibly identical to the conclusion reached in *Des Forges v Wright*, the difference between statutory provisions in Australia and New Zealand may make Australian application of *Des Forges* inappropriate.[117]

It is uncertain as to what bearing s 4(2) has on the issue of inadvertent half-truths. Academics believe that s 4(2) may only apply to cases of pure silence. In a half-truth case, it is argued the provision has no application, as the defendant's actions constitute a mix of refraining to act (the non-disclosure) and a representation (which is not covered by 4(2)(c)(i)). Thus, as Gilles states, "collectively the defendant's conduct is not truly a refusal to act."[118]

Alternatively, the half-truth could be split in half, thus comprising both a positive statement and, separately, an omission. By not providing additional qualifying facts, the defendant has refrained from acting, and such an act must be intentional.[119] However, Pengilley states that such an argument is "a somewhat thin straw to grasp".[120] Given my previous discussion on the nature of half-truths, it is submitted that the former view is correct, as the defendant's initial disclosure is the operative misleading statement. Therefore, the representor has not refrained from acting in the usual sense of the phrase. Indeed, in Cheshire and Fifoot's Law of Contract it is suggested that, to the extent that s 52 and s 4(2) are inconsistent, the former should prevail so that an element of deliberateness is not a necessary requirement in half-truth cases.[121] Likewise, Australian courts may be encouraged to

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[117] The position under *Des Forges v Wright* and s 4(2) is certainty the same for situations of pure silence. For example, Wright, by providing no information as to the proposed sale of the Tenderkist factory, refrained from acting, and therefore s 4(2) would ensure that he is not liable as such inaction was inadvertent. This is the same conclusion reached by Elias J.

[118] Gilles, above n 110, at 661.

[119] (CTH) Trade Practices Act 1974 s 4(2)(c)(i).

[120] Pengilley, above n 97, at 15.

[121] Seddon and Ellinghaus, above n 37, at 588.

hold *Des Forges v Wright* as applicable Australian law, as the New Zealand High Court sees its application in Australia as "beyond doubt".[122]

From the weight of available authorities, it is evident that where silence alone is concerned, the defendant must have actual knowledge of the facts he failed to disclose.[123] This is consistent with *Des Forges v Wright*, and the application of s 4(2)(c)(i). The position regarding inadvertent half-truths remains unsettled. Regardless of whether s 4(2) is applicable to half-truths, one must consider that s 9 of the Fair Trading Act is demonstrably similar to, and indeed derived from, the Trade Practices Act 1974. Thus, the exclusion of an "inadvertence" section in the Fair Trading Act suggests that the legislature intended an inadvertent failure to act as capable of attaching liability in New Zealand.

It is argued that the issue should be decided in principle, rather than a superficial discussion of the word "inadvertence".[124] When approaching the Fair Trading Act or the Trade Practices Act, academics and judges agree that the issue is substantially a question of fact and degree, in light of the circumstances.[125] In *Forwood Products Pty Ltd v Gibbett*,[126] a claim was brought under s 52 of the Trade Practices Act. The Court confirmed that it is not necessary that the misrepresentation be known by the respondent to be false or misleading.[127] However, instead of a complex discussion of inadvertence, the Court focused on the whether the defendant's conduct was misleading overall. The Court stated: "the question is whether, in all the circumstances, that conduct contravened s 52".[128] This approach must also be adopted when considering the Contractual Remedies Act, demanding a general investigation into "falsity" of the

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122 Pengilley, above n 97, at 15.
123 Gilles, above n 110, at 663.
124 Pengilley, above n 97, at 15.
125 Elias J in *Des Forges v Wright*, above n 91; Gilles, above n 110, at 655.
126 [2002] FCA 298.
127 *Forwood Products Pty Ltd v Gibbett* [2002] FCA 298 at [3].
128 Ibid at [113].

statement, rather than a strict process of categorisation and determination of knowledge.

Other Jurisdictions

It is beneficial to explore the status of inadvertent half-truths within alternative jurisdictions. In the United Kingdom, this was initially governed by the common law. Relief afforded to a representee did not extend to an award of damages, unless the representee could further show that the representation was made fraudulently, negligently or in breach of a fiduciary duty. Therefore, damages were not available for a purely innocent misrepresentation. However, the introduction of the Misrepresentation Act 1967 (UK) provided the possibility of an award of damages despite the absence of fraud on the part of the representor. It is instructive to compare s 6 of the Contractual Remedies Act with s 2(1) of the Misrepresentation Act 1967. This provision differs from the New Zealand position, as s 2(1) does not abolish the common law actions for fraudulent and negligent misrepresentation. [129] Equity and actions in tort for deceit and negligent misstatement run parallel to the Act. However, the Act provides the only recourse for purely innocent misrepresentation. Under s 2(2), damages are available for innocent misrepresentation in lieu of rescission, if it is equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused if the contract was upheld, as well as the loss that rescission would cause to the other party.[130]

In the United Kingdom, as in New Zealand, a statement may amount to a misrepresentation if facts are omitted that render that which has actually been stated false or misleading in the context in which it is made.[131] It must always be proved that the incompleteness rendered

[129] Dawson and McLauchlan, above n 32, at 13.
[130] Misrepresentation Act 1967 s 2(2).
[131] HG Beale (ed) *Chitty on Contracts* (29th ed, Sweet & Maxwell, London, 2004) at [1-016].

the initial statement fallacious and false.[132] However, the leading UK text onerously concludes that these cases of partial disclosure can either be explained as cases of actual misrepresentations, or as cases in which there is a duty to disclose certain facts by reason of the facts already stated.[133] As previously discussed, half-truths must not be categorised as depending on a "duty to disclose". This distinction is important, as the Misrepresentation Act 1967 only applies to actual misrepresentations, not breaches of duties to disclose. The text later states that cases of partial non-disclosure will normally be treated as cases of actual misrepresentation, thus falling within the Act, whereas complete non-disclosure will not. Indeed, academics accept that non-disclosure is not sufficient for a claim under s 2(1), since it refers to liability for a misrepresentation that has been "made".[134] This is consistent with New Zealand's position on mere silence.[135]

It must be asked whether fraud is required by s 2(1) of Misrepresentation Act, in relation to a claim of misrepresentation. The section states that the defendant is liable, even if he was not fraudulent, "if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently".[136] However, fraud is not a requirement. The reference to fraud is historical, and arguably an unnecessary complication in the Act.[137] It merely means that a claimant must prove all the elements of the tort of deceit except for fraud. This equates to the claimant proving the defendant intended him to act on the statement, and he did in fact act on it.[138]

The position of statutory liability in the United Kingdom appears substantially similar to that under the Contractual Remedies Act 1979.

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132 *Re Coal Economising Gas Co, Grover's Case* (1875) 1 ChD 182 at 199.
133 Beale, above n 131, at [1-016].
134 Cartwright, above n 35, at 24.
135 Mere silence is not a misrepresentation.
136 Misrepresentation Act 1967 s 2(1).
137 Cartwright, above n 35, at 246.
138 Ibid at 248.

However, the Misrepresentation Act presents one fundamental difference. An innocent representor is liable, unless he proves that he had reasonable grounds to believe, and did believe at the time the contract was made, that the facts represented were true. This statutory defence is similar to negligent misstatement, a previous remedy for a victim of an innocent misrepresentation.[139] However, there are two important differences. The burden of proof is reversed, meaning that the representor must prove they had reasonable grounds, rather that the representee having to prove the representor failed to take reasonable care. Additionally, there is no need to prove a duty of care between the contracting parties.

Is this "reasonable grounds" defence of relevance to New Zealand? Given the similarities between the two Acts, it is arguable that an innocent representor could claim they had reasonable grounds for their belief, and thus should be excused from liability under the Contractual Remedies Act. However, the Contract and Commercial Law Reform Committee report deems such an argument unsuccessful. The Committee expressly rejected the English approach. At paragraph 1.2 they state: "the changes recommended in England and now given effect to by the Misrepresentation Act 1967 do not go far enough and carry their own disadvantages",[140] and "the subject should be approached in a more fundamental way".[141] More explicitly, the Committee stated:[142]

> Our second object is against the intrusion of negligence ... [I]t is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given.

The report repeatedly rejects the English approach,[143] as "damages

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[139] *Rust v Abbey Life Assurance Co Ltd* [1978] 2 Lloyd's Rep 386.
[140] Contracts and Commercial Law Reform Committee, above n 39, at [1.2].
[141] Ibid at [1.1].
[142] Ibid at [9.4.3].
[143] Ibid at [9.4.3], [13.2].

should be available for all misrepresentations".[144] This explicit rejection, when coupled with lack of reference to "reasonable grounds" within the Contractual Remedies Act, makes it clear that this defence is not available in New Zealand. In addition, when faced with the Committee's determination to provide damages regardless of reasonable grounds for belief, the argument for inadvertent half-truths is indeed strengthened.

The common law position in Australia parallels that existing in the United Kingdom. If the representor has an absence of belief in the truth of representation, or knowledge of its falsity, the representee can bring an action for deceit. Honesty is sufficient to defeat such a claim. Thus, the remedy for innocent misrepresentation lies in equitable rescission. *Dimmock v Hallet* and *Peek v Gurney* apply in Australia, providing liability for a half-truth, when a withholding makes an active misstatement absolutely false. As the High Court of Australia stated, a contract may be set-aside in equity so long as the court can achieve practical justice between the parties.[145]

The Australia legislative position differs somewhat from the New Zealand approach. Legislation dealing with innocent misrepresentation exists only in the Australian Capital Territory (Civil Law (Wrongs) Act 2002)[146] and South Australia (the Misrepresentation Act 1972). The object of these Acts was to directly reform the common law of misrepresentation. Like New Zealand and the UK, the Acts permit an award of damages for innocent misrepresentation. However, the application of the Acts is limited to misrepresentations made in trade or business (SA) or in the course of trade or commerce (ACT).[147] Both Acts provide that it is a statutory defence to the action for damages that the representor had reasonable grounds to believe, and did in fact

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144 Ibid at [13.2], emphasis added.
145 *Vadasz v Pioneer Concrete (SA) Pty Ltd* 130 ALR 570 (HCA).
146 Civil Law (Wrongs) Act 2003 Ch 13.
147 Misrepresentation Act 1972 (SA) s 4(1) and Civil Law (Wrongs) Act 2003 Ch 13 (ACT) s 177.

believe, that the representation was true.[148]

Apart from ACT and SA, Australia thus remains governed the common law. The High Court of Australia has stated:[149]

> The court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation … The court will be less ready to pull a transaction to pieces where the defendant is innocent, whereas in the case of fraud the court will exercise its jurisdiction to the full in order.

This statement, coupled with the lack of reform in the remaining states and territories, suggests that those wronged by innocent misrepresentation are unlikely to have unmitigated access to the remedies they arguably deserve.

The position in Australia fails to shed light on the issue of inadvertent half-truths. Similarly, the United States law fails to offer any substantial assistance. In its definition of misrepresentation, the Restatement (Second) of Contracts confirms that half-truths may be as misleading as an assertion that is wholly false.[150] A statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts.

Whether fraud is a requirement within the United States is somewhat more complex. As the Restatement verifies:[151]

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148 Misrepresentation Act 1972 (SA) s 7(2)(a); Civil Law (Wrongs) Act 2003 Ch 13 (ACT) s 173(3)(a). This defence does not apply in New Zealand.
149 *Vadasz v Pioneer Concrete (SA) Pty Ltd* 130 ALR 570 (HCA) (discussing rescission for misrepresentation).
150 American Law Institute *Restatement of Contract* (2nd ed, St Paul, Minnesota, 1981) § 159.
151 Ibid.

> An assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word "not" is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences under this Chapter unless it is material.

Is this requirement for fraud or materiality required when defining a misrepresentation, or is it, like the need for intentional inducement, a separate requirement? The rule is expressed in § 164, where it is stated:[152]

> Three requirements must be met in addition to the requirement that there must have been a misrepresentation. First, the misrepresentation must have been either fraudulent or material … Second, the misrepresentation must have induced the recipient to make the contract … Third, the recipient must have been justified in relying on the misrepresentation.

Therefore, an innocent half-truth could be regarded as misrepresentation, but the additional requirements of the misrepresentation enquiry provide that such a half-truth would not be actionable unless material. The United States position offers little assistance to a jurisdiction where purely innocent misrepresentations are actionable, regardless of materiality.

Conclusion

In *Ladstone Holdings v Leonora Holdings Ltd* Potter J purported to remove the possibility of liability for an innocent half-truth. This paper has sought to examine Potter J's reasoning, to determine whether such a conclusion should represent accurate New Zealand law. For the reasons given, it is submitted that Potter J's conclusion is erroneous.

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[152] American Law Institute *Restatement of Contract* (2nd ed, St Paul, Minnesota, 1981) § 164. Emphasis added.

The element of intention, while required for assessing inducement, does not apply when determining the existence of an actionable misrepresentation. Additionally, the 1967 Misrepresentation and Breach of Contract report evidences an explicit intention to improve the remedies available for innocent misrepresentation, rather than abolishing such sanctions altogether.

However, the paramount determination is whether an erroneous statement was indeed made. As discussed, a half-truth is misleading in itself, as the statement fails to tell the full story. Such a statement should be capable of attracting liability under the Contractual Remedies Act, irrespective of fault. As the New Zealand Court of Appeal has stated, "state of mind in relation to the representation – fraudulent, negligent, or otherwise – is not relevant in light of s 6".[153] Fraud is not, and should not be, a necessary requirement before a half-truth is deemed an actionable misrepresentation under the Act. Although there is no definitive law on this issue, it is imperative that such a conclusion be made.

[153] *Thompson v Vincent*, above n 21, at [72].

THE TORRENS SYSTEM AND THE IN PERSONAM CLAIM

REBECCA ARDAGH*

Introduction

"Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place."[1]

This quote from Frederic Bastiat identifies a concept that is not often addressed when commenting on the application of property law; the idea that to have property is an inherent, natural right, in the same league as liberty and life itself. The ability of individuals to own separate property, and to be able to identify this property, is essential for the cohesion of society as a whole, over and above the intrinsic importance of property ownership to the everyday lives of individuals. The importance of this notion arguably is reflected in the significance of 'security' of title demonstrated in land statutes, case law and commentary. Giving a title holder security allows them to confidently exercise their right to enjoy the land they own without interference. However, in giving the legal owner of property too much security one runs the risk of allowing them to hide behind this, while depriving someone else of their own legitimate interests. Finding this balance between superiority of title and potential competing interests has become a controversial issue in land law, the limits of which are still undefined.

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1 Frederic Bastiat, *The Law,* (The Foundation for Economic Education: Irvington, New York, 1987) at 6.

With the introduction to New Zealand law, of the initially strict Torrens system of registration, the registered title became absolutely paramount and competing interests could not affect this. However, through time, this concept has become more flexible and avenues around this security of title ('indefeasibility'), other than those outlined in Torrens statutes, are being debated in both courts and commentary. One such avenue, known as claims in personam, is still being defined through continuing cases. In assessing the place of such a claim in a Torrens system this paper will discuss the Torrens system itself and the concept of indefeasibility as it is incorporated into this system. The in personam claim will also be examined, along with the way it is applied alongside Torrens principles to determine whether it effectively works with them or undermines them in its current form. In addition, there are suggestions for reform or improvement that will be addressed in order to gain an understanding of the future of this claim in the New Zealand Torrens system.

A. New Zealand's Torrens System

Previously, New Zealand's system of registration operated as a Deeds system. However, this system was fraught with problems as to the acquisition of the title, the validity of previous titles and the lack of security.[2] In South Australia, Sir Robert Torrens introduced a new system of title and registration into the Real Property Act of 1858.[3] New Zealand then followed suit by implementing the system in the Land Transfer Act 1870. After four consolidations of this Act, New Zealand has the same system under a new Act; the Land Transfer Act 1952. Torrens' aim in developing this system was to introduce a "cheap, simple, expeditious and accurate system of transfer of land", restoring "to its intrinsic value a large amount of property depreciated or unmarketable through defective evidence or technical imperfection

[2] Bennion, Brown, Thomas, and Toomey, *New Zealand Land Law*, (2nd ed, Wellington, 2009) at 38.
[3] Ibid.

in title".[4] This has often been cited as the aim of many Torrens statutes.[5] In a review of the New Zealand Land Transfer Act made by the Law Commission in 2008 the aims of New Zealand's Torrens statutes were to "create a register of land titles reflecting the estates in land throughout New Zealand and their encumbrances; an "indefeasible title" in the absence of fraud, with specific exceptions; as well as a public record of land transfers; a simpler, less costly system of conveyancing than the deeds system, and a means whereby compensation for loss of title due to the system could be granted by the state."[6] It can be concluded that many of the aims of these statutes are practical; to create efficiency and reliability in an area where the system has previously been inadequate to cope with demand.

In order to meet these aims there are some cardinal principles of the Act that must be upheld to allow the system to be as efficient as possible. These principles have come to be characterised as the 'curtain and the mirror' principles of land registration.[7] More specifically; the 'mirror' principle, ensuring that the register reflects the complete state of the title - in other words, 'what you see is what you get'; the 'curtain principle', that the register creates a curtain between the title and other interests lying behind the register, and any purchaser is not required to investigate any interests behind that curtain; and finally the 'insurance principle', where as mentioned, if the register does not accurately reflect the title to the detriment of a person then compensation can be

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[4] Robert Torrens, *A Handy Book on the Real Property Act of South Australia* (1862) 11 cited by Lynden Griggs, "In Personam, *Garcia v NAB* and the Torrens System – Are they Reconcilable?", (2001) 1:1 QUT *Law & Justice Journal* 76 at 77.

[5] For example, opening statement in the Report of the Real Property Law Commission in November 1861 (SA): Parl Paper No 192 (1861).

[6] Review of the Land Transfer Act 1952, Law Commission October 2008, Wellington, NZ, Issues Paper 10 at 19.

[7] Griggs, above n 4; Tang Hang Wu, "Beyond the Torrens Mirror: A Framework of The In Personam Exception to Indefeasibility", (2008) 32 MULR 672 at 673.

made by a State assurance fund.[8] Despite these being the principles behind the working of the system, it is commonly expressed that the fundamental principle of any Torrens system is indefeasibility of title[9] as this contributes to the operation of these three mentioned overarching principles.

B. Indefeasibility of Title

In *Frazer v Walker*[10] Lord Wilberforce describes indefeasibility as "a convenient description of immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration". The importance of this concept is also highlighted in the well cited dictum of Edwards J;[11] "The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world".[12] While only mentioned in two sections of the statute,[13] despite statements in *Frazer v Walker* that it does not appear at all,[14] this concept has a firm grounding in case law to do with registration. The indefeasibility focussed sections of the Act are ss 62, 63, 64, 182 and 183. In order to understand the potential exceptions to immediate indefeasibility it is necessary to examine these sections.

Section 62 states that the registered title will be paramount unless one of the four described situations exists; the title is obtained by fraud, an

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[8] Bennion, Brown, Thomas, and Toomey, above n 2 at 39
[9] Wu, above n 7 at 672.
[10] *Frazer v Walker* [1967] AC 569, at 580.
[11] *Fels v Knowles* (1906) 26 NZLR 604, at 620.
[12] Ibid.
[13] The Land Transfer Act 1952 ss 54 and 199.
[14] *Frazer v Walker,* above n 10.

earlier title exists[15], there is an omission of an easement on the title,[16] or there is a misdescription of boundaries.[17] The most controversial of these exceptions is the fraud exception as the interpretation of this is varied between cases. However, it is accepted, since the case of *Assets Co Ltd v Mere Roihi*, that to constitute fraud under the statute then there must have been actual fraud,[18] leaving equitable fraud available as a basis for a claim in personam, as will be discussed later. Section 63 protects the registered proprietor from ejectment unless, as before, there is fraud,[19] misdescription of boundaries,[20] or a prior title. However, there are additional exceptions to indefeasibility in this section including the right to a legitimate mortgagee sale of the property,[21] or the registered proprietor is a tenant under a lease and the landlord has legitimate reason to eject him,[22] where the registered proprietor will not be protected from ejectment. Section 64 guarantees to uphold the title of the registered proprietor, preventing any right that may be held over the same title to be used in a way that undermines the registered proprietor's title.[23] Section 182 is effectively the 'curtain' section, alleviating the new registered proprietor of any responsibility, unless in the case of fraud, to inquire as to previous registrations of title for that property, how the purchase money was used. It also guarantees that any notice of interests such as trusts or unregistered mortgages will not affect his title.[24] Section 183 protects a bona fide purchaser or mortgagee for value from any adverse claims arising from the fact that they derived their title from a person who was "registered as proprietor through fraud or error, or under any void

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15 The Land Transfer Act 1952 s 62(a).
16 Ibid, s 62(b).
17 Ibid, s 62(c).
18 *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210 (PC).
19 The Land Transfer Act 1952 s 63(1)(c).
20 Ibid, s 63(1)(d).
21 Ibid, s 63(1)(a).
22 The Land Transfer Act 1952, s 63(1)(b).
23 Ibid, s 64.
24 Ibid, s 182.

or voidable instrument".[25]

These sections combine to give a registered proprietor the security of title more commonly referred to as 'indefeasibility', however, interpreting them together has been difficult. As described by Salmond J the legislation was "so badly drafted… that it is difficult so to harmonize these sections"[26]. Although the exceptions to indefeasibility that were originally anticipated were named in the statutes, no other direction was given in addition to this. Because of this vague nature there is difficulty in knowing whether these exceptions should be widely or narrowly interpreted and applied. The centrality of the concept of indefeasibility to the Torrens system has been used to suggest that a strict interpretation and application is what must have been intended. J. E. Hogg made the statement that "indefeasible title means a complete answer to all adverse claims on mere production of the register".[27] However, an argument that indefeasibility is a principle is that easy to apply, that it is a direct and ready-made answer to any adverse claim is, in this author's opinion, hard to believe. In fact, it is arguable that indefeasibility was never meant to be absolute,[28] even in drafting Torrens legislation exceptions to the principle are outlined. These exceptions have been interpreted very strictly by the courts. The exception of 'fraud' contained in these sections has been interpreted to include only actual fraud, and no other (arguably more easily proved) accepted definition.[29] This strict interpretation of statutory exceptions to indefeasibility is just another example of the judicial respect for the

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[25] Ibid, s 183.

[26] *Boyd v Mayor of Wellington*[1924] NZLR 1174, 1211; Rt Hon Justice Peter Blanchard, "Indefeasibility under the Torrens System in New Zealand" in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexisNexis, Wellington:2003), at 31.

[27] J.E. Hogg, *Registration of Title to Land Throughout the Empire*, (1920) at 94 cited by L. L. Stevens, "The In personam Exceptions to the Principle of Indefeasibility," (1969) 1 (2) *Auckland University Law Review* 29 at 29.

[28] Lynden Griggs, *The Tectonic Plate of Equity – establishing a fault line in our Torrens Landscape*, (2003) 10 APLJ 21 at 21.

[29] *Assets Co Ltd v Mere Roihi,* above n 18.

principal and their unwillingness to undermine it. However, the courts do have an inherent jurisdiction in equity and have not endorsed any attempt of indefeasibility to limit that jurisdiction;[30]"that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant".[31] The tension that can be seen to exist between these two principles leads to the crux of this paper; how can indefeasibility and the courts equitable jurisdiction, namely when acting in personam, co-exist within a Torrens system?

C. Claims In Personam

1. What is the in personam claim?

According to Snell there are many different uses of the term "equity" depending on its context.[32] An equitable interest in property is a form of ownership that equity would endorse but that is not endorsed by other legal means; statute or at common law.[33] However, these equitable interests do have to arise out of some sort of obligation in order to be recognised; most commonly this is in the form of a contractual relationship, such as the equitable interest of the unregistered mortgagee.[34] When acting in personam someone has the right to go to the court, acting in equity, for a remedy or relief.[35]

Robert Torrens never anticipated the role that equity could play in his system and so any guidance or direction for applying such a claim is

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[30] Stevens, above n 27 at 30.
[31] *Frazer v Walker,* above n 10. at 585 per Lord Wilberforce.
[32] Edmund Henry Turner Snell, *Principles of Equity,* (London: Sweet and Maxwell, 1990), at 23.
[33] Diane Skapinker, "Equitable interests, mere equities, "personal" equities and "personal equities" – distinctions with a difference", (1994) 68 Australian Law Journal 593 at 593.
[34] Ibid.
[35] Ibid; Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (Butterworths: Adelaide, 1992) at 118-120, [428].

inherently lacking in original statutes. Some cases can attract compensation under s172 of the Land Transfer Act 152, upholding the original aim mentioned; that the state would be responsible for loss suffered under the system. With named exceptions to the concept of indefeasibility, and compensation for situations that are not one of these named exceptions, it was not seen that equity could be needed. Therefore, in interpreting the application of a claim, the courts focus on maintaining the aim of the statutes and therefore indefeasibility, the debate centres on the extent to which this should be upheld against all other interests. The in personam claim itself has been described as "inherently vague"[36] and that because of this its application based on a right to property would undermine indefeasibility and so the Torrens system in general.[37] However, equity plays a large role in modern society and in addition to this there are a lot of interrelated interests that can be attributed to properties, which makes the system a lot more complicated than it originally was or foreseen to be. Because of this the Torrens system has had to be flexible to react and change with society.[38]

2. How has the application of the in personam claim evolved?

There are, generally speaking, two schools of thought on how far this 'flexibility' should be able to extend concerning the potential application of claims in personam; that it should be interpreted narrowly to avoid posing a threat to the Torrens system, or that it should be interpreted more widely.[39] There is concern that a narrow approach to equitable claims can constrain the development of the law.[40] Of course law according to property operates around rights so central to society that changes in social values will readily affect the

[36] Barry C Crown, "Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*" [2002] *Singapore Journal of Legal Studies* 409 at 415.
[37] Ibid; Wu, above n 7 at 674.
[38] Griggs, above n7 at 78; *Barry v Heider* (1914) 19 CLR 197.
[39] Wu, above n 7 at 673.
[40] Ibid, at 676.

public's expectations from the law in this area. This does create an expectation that the law be able to change and develop with society. Although the statute states that a registered proprietor's title cannot be affected by notice of another interest,[41] Robert Chambers thinks that this should not be the case. "A defendant who acquires a registered interest in Torrens land from the plaintiff, with notice of the facts giving rise to the plaintiff's claim for restitution of that interest (i.e. notice that the interest is an unjust enrichment at the plaintiff's expense), should not be protected from that claim by the principle of indefeasibility".[42] Respectfully, it is this author's opinion that although the in personam claim should be interpreted widely in order to recognise the various interests that can be vested in a common title, seeking a remedy of restitution is taking the application of this claim too far. It is necessary to find a balance between indefeasibility of title and the right to bring equitable claims against the registered proprietor. As indefeasibility is qualified by provisions within Torrens statutes themselves it seems logical that some encroachment by equitable claims is also not only viable, but in some ways to be expected. However, it is the author's opinion that the most important aspect of a claim in personam, arguably what makes it acceptable in a Torrens system at all, is that a claim in personam is not a claim against the title, but a claim against the registered proprietor him or herself, arising out of conduct.[43] In a remedy of specific performance or constructive trust the courts are merely ensuring that the registered proprietor's conduct is corrected. Sometimes this can have an effect on the title, but is still granted to remedy the conduct of the registered proprietor. A remedy of restitution, however, is a remedy focussed solely on the title itself, as opposed to the behaviour leading to the claim. Because if this, it is

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41 Land Transfer Act 1952, s 182.

42 Robert Chambers, 'Indefeasible Title as a Bar to a Claim for Restitution', *Restitution Law Review* 6 (1998) 126 at 134.

43 Right Honourable Justice Andrew Tipping, 'Commentary on Sir Anthony Mason's Address' in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexiNexis, Wellington:2003), 23; S Robinson, *Claims in Personam in the Torrens System: Some General Principles*, (1993) 67 Australian Law Journal 355 at 355.

harder to see the application of this equitable remedy being able to coexist with the Torrens system without posing too large of a threat to indefeasibility of title and the system itself.

As mentioned previously, *Frazer v Walker*[44] is authority for the accepted notion that claims in personam are acceptable. However, there is still much debate as to whether these claims are an exception to indefeasibility or not. In *CN & NA Davies v Laughton,*[45] Thomas J noted that in personam "sits comfortably with the concept of indefeasibility… It is essentially non-proprietary in nature. The key element is the involvement in or knowledge of the registered proprietor in the unconscionable or illegal act or omission in issue".[46] Chambers also argues that calling the in personam claim an exception to indefeasibility is a misnomer as it does not prevent indefeasibility operating legitimately.[47] It is still commonly referred to as an 'exception' to indefeasibility, whether it technically is one or not. If it is an exception to the principle, it is still regarded as a necessary one in order to ensure that the Torrens system is fair and maintains justice, though it must always be applied in a way that limits any threat to the system.[48]

Therefore, it is seen as necessary that the registered proprietor is not given such an elevated priority over every other interest that the registered title becomes a shield from any unconscionable conduct or illegal act they may have done in acquiring the title. Protecting the registered proprietor to this extent was never Torrens' aim.[49] However, whilst attempting to uphold this justice the courts must also act so as not to undermine the principle of indefeasibility itself. This concept of

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[44] *Frazer v Walker,* above n 10 at 585.
[45] [1997] 3 NZLR 705, 712.
[46] Ibid.
[47] Chambers, above n 42 at 128.
[48] Sir Anthony Mason, 'Indefeasibility – Logic or Legend?' in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexisNexis: Wellington, 2003) at 16.
[49] Mason, above n 48.

balance between the priority of competing rights is extremely fragile and due to lack of guidance in statute many different ways of approaching different types of claims have been explored, in particular reference to claims for restitution. Chambers argues that this has lead to inconsistencies between cases and a remaining question of how to approach these claims in a satisfactory manner.[50] It is widely recognised by the courts that these claims are limited, though these limits are largely undefined.[51]

Originally its application was more strictly confined to situations where a contractual relationship existed or a trust. One reason for this, in terms of contract, is that it provides a tangible basis from which the plaintiffs can prove their rights.[52] It was also mentioned in dictum by Prendergast CJ in *Paoro Torotoro v Sutton*[53] that "there is nothing in the Land Transfer Act which, as between the trustee and the cestui que trust, puts an end to the trust. The trust is not noticed in the Register; but the cestui que trust may always in this Court enforce his rights against the trustee, although the trustee may have acquired a certificate of title".[54]

A constructive trust was created by the Courts in *Taitapu Gold Estates Ltd v Prouse*[55] where the plaintiffs and defendants had a contractual relationship for the transfer of property. The rights to minerals under the land being transferred was contained in the contract but not included in the transfer, due to a simple mistake. The court held that from the moment of the transfer the defendants held the minerals on constructive trust for the plaintiffs. The plaintiffs had a contractual

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[50] Chambers, above n 42 at 126.
[51] *Boyd v Mayor of Wellington* (1913) 32 NZLR 1149; *Tataurangi Tairuakena v Mua Carr* [1927] NZLR 688.
[52] *Paoro Torotoro v Sutton* 1 NZ Jur (NS) SC 57; *Jonas v Jones* (1882) NZLR 2 SC 15.
[53] Ibid.
[54] *Sutton,* above n 52 at 65.
[55] [1916] NZLR 825.

right to the property which created an equitable interest in the minerals; however, the equitable right to the minerals was not turned into a legal right through registration. The reasoning of the judge in this case, seems to align itself with the argument, that an equitable interest in the property created through contract is made into a legal title through registration, the part of that interest that was not recognised through registration still exists in equity with the intention that it transfer into a legal title eventually. This is similar to Tipping J's interpretation of the act of registration. He stated that registration is "a system of creating legal title through the process of registration. Prior to registration an equitable title may exist, but only the act of registration can create a paramount legal title".[56] When granting the remedy of a constructive trust in this case, Hosking J mentioned that it was not conflicting with the Land Transfer Act and that the courts often enforce obligations under contract and in concern of trust.[57] This principle has been followed in a succession of cases.[58] However, when these cases were analysed by Stevens, he also noted that these principles, though accepted in the case would not be applied where the plaintiffs themselves did not follow equitable maxims. Therefore, the equitable maxim that one must 'do equity' to receive equity still applies in cases concerning equitable interests in land and the in personam claim.

However, one noticeable development of this area of claim was when it was extended to claims by third parties to the contract. One example of this, also given by Stevens, was the case of *Shepherds v Graham*, where the claimant was a subsequent transferee. Whilst there was no privity of contract between the two parties, the original registered proprietor had still not performed their obligations as they were outlined in the

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[56] Right Honourable Justice Andrew Tipping, 'Commentary on Sir Anthony Mason's Address' in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexiNexis, Wellington:2003) at 21.

[57] Mason, above n 48 at 833; Hogg, above n 27 at 34.

[58] Stevens, above n 27 at 34 gives the examples of: *Mereana Perepe v Anderson* [1936] NZLR 47; *Shepherd v Graham* [1947] NZLR 654.

original contract. A property was to be transferred to the original transferee, agreed upon by both parties. However, due to a genuine mistake a portion of the property was left off the register, though this went unnoticed by both parties. The new registered proprietor inhabited the property completely, as if it had been transferred in the stipulated manner. It was the subsequent transferee who noticed the mistake in the register and sought to get it rectified. However, the title of the original registered proprietor was in control of the executor of her estate. The court held that because the executor had inherited the property he did not fall into the 'bona fide purchaser for value' category of the Act. Because of this a decision to allow the claim would not be contrary to the Act. Although there was no privity of contract between the two parties this would not disallow rectification of the mistake. It was held, once again, that at the time of transfer the equitable interest that still remained after the legal title had been established was held as part of a constructive trust for the claimant by the executor of the original registered proprietor's estate. In the author's opinion this also highlights the idea that claims in personam are granted with the interest of remedying behaviour of the registered proprietor. The obligations that the registered proprietor committed to are more important than the evidence of a relationship between the two parties.

In trustee cases a trust can be implied from a relationship, such as in *Congregational Church of Samoa Henderson Trust board v Broadlands Finance Ltd*[59] and *Tataurangi Tairaukena v Mua Carr*[60]. In the first case it was held that there must be something from which the court could form a constructive trust; either an express trust or a contractual relationship between parties, or an implied fiduciary relationship. In the case of *Tataurangi* a member of a committee gained a lease with the approval of the committee. The lease was to land the committee held as tenants in common. This lease was held not to gain indefeasibility as the

[59] [1984] 2 NZLR 704.
[60] [1927] NZLR 688.

member held the lease in a "fiduciary capacity as a member of the committee".[61] From this it can be concluded that originally the in personam claim was applied in cases where it could be proved that the defendant had obligations that had not been fulfilled, and could be remedied through specific performance of these obligations. However, the claims need a basis from which the equitable interest or rights of the plaintiff to the land in question can be proved, hence a contractual relationship being the usual starting point for this type of claim, though privity of contract between the plaintiff and defendant is not expressly required. A claim can also originate from a trust. These can be implied through the relationship between plaintiff and the defendant, or awarded for an express trust, as in the case of *Kissick v Black*.[62] One common ground between these two claims is that both a contract and fiduciary or trustee relationships imply a sense of obligation. However, while there were these principles there were no direct rules as to how the in personam claim was to be approached.[63] This led to the claim being applied in a broad spectrum of cases, without much consensus on guidelines for its application[64] and increased tension between the 'narrow' and 'wide' approaches to application of claims in personam.

In *Oh Hiam v Tham Kong*[65] *Lord Russel of Killowen* stated that courts can exercise their equitable jurisdiction in this area on grounds of conscience, and that they have the ability to exercise "its jurisdiction in personam to insist upon proper conduct in accordance with the conscience in which all men should obey".[66] This seems to invoke a sense of 'fairness' as being a determinant in both when and how the in personam claim should be applied. In this sense it is almost as if directions that are too strict are counter-productive when it comes to

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[61] Hogg, above n 27 at 37.
[62] (1892) 10 NZLR 519.
[63] Bennion, Brown, Thomas, and Toomey, above n 2 at 99.
[64] Chambers, above n 42 at 126.
[65] (1980) 2 BPR 9451 (PC).
[66] *Mua Carr, a*bove n 60 at 9453 and 9454.

the operation of a court acting in personam. More specifically, that the application of this claim should be on a case by case basis, in a way that relies more on a sense of justice than a strict adherence to rules that are determined for the sole purpose of aiding compliance with the principle of indefeasibility. Lyn Stevens and Kerry O'Donnell believe that flexibility is necessary in a system of indefeasibility, as without it the principle of indefeasibility itself would allow injustices to occur.[67] This supports the view that the in personam claim should at least be capable of being applied widely, but specifies that the reason for this is to prevent indefeasibility being used as a tool of injustice. This is much less broad than having jurisdiction to accept the claim in any case where conscience would allow it, as seemingly suggested by Killowen. Therefore, there are even arguments about jurisdiction within the generalised theories themselves. To the other extreme it has been stated that these remedies have "extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint".[68]

3. Current Guidelines for the Application of Claims in personam

In the recent case of *Regal Castings Ltd v Lightbody*[69] some guidelines were established for the application of the in personam claim in an attempt to regain the balance between legal and equitable rights. The first thing that was deemed necessary by the Supreme Court was that the plaintiff show that they had a cause of action, the basis of which

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[67] Lyn Stevens QC, Kerry O'Donnel, 'Indefeasibility in decline: the in personam remedies', in Grinlinton (ed) *Torrens in the Twenty-first Century*, (LexiNexis, Wellington:2003) at 152.

[68] Mary-Anne Hughson, Marcia Neave and Pamela O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict Between Purchasers and Prior Interest Holders', (1997) 21 *Melbourne University Law Review* 460 at 462 citing Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238 at 238.

[69] [2008] NZSC 87.

was either legal or equitable.[70] Tipping J then goes on to the second criteria for a successful in personam claim; that it must be unconscionable for the defendant to rely on indefeasibility gained from their title to defeat the plaintiff's interest.[71] It is important to note that here he does define 'unconscionable' as 'being against good conscience'. Unconscionability has often been a controversial point, especially for those who do not support a wide application of the in personam claim. Though the vague notion of using conscience as a deciding factor in when the claim should be applied can very possibly lead to a wide application, it is important to remember that this claim itself is an operation of equity. Its basis is focussed on the conduct of a registered proprietor and unlike statutory limitations on conduct, its operation is to prevent exploitation of privileges granted by these statutes and using them in an improper manner. Jonathan P Moore made the comment that "a vague and amorphous concept such as unconscionability would, if sufficient on its own to defeat a registered interest in land, drive a horse and buggy through the Torrens system."[72] However, he also noted that this is why it is so important that unconscionability isn't sufficient on its own. As implemented by Tipping J in *Regal Castings Ltd v Lightbody*, it is qualified by two other criteria and importantly the first criteria is one of law, as mentioned. The third criteria that limits the possible exploitation of the term 'unconscionable' is that allowing the claim must not be contrary to or undermine the Torrens system.[73] It is easy to see how these three guidelines draw on principles of previous cases, especially when it comes to the traditional contract/trust basis for a claim, the focus on the causes of action themselves and the responsibility of a registered proprietor to act responsibly in respect to the rights of and obligations they undertake in relation to others.

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[70] *Regal Castings Ltd v Lightbody* [2008] NZSC 87; [2009] NZLR 433, [157].
[71] Ibid, at [158].
[72] Jonathan P Moore, 'Equity, Restitution and In Personam Claims under the Torrens System' (Pt 1) (1998) 72 *Australian Law Journal* 258 at 260.
[73] *Regal Castings Ltd v Lightbody*, above n 70 at [160].

The surprising thing is that the evolution of the application of this claim can be generalised as having gone from a more 'strict' application; needing either a direct involvement in trust, or a contract where the parties gained privity of contract for a claim to be based, to a slightly wider application through the employment of the rationale outlined in *Regal Castings*. Since this development the law seems to have turned back to attempting to constrain the application of the claim in New Zealand. The matter of jurisdiction of courts to grant claims in personam was contested in *Ludgater Holdings Ltd v Gerling Australia Insurance Company Pty Ltd.*[74] The Supreme Court and Court of Appeal both agreed that the High Court did have jurisdiction to hear these claims, however the subject matter must be one for which they have jurisdiction. However, in terms of the application one criteria or measure of unconscionability has recently returned to employment in New Zealand courts. *Cashmere Capital Ltd v Crossdale Properties Ltd*[75] was a Court of Appeal case that recently limited the in personam claim to "positive affirmative act such as written or oral acceptance or … an implied acceptance by conduct" that "truly engages the conscience of the party whose registered priority is challenged".[76] This means that rather than the defendant's reliance on the register, it is their previous behaviour that is drawn into question and rather than simply being found to be against good conscience, they must have participated in some positive action. This was a rule first established in *Bell v Alfred Franks & Bartlett Co Ltd* [1980],[77] accepted by *Regional Securities Ltd v Christensen Potato Co Ltd* (1991)[78] and *NZ Fisheries Ltd v Napier City Council.*[79] The latter of these cases was applied *in Harman & co Solicitor Nominee Company v Secureland Mortgage Investments Nominees Ltd*,[80] which was also in the Court of Appeal. A recent application of this rule in the

[74] [2010] NZSC 49.
[75] [2009] NZCA 185.
[76] *Cashmere Capital Ltd,* above n 75 at 18.
[77] 1 All ER 356.
[78] ANZ ConvR 57.
[79] CA 173/88 24 November 1989.
[80] [1992] 2 NZLR 416.

High Court was *Bobs Cove Developments Limited v Strategic Nominees Limited*,[81] in April 2010. A Mortgagee tried to exercise its power of sale over property. However, another party had a caveat on that title arising out of an Agreement for Sale and Purchase for a portion of that property and tried to stop it from lapsing in light of the mortgagee sale. The mortgagee did have notice of this prior interest and acknowledged this before they were registered. A point this author finds worth considering in this case is that the mortgagee admits that the portion of land that is contained in the Agreement is not actually listed under the security for the mortgage. Their argument is that as part of the company's title their registered interest still extends to it, despite their knowledge of the agreement for sale and purchase, this portion of the land is not officially excluded. The judge accepted this argument. A similar case, *Centillion Investments Ltd v Hillpine Investments Ltd*[82] was decided on the basis of supervening fraud according to the knowledge of the interest. However, the judge in *Bobs Cove* preferred to decide on the grounds of the in personam claim, which he stated had overtaken this area of law.[83] It was held that the in personam claim could not be relied on as they did not reasonably argue that the interest was enough to undo the mortgagee's registered interest. According to the high threshold put forward in the Cashmere, SNL just stood by and therefore was not guilty of any affirmative conduct. Although it is arguable that accepting the existence of a previous interest in land before becoming registered and then using the register to deny the other party of that interest to the land would fall under the 'unconscionable' limb in *Regal Castings* this was not enough in *Bobs Cove*. Although the rationale behind employing the aforementioned rule was discussed in the Court of Appeal case of Cashmere this case was in fact appealed to the Supreme Court. The court did not go into any in depth discussion of the principles of the case it did mention its

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[81] CIV-2010-485-61, 26 April 2010.

[82] HC Auckland CIV-2006-404-695, 6 December 2006.

[83] Also suggested in Elizabeth Toomey, *Why Revisit Sutton v O'Kane? The Tricky Trio: Supervening Fraud; the in personam claim and Landlocked Land,* (2007) 13 CLR 263 at 276.

support for all aspects of the decision and the reasoning therein. Because of this, *Bobs Cove* applied the principle contained in the Court of Appeal case but referred to it as a Supreme Court authority.[84] However, it is respectfully the opinion of this author that the application of this rule in *Cashmere* is inherently flawed. In this case Cashmere Capital loaned money to property managers Crossdale for residential units. These were being used for the purpose of a retirement home and the residents had leases for life that were consented to by Cashmere when giving the loan. However, when the director of Crossdale became bankrupt they sought to reclaim their investment through a mortgagee sale of the units. On page 10 of the judgment the court recognises that Cashmere has consented to the leases however, the level of knowledge they had as to the terms of the leases was not recorded. The court concluded that because of this it was 'reasonable' for Cashmere to infer that the leases were short term. Therefore there was no action positive enough to warrant an application of the in personam claim. In spite of this it seems given these particular circumstances this is not a well reasoned conclusion to draw. It would seem that one would naturally assume that leases to residences in a retirement home would not be short term. In looking back to *Regal Castings* and the concept of unconscionability it would seem that these are the exact circumstances that equitable claims such as those in personam exist to remedy. When one has knowledge of and consents to upholding agreements between parties and then uses their position on the register to renege on these agreements, then that is unconscionable action. In addition to this, when one has knowledge of existing leases, especially when that knowledge is constructed around the basis of a mortgage agreement, it seems that the reasonable thing to infer is not limited knowledge, but considerable knowledge. Things like the value of agreed payments, the frequency of these and any limits to the term the payment would be received for must arguably all be things that a finance company could be assumed to take into consideration when guaranteeing the security of their investment.

[84] CIV-2010-485-61, 26 April 2010, at [35].

There is no mention of the *Regal Castings* case as a guide for application of the claim, simply as authority for allowing the claim to be heard. This means that the rationale that Regal Castings gave was neither accepted nor overruled. The *Regal Castings* three criteria were intended to be more of a guiding rationale than a strict test, and maintain the room for flexibility within judicial reasoning of the law. On the other hand *Cashmere* seems to create a criteria or measurable standard when it comes to assessing the behaviour of the registered proprietor and *Bobs Cove* is a recent case addressing the in personam claim in New Zealand courts, suggesting that the judiciary is leaning towards the limited application of the claim itself. An interesting point to note is that before *Bobs Cove* this rule had only been applied in cases addressing the actions of mortgagees. However, *Bobs Cove* discusses the principle as being a rule for applying the in personam claim in general, in this case surrounding agreements for sale and purchase.[85] These two lines of thought can be seen as co-existing; the new criteria simply building upon the initial level of unconscionability. However, this author would argue that by setting a measureable standard the flexibility intended by the court in *Regal Castings* becomes more rigid. Which method of assessment will be more commonly used, and whether strict criteria for this inhibits or aids the development of this area of law in the future remains to be seen.

4. Other Possible Solutions

The courts will always be bound to interpretation of the Land Transfer Act 1952 as it exists, and as mentioned the vague nature of the drafting of these sections can lead to many different interpretations. Therefore, the ability of the courts to create their own system of guidance will always be limited to adherence to notions 'indefeasibility' that are mentioned, but not adequately defined in the Act.[86] There are various

[85] CIV-2010-485-61, 26 April 2010, at [33] and [35].
[86] Review of the Land Transfer Act 1952, Law Commission October 2008, Wellington, NZ, Issues Paper 10 at 21.

options for reform suggested in the 2008 review of the Act. One of these is to attempt to define indefeasibility within the Act,[87] as done in s 40 of the Land Titles Act 1980 (Tasmania, Australia). This seems very logical. Often concerned about the boundaries of the in personam claim one forgets to acknowledge that boundaries by definition are between two things. Potentially, a way to figure out where the in personam claim stops is by ascertaining where indefeasibility begins. By determining the boundaries of indefeasibility it can help bring definition to the current shadow boundaries of the in personam claim.

In Singapore the Torrens system was introduced almost 100 years later than in New Zealand and Australia.[88] This gave the drafter of their Torrens statute, Baalman, the advantage of knowing the potential of equity to arise in the Torrens system, and the problems this was creating overseas. In reaction to this he attempted to remain as close to having complete indefeasibility of title as possible in his Torrens system by including an exhaustive list of strictly defined exceptions in the statute.[89] This seems to be close to what would need to happen if one were to attempt to define the operation of indefeasibility within a statute - provide an exhaustive list of when it were not to apply. However, it was soon seen in this system that even an exhaustive list of exceptions was not enough to intrude on the court's jurisdiction to operate in equity within a Torrens system. This was shown in the case of *Ho Kon Kim v Lim Gek Kim Betsy*,[90] where the Singapore Court of Appeal adopted personal equities as applied in other Torrens jurisdictions as a general exception to indefeasibility outside of those specific exceptions named in the statute. Where a Torrens system, or any system, is seen to be too harsh or strict in its recognition of competing rights, equity has often been seen to step in and soften the

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[87] This was suggested again in Law Commission, *A New Land Transfer Act*, (NZLC R 116, June 2010) 19 at 19.
[88] Barry C Crown, 'Indefeasibility of Title: Developments in Singapore', (2007) 15 *Australian Property Law Journal* 91 at 92.
[89] Ibid, at 94-95.
[90] [2001] 4 SLR 340.

application in order to provide a sense of justice under the law.[91]

Another option for reform given in the 2008 review of the Land Transfer Act 2008 was the introduction of a conclusive register.[92] This would mean that the title would include a list of all interests, equitable and legal, when it was registered so that all had equal ability to be recognised and protected by indefeasibility. It could be argued that the caveat system allows persons with an equitable interest in land to do this now. However, it is a necessary component of the caveat system that the equitable interest be capable of eventual registration to be able to be noted on the title. This would provide protection in most cases but still leave some interests without protection. In order for a conclusive register to operate properly, the types of interests that are capable of registration in the reviewed system would need to be specified to prevent potential abuse by those with equitable interests. The review of the Act itself mentions that although this would be an ideal solution, like indefeasibility itself it could never be absolute.[93] It could also be seen as diminishing the effect of indefeasibility by allowing too many other interest holders to have affect over the title of the registered proprietor. Once again this is an issue of careful balance between interests and also between abilities of those being advantaged to use their benefit given under the system in a way that detriments the rights of another. In addition to this, there is an issue of practicality in defining the types of interests that can be registered and establishing an effective system to allow this to take place.

Although it seems easy to say that consolidation of the system should be attempted through legislative means, it is actually very difficult to ascertain a way in which this could be done without requiring very strict definitions of statutory terms or an exhaustive list of named

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[91] Margaret White, 'Equity: a general principle of law recognised by civilised nations?' 4 2004 (1) *QUTLJJ* 103 at 105.
[92] *Cashmere Capital Ltd,* above n 75 at 20.
[93] *Cashmere Capital Ltd,* above n 75 at 21.

exceptions to the indefeasibility principles. These present problems both of conclusiveness and adherence. It is hard to both define terms within the Act and create a list of exceptions that is complete. There will still always be a need for the court to interpret terms in their own way and also exceptions to the principle not foreseen in the drafting of the legislation. This author shares the opinion that to create an exhaustive list of exceptions to indefeasibility would likely lessen the exceptions to indefeasibility that currently operate but also create a strict application of the law in an area that is so deeply enrooted in the livelihood of individuals. In operating around something as important as land and the ownership of property it is necessary that the system is flexible so as to allow individuals to feel satisfactorily protected by the law and have confidence in the ability of the law to recognise their rights. Because of this, the author believes that the best option for consolidation of the in personam claim as it operates in a Torrens system is through the courts.[94]

Conclusion

It can be concluded that the aim of a Torrens system in any jurisdiction is to provide accuracy, affordability and simplicity in a transfer system but also to provide the registered proprietor with security of title, giving them priority over any adverse claims. However, due to the strict nature of drafting, equitable claims, claims in personam in particular, had to be included in the system to soften this and also provide security to other types of rights that might not be registered. However, with this came competing thoughts as to whether such claims had a place within a Torrens system or not, as it potentially undermined the central principle. Through examination of the subsequent cases and commentary on the issue it is this author's opinion that the in personam claim has not only an acceptable, but a necessary place in any Torrens system. However, it is essential that

[94] Also an argument put forward in Law Commission, *A New Land Transfer Act,* (NZLC R 116, June 2010), at 23-24.

competing rights are balanced; the registered proprietor attracts indefeasibility, but it should not be to the extreme that he or she is able to use this principle to undermine the legitimate rights of others. One must still be able to feel secure in their title so in applying the in personam claim in a Torrens system the courts established guidelines to ensure a balance was obtained. Although the in personam claim has a place in a modern Torrens system it is not without doubt and attack from commentators and even courts. However, with guidelines and consistency in its application there is no argument against it enough to show that it is not worth applying in such a system. When *Regal Castings* was first decided it seemed that there was an identifiable rationale that was to be employed that would give consistency between cases whilst still allowing judicial flexibility in the application of the claim. However, since *Bobs Cove* it seems that the courts are favouring more a definitive test or measure for the application of this claim. With both avenues coexisting currently it is important to watch the future cases in this area to see which line of thought is favoured judicially. However, one thing that can be concluded from this analysis is that this is an area that is most definitely for the courts to develop, as opposed to requiring legislative reform.

BRIDGING THE GAP: INDIGENOUS COMMUNITY INVOLVEMENT IN CRIMINAL JUSTICE INITIATIVES AND ITS IMPACT ON REDUCING DISPROPORTIONATE REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM

JORDANNA BOWMAN*

"Until we realise that [Aboriginal people] are not simply "primitive versions of us" but a people with a highly developed, formal, complex and wholly foreign set of cultural imperatives, we will continue to misinterpret their acts, misperceive their problems, and then impose mistaken and potentially harmful remedies."[1]

Introduction

In recent years it has become recognised internationally that Indigenous community participation in criminal justice initiatives is crucial if the gap between Indigenous and non-Indigenous experiences in the criminal justice system is to be bridged. Currently, it is a shared experience of Indigenous communities worldwide that their people suffer tragic overrepresentation in all facets of the criminal justice system, from arrest through to incarceration. There are two fundamental causes that perpetuate this overrepresentation. The first is the socio-economic disadvantage faced by Indigenous communities as a result of the ongoing impact of colonisation. Secondly, fundamental differences in the world view of Indigenous peoples and the

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1 Rupert Ross, "Dancing with a Ghost: Exploring Indian Reality," unpublished manuscript, Kenora, 1987, pp. 5–6; see also his "Leaving Our White Eyes Behind: The Sentencing of Native Accused," [1989] 3 C.N.L.R. 1. Cited in A C Hamilton "Chapter 2 – Aboriginal Concepts of Justice" in Volume 1: The Justice System and Aboriginal People of Report of the Aboriginal Justice Inquiry of Manitoba (November 1999) The Aboriginal Justice Implementation Commission < http://www.ajic.mb.ca/volumel/chapter2.html>

conceptual backbones of Western legal systems towards the notions of justice, crime and punishment create an environment of isolation and misunderstanding that provide for negative experiences for many Indigenous people in their dealings with Western legal systems. From these it becomes apparent that the involvement of Indigenous communities in criminal justice initiatives aimed at countering these two fundamental causes could be beneficial in reducing the worrying overrepresentation and recidivism rates of Indigenous peoples.

Australia and Canada are two countries in which there have been extensive moves towards Aboriginal communities implementing and being actively involved in initiatives aimed at rectifying the excessive involvement of their peoples in the criminal justice system. In order to examine the importance of this, this article will first provide a statistical overview of Australian and Canadian Aboriginal criminal justice involvement, as well as statistics depicting the socio-economic disadvantage facing Australian and Canadian Indigenous communities. Such information provides an important foundation for the following examination of the rationale behind Indigenous community involvement in criminal justice initiatives. Finally, this article will discuss a number of criminal justice initiatives that cover both the alleviation of the isolation and misunderstanding faced by Indigenous people in criminal justice processes, and crime prevention through the minimisation of leading social and economic factors causing involvement in crime. It is important to note that there are concerns associated with some of the material discussed in this article, such as the experience of victims, and the overwhelming focus on the culture of young male offending, which will not be addressed.

A. The background

In Australia's criminal justice statistics, Aboriginal and Torres Strait Islander peoples account for approximately 2.5% of the Australian population[2], but in March 1996 made up 19% of the Australian prison

[2] Australian Bureau of Statistics "National Aboriginal and Torres Strait Islander Social Survey, 2008 (2008) Australian Bureau of Statistics

population, making an overrepresentation rate of 18.3.[3] Further to this, in 1995 Indigenous Australians were 27 times more likely to be held in police custody than non-Indigenous people.[4] These statistics improved little in the following decade, with Indigenous people still being 13 times more likely than non-Indigenous people to have been incarcerated in 2006, and representing 24% of the total prisoner population.[5] Alarmingly, between 1990 and 1996, Aboriginal people were also 16.5 times more likely than non-Indigenous people to die in custody.[6] Aboriginal and Torres Strait Islander peoples also suffer from high rates of arrest, with one in six Indigenous people aged 15 years and over having been arrested in the five years prior to the 2002 survey. In 2002, 35% of Indigenous Australians "reported having been formally charged at some time in their lives."[7]

Further, Indigenous Australians suffer severe disadvantage in all areas of socio-economic status. In 2008, only 21% of Indigenous people aged 15 – 64 years had completed Year 12 education or equivalent, in comparison to 54% of non-Indigenous people. Of Indigenous people aged 20 – 24 years, 31% had completed Year 12 or equivalent, less than half the completion rate of 76% for non-Indigenous people.[8] Further, in 2008 "the unemployment rate for Indigenous people was more than three times the unemployment rate of the [general]

<http://abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4714.0Main%20Features12008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=>

[3] Chris Cunneen, "Reconciliation in the Community: How do we make it a reality through policing and custodial issues?" (Australian Reconciliation Convention, Melbourne Convention and Exhibition Centre, Melbourne, Australia, 26 May 1997).

[4] Ibid.

[5] Australian Bureau of Statistics "Law and Justice Statistics: Aboriginal and Torres Strait Islander people, a snapshot, 2006" (2006) Australian Bureau of Statistics < http://www.abs.gov.au/ausstats/abs@.nsf/mf/4722.0.55.003/>

[6] Cunneen, above n3.

[7] Australian Bureau of Statistics Crime and Justice: Aboriginal and Torres Strait Islander People: Contact with the Law" (2005) Australian Bureau of Statistics <http://www.abs.gov.au/AUSSTATS/abs@.nsf/2f762f95845417aeca25706c00834efa/a3c671495d062f72ca25703b0080ccd1!OpenDocument>

[8] Australian Bureau of Statistics, above n2.

population (16.6% and 5.0% respectively)."[9] In the same year, "25% of Indigenous people aged 15 years and over lived in a dwelling where one or more additional bedrooms [were] required", and 28% lived in a dwelling that had major structural problems.[10] Such poor socio-economic statistics are reflected in the disproportionate instance of Indigenous crime; for example, Indigenous people who had been incarcerated were more likely than those who had not been to be unemployed (30% compared to 12%). The impact of socio-economic factors on substance abuse is also evident in criminal justice statistics. "Among Indigenous people who have been incarcerated, 30% reported risky/high risk levels of long-term alcohol consumption […], compared with 14% of those who had not be incarcerated."[11]

Canadian information paints an equally bleak picture. Canadian Indigenous people represented only 2.6% of the total population in 2003/2004, yet accounted for 18% of all admissions to federal custody and for 21% of all admissions to provincial/territorial sentenced custody.[12] In some regions, however, this figure is much higher. For example, Aboriginal people constitute approximately 12% of the Manitoba population, yet they account for over one-half of the 1600 people incarcerated each day in Manitoba's correctional institutions.[13] Further, "between 1997 and 2000, Aboriginal people were 10 times more likely to be accused of homicide than non-Aboriginal people",[14] reflecting the disparity between the national violent crime rate and the violent crime rate for Indian bands – 9.0 per 1000, compared with 33.1 per 1000.[15]

Canadian Aboriginal people share similar poor socio-economic

[9] Ibid.
[10] Ibid.
[11] Australian Bureau of Statistics, above n5.
[12] Jodi-Anne Brzozowski, Andrew Taylor-Butts and Sara Johnson "Victimisation and offending among the Aboriginal population of Canada" (June 2006) Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/85-002-x2006003-eng.pdf>
[13] A C Hamilton "Chapter 4 - Aboriginal Overrepresentation" above n1
[14] Brzozowski, Taylor-Butts and Johnson, above n12.
[15] Hamilton, above n13.

indicators as Indigenous Australians. Of Canada's Aboriginal population, 48% had not completed high school, compared with 31% of the non-Aboriginal population, while 4% of the Aboriginal population had acquired a university degree compared with 16% of the non-Aboriginal population.[16] Further, "[i]n 2001 the rate of unemployment was 19% for the Aboriginal population, compared to a rate of 7% for the non-Aboriginal population."[17] Reflecting similar living conditions to Australian Indigenous people, the average Aboriginal household in Canada had twice as many people as non-Indian households, with their homes being three times more likely to be in need of major repair.[18] The substance abuse associated with such poor socio-economic indicators is again reflected in Canadian criminal justice statistics. In incidents where it was known if alcohol or drugs were involved, 89% of Aboriginal people accused of homicide had consumed an intoxicant at the time the crime was committed. This is well above the 61% of non-Aboriginal accused.[19] In addition, nine out of ten Aboriginal adults in correctional services in Saskatchewan had a substance abuse need.[20]

The statistics for both Canada and Australia depict parallel, grim situations. It is from this background that the push for Indigenous community participation in criminal justice initiatives arises. The rationale is persuasive, and is supported in Australia and Canada by government bodies, the judiciary, Indigenous groups and communities alike.

B. The rationale

There are a number of fundamental and intertwined reasons that provide legitimate bases for Indigenous community involvement in the criminal justice system. The inherent clash of worldviews experienced by Aboriginal offenders in the system is at the heart of the rationale.

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[16] Brzozowski et al, above n12.
[17] Ibid.
[18] Hamilton, above n13.
[19] Brzozowski et al, above n12
[20] Ibid.

The Aboriginal worldview and its concepts of justice are in profound conflict with the Western ideas of crime, punishment and justice. Therefore, when Aboriginal offenders interact with the Western justice system, they experience misunderstanding and isolation stemming from the denial of their own beliefs, and the imposition of concepts that are foreign to them and their community. Further, there is a strong argument for Aboriginal communities being a key force in establishing and carrying out crime prevention initiatives. The central idea behind this is that inherent in the socio-economic status of Aboriginal people that adversely affects their involvement in the criminal justice system is the lack of self-determination and the breakdown of traditional social and power structures. Therefore, when Aboriginal communities are given the autonomy to implement their own initiatives it reduces criminal activity within their communities, as well as empowering the community. This provides an important element of self-determination and a reintroduction of key social structures that are important in maintaining social harmony and reducing Indigenous involvement in the criminal justice system. Here, it is helpful to look at bodies that have expressed their support for community involvement.

The New South Wales Law Reform Commission Report 'Sentencing: Aboriginal offenders' was a key Australian source that highlighted the need for Aboriginal community involvement in sentencing. The opening sentence to its section 'The Aboriginal community's role in sentencing' summarises the issue well – "Given the alarming number of Aboriginal people coming before the court, it is clear that the justice system is not as responsive to Indigenous members of the community as it should be."[21] The report goes on to express the view that it is necessary for Aboriginal people to play a more extensive role in initiatives aimed at reducing Indigenous offending, in addition to having greater involvement in all stages of the criminal justice process. It also notes that this is central to achieving cultural relevance in the system, as well as "empowering communities where the traditional

[21] NSW Law Reform Commission *Sentencing: Aboriginal Offenders* (NSWLRC Report 96, 2000) <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r96chp4>

Indigenous authority structures and social cohesion may have broken down."[22] In concluding, the Report states that such involvement by Indigenous communities is the only way to make the system relevant, and less alienating and discriminatory for Aboriginal people, and, in turn, to reduce offending and recidivism rates.

Prior to this report, the importance of Indigenous community involvement in criminal justice initiatives had been asserted in Australia in The Royal Commission into Aboriginal Deaths in Custody Report. This Report highlighted the importance of Indigenous communities playing an instrumental role in creating diversionary programs aimed at reducing offending, as well as within the criminal process. The Report substantiated this position by recognising that "the most significant contributing factor [to overrepresentation of Aboriginal people in custody] is the disadvantaged and unequal position in which Aboriginal people find themselves in the society – socially, economically and culturally."[23] The Report highlighted the importance of Aboriginal involvement, basing it on the proposition that: [24]

> Aboriginal people have for two hundred years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination… The elimination of this disadvantage requires an end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands.

From the Royal Commission into Aboriginal Deaths in Custody Report, and the NSW Law Reform Commission Report it is evident that the Australian rationale for Indigenous community involvement is grounded in the need for Indigenous communities' self-determination

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[22] Ibid.

[23] Aboriginal and Torres Strait Islander Commission *Royal Commission into Aboriginal Deaths in Custody* (ATSIC Annual Report, 1991–1992) <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/17.html>

[24] Ibid.

and empowerment as pre-conditions to effecting reductions in the number of Aboriginal people coming before the criminal justice system. In Canada, the approach is a little different. While recognising the need for self-determination and empowerment, Canadian proponents take a more metaphysical approach, identifying the inherent ideological differences between Aboriginal and Western worldviews. This, perhaps, can be explained by the greater advancement of the rights of Aboriginal people in Canada to self-determination – Australian efforts to restore Indigenous communities with self-determination pale in comparison to the progress already made in Canada in this respect.

This approach is particularly apparent in the Report of the Aboriginal Justice Inquiry of Manitoba. The underlying premise of the Report is that Aboriginal people and European-Canadians hold different worldviews that colour the way they see and interpret the world in which they live. In discussing their differing meanings of justice, the Report notes the dominant view in Canada emphasises "punishment of the deviant as a means of making that person conform, or as a means of protecting other members of society."[25] This is juxtaposed with Aboriginal justice systems, which aim to "restore the peace and equilibrium within the community, and to reconcile the accused with his or her own conscience and with the individual or family who has been wronged."[26] On a basic level, this difference can be characterised as punishment versus conflict resolution. This inherent difference requires an alternative system of justice to be made widely available to Aboriginal communities, in which they can assert their own justice and values in order to more effectively deal with criminality. The importance of Aboriginal community involvement in addressing the socio-economic factors affecting crime causation is also expressed in the Report. It asserts that: [27]

> The avenues through which Aboriginal people might be able to escape

[25] Hamilton, above n1.
[26] Ibid.
[27] Hamilton, above n13

> from their current social conditions, such as the justice system, the education system, economic development in their communities and the institutions of local government, are perceived by Aboriginal people to be under the control of external governments.

As such, it is crucial that Aboriginal people are empowered to address the social injustices and disadvantages faced by their communities if they are to rectify overrepresentation of their peoples in the criminal justice system.

This importance of alternative systems and diversionary efforts to counter Aboriginal overrepresentation was accepted and promoted by the Canadian judiciary in the case *R v Gladue*.[28] This was the first case to interpret the meaning of the 1996 amendment of section 718.2(e) of the Canadian Criminal Code, concerning sentencing and Aboriginal offenders (Appendix 1). In the Court's discussion, it was held that special consideration should be paid to the circumstances of Aboriginal offenders, as required by the section, "because those circumstances are unique, and different from those of non-Aboriginal offenders."[29] After recognising the worrying rates of incarceration of aboriginal offenders, the Court acknowledged, "sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system."[30] This is because Aboriginal people have suffered from systemic discrimination, a legacy of dislocation and are affected by social and economic conditions, and further, incarceration is a culturally inappropriate and ineffective rehabilitation method.[31] Therefore, restorative justice is more effective in addressing the needs of Aboriginal offenders as it incorporates "the needs, experiences, and perspectives of aboriginal people or aboriginal communities."[32] This is because restorative justice, unlike the traditional Western justice system, is based on the concept that "all things are interrelated and that

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[28] *R v Gladue* [1999] 1 S.C.R 688
[29] Ibid, at [37], emphasis original
[30] Ibid, at [65]
[31] Ibid, at [68]
[32] Ibid, at [73]

crime disrupts the harmony which existed prior to its occurrence", and therefore those who were closely affected by the crime – the offender, the victim, and the Aboriginal community – need to have much more input into sentencing.[33]

From this small cross-section of reports and cases it becomes clear that there is great support in favour of the involvement of Indigenous communities in criminal justice initiatives. Clearly, this support would not be so widespread if there was no evidence to sustain such a practice as being effective. As such, it is important to examine some examples in which Indigenous communities have been involved in programs and initiatives aimed at reducing Aboriginal offending, and the effect they have had on those communities in which they have operated.

C. The evidence

This section will discuss a variety of initiatives that have been implemented in Canada and Australia by or in conjunction with Aboriginal communities, and the impact they have had on Aboriginal offending and crime prevention. First, sentencing circles will be discussed, followed by an assessment of Indigenous community justice groups, and finally a discussion of two crime prevention programs.[34]

1. Sentencing circles

Sentencing circles were first implemented in the Territorial Court of Yukon in Canada in 1992.[35] A similar pilot program was introduced in Nowra, New South Wales, Australia in 2002.[36] Put simply, sentencing

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[33] Ibid, at [71]

[34] It should be noted that in these discussions I will provide as much information as possible regarding the effect of such programs, however, in some cases statistical information, or otherwise, is not available.

[35] NSW Law Reform Commission, above n21.

[36] Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas, Rowena Lawrie and Rhonda Clarke "Circle Sentencing in New South Wales: A Review and

circles are a form of restorative justice where "individuals are invited to sit in a circle with the accused and discuss together what sentences should be imposed."[37] The aim of sentencing circles is to give Aboriginal offenders a sentencing process that is more in line with Aboriginal conceptions of justice, which are very much concerned with community involvement, healing, restoration of balance and rehabilitation. As such, the key objectives of sentencing circles are to: [38]

a) Include members of Aboriginal communities in the sentencing process;
b) Increase the confidence of Aboriginal communities in the sentencing process;
c) Reduce barriers between Aboriginal communities and the courts;
d) Provide more appropriate sentencing options for Aboriginal offenders;
e) Provide effective support to victims of offences by Aboriginal offenders;
f) Provide for greater participation of Aboriginal offenders and their victims in the sentencing process;
g) Increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong; and
h) Reduce recidivism in Aboriginal communities.

The most important part of the process is community involvement in sentencing. As Australian Chief Justice James J Spigelman noted: [39]

> There is a good deal of evidence that sentences which carry the support of the elders of the local Aboriginal community have a much greater impact on the individual offender than any sentence

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Evaluation" <http://www.austlii.edu.au/au/journals/AILR/2004/16.html> at 1

[37] Royal Commission on Aboriginal Peoples *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (RPAC 1996) at 110

[38] Potas et al, above n36 at 5.

[39] James J Spigelman, Chief Justice of New South Wales "Dr Charles Perkins AO Annual Memorial Oration 2005" (University of Sydney, 27 October 2005)

> imposed by a white magistrate. The sense of shame imposed by the [circle sentencing] process itself appears to be much more effective, particularly in reducing recidivism.

In addition, such involvement of the Indigenous community shows a move towards empowerment and self-determination.

Sentencing circles in both countries have had a positive effect on recidivism rates, and the experience of Aboriginal people in their relations with the criminal justice system. As McNamara noted:[40]

> Circle sentencing will not be a magic solution to many of the weaknesses in the current criminal justice system which operate to the detriment of Indigenous people. However, the manner in which circle sentencing has developed… in Canada does suggest that it has the potential to affect an important, if relatively modest, shift in the relationship between the criminal justice system and Aboriginal offenders, victims and communities.

Statistics in both countries reflect this. In Whitehorse, Canada, for example, Justice Stuart reported that recidivism rates had reversed for those sentenced by circles, with 75% not reoffending compared to 75% reoffending after being sentenced in courts.[41] Similarly, of the first ten cases to be heard in the Nowra circle sentencing pilot only one person reoffended, and there was a clear reduction in alcohol abuse in most people sentenced by the circle.[42] From this it becomes clear that circle sentencing, through its emphasis on community involvement, is effective in achieving its objectives of reducing Aboriginal involvement

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[40] Luke McNamara "Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing"<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/IndigLawB/2000/72.html?stem=0&synonyms=0&query=title(Indigenous%20Community%20Participation%20in%20the%20Sentencing%20of%20Criminal%20Offenders:%20Circle%20Sentencing%20)> at 6

[41] Kevin Libin, "Sentencing circles for aboriginals: Good justice?" *National Post* (Canada, 26 February 2009)

[42] Potas et al, above n36.

in the criminal justice system. Perhaps most importantly, however, it breaks down the misunderstanding and systemic discrimination that many feel within the system, with one elder commenting to Nowra Magistrate Doug Dick, "This is not white man's law anymore, it's the peoples' law."[43]

2. Indigenous community justice groups

Indigenous community justice groups are a key initiative in crime prevention. Such justice groups focus on countering the key motivators behind crime in the community, such as unemployment, poor school attendance and substance abuse. As the Indigenous community is the driving force, such programs are effective in addressing the needs of their community, and provide empowerment through community control and self-management. The Queensland community justice groups operating in Palm Island and Kowanyama have been exceptionally successful in "realising sustained reductions in youth detention and recidivism."[44] Similar programs have been implemented across Canada, although evaluations of their success are limited.

Queensland community justice groups implemented in the above communities provide important services to the Indigenous community. Central to this is the identification by the community of the most pressing issues resulting in criminal activity. Primarily, the groups are involved in providing guidance around, and providing services in relation to, issues such as parental supervision, recreational opportunities, social infrastructure, counselling and support services and community facilities.[45] The underlying aim here is to rebuild traditional community structures, in addition to providing early interventions as an alternative to direct contact with the formal system. For example, in Kowanyama, women elders conduct night patrols of

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[43] Spigelman, above n39.
[44] Paul Chantrill "Community Justice in Indigenous Communities in Queensland: Prospects for Keeping Young People out of Detention" http://www.austlii.edu.au/au/journals/AILR/1998/18.html at 1
[45] Ibid, at 5.

the town to "break up fights, resolve disputes and return children who are at risk of offending to their homes. Their status as elders in the community gives them an authority, which in many circumstances proves more effective than that of the police."[46] Further, there is an emphasis on the accountability of community members. This is done through methods that incorporate traditional local custom. For example, where parents have been neglecting their familial responsibilities the concept of public shaming is invoked by avoiding people or making them not welcome at particular homes; forbidding access to the community canteen; asking people to leave the community for varying periods of time; growling and shaming (public humiliation) to promote socially acceptable behaviour.[47]

Such practices have been very effective. The community justice programs were implemented in 1993–94, and in 1994 there was a significant decrease in juvenile offences in both communities where groups were established. In Kowanyama, prior to implementation, there were approximately 40 to 50 offences per month. This decreased to nil for March to November 1994 and to two offences between December 1994 and March 1995. Further, there were only three recorded juvenile offences for the first six months of 1997.[48] Evidently, the involvement of the Indigenous community has been essential in addressing Indigenous overrepresentation in the criminal justice system. Despite this, there needs to be greater funding support from the government in order to maintain the effectiveness of such programs. Logically, it is in the best interests of governments to provide additional funding, given the cost of running a community justice group for one year is less than that of incarcerating a juvenile offender for the same period.[49]

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[46] Michael Limerick "Indigenous community justice groups: the Queensland experience" <http://www.austlii.edu.au/au/other/alrc/publications/reform/reform80/04.html> at 4.

[47] Chantrill, above n44 at 9

[48] Ibid, at 3.

[49] Limerick, above n46 at 5

Similar initiatives also exist in many Canadian provinces, however, their success is not widely published. It can be inferred from their continued funding and promotion by the Aboriginal Justice Strategy that operates under the Department of Justice, however, that they are effective in achieving their aims. One such program is the Esketemc Alternative Measures Program which "delivers a holistic, culturally and community appropriate service, coordinated across various Federal and Provincial jurisdictions and community agencies, to meet the needs of the Esketemc community."[50] According to the Department of Justice, the Program deals with a wide range of issues affecting Aboriginal involvement in the criminal justice system, including healing circles, community work, educational programs, interventions, treatment and circle sentencing. Such services are provided with that aim of providing a safe environment where the community can facilitate the resolution of crime, and to promote healings, recovery and prevention.[51] This provides another example of how Indigenous community involvement in initiatives is important in addressing Indigenous criminal justice issues.

3. Specialised crime prevention programs

Specialised crime prevention programs implemented by Indigenous communities have been critical in countering specific causes of crime in certain communities. Across Australia and Canada many Aboriginal communities have established their own programs to address such issues. Two key examples of this are the Mt Theo Outstation in Yuendumu, Australia and the Gwich'in Outdoor Classroom Project in Fort McPherson and Aklavik, Canada.

Mt Theo Outstation was established in 1994 in the remote Aboriginal community of Yuendumu to provide cultural respite and rehabilitation. This was a direct response to the high instances of petrol sniffing in the community, a leading cause of crime and poor school attendance in

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[50] Department of Justice "Community-Based Justice Programs – British Columbia" (2009) Department of Justice <http://www.justice.gc.ca/eng/pi/ajs-sja/prog/bc-cb.html>

[51] Ibid.

the community. The key part of this program was the removal of youth who showed signs of substance abuse from the town to the Outstation, located 160 kilometres away. While at the Outstation, the young people are placed on a rehabilitation and detoxification program, participate in gardening projects and community employment projects, in addition to being involved in traditional cultural activities such as artefact making and hunting. The young people remain at Mt Theo until the elders believe the youth have broken their habit and can be re-introduced into the community without relapsing. The program has enjoyed exceptional success. Removing and rehabilitating the most chronic petrol sniffers and 'ring leaders' has prevented the entrenchment of the petrol sniffing culture among other young people. For example, in early 1997, there were 60 youths sniffing petrol in the community. After taking the 14 most chronic sniffers to the Outstation, and implementing a youth program, the number of young people in the community sniffing was reduced to two.[52] Community members have noted a significant decrease in youth gangs and crime, as well as greater school attendance and youth participation in community activities. Evidently, the Yuendumu Aboriginal community has been highly effective in controlling community-oriented programs, particularly through their use of traditional methods of removal and cultural study. As such, Mt Theo provides strong evidence for the beneficial nature of Indigenous community involvement in crime prevention initiatives.

The Gwich'in Outdoor Classroom Project was a culture-based crime prevention program aimed at children aged 6 – 12 who were subject to "multiple risk factors associated with crime, such as lack of attachment to school and to community role models, addictions, involvement in youth gangs and lack of parental support."[53] It included an outdoor camp, a breakfast program, and in-school programming involving life and communication skills, Elders and traditional learning. The life

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[52] Andrew Stojanovski and Johnny Japangardi Miller "The Mt Theo Story" (1999) Mt Theo <http://www.mttheo.org/mttheo_story.htm>

[53] National Crime Prevention Centre "Promising and Model Crime Prevention Programs" (2000) Public Safety Canada <http://www.publicsafety.gc.ca/res/cp/res/2008-pcpp-eng.aspx#toc_2b>

skills and Elder involvement targeted risk factors linked to negative behaviour such as learning difficulties and early school leaving. The inclusion of traditional cultural elements was key in stimulating learning and encouraging attendance among students. The program was very successful, with an evaluation noting that cultural relevance and the use of Gwich'in traditions, values and customs was a major strength of the program.[54] Further, when comparing the program site to a non-program site, there was significance difference in school achievement levels, with the program site rating much higher. Further, the breakfast program was key, improving monthly school attendance rates by 20%. Reflecting the importance of cultural learning, "75% of students who performed below the average grade level in the standard classroom outperformed their peers in cultural skills in the outdoor classroom."[55] From this it becomes clear that Aboriginal community involvement in crime prevention programs is critical, particularly in that it makes the program relevant to those it is aimed at, while also allowing targeted assistance to take place.

Conclusion

It is evident from the various programs and initiatives in which Indigenous communities are involved that such involvement is beneficial and can have positive impacts on Indigenous criminal justice statistics. This is true in both Australia and Canada where Indigenous communities have played instrumental roles in criminal justice system initiatives, as well as those aimed at crime prevention. Therefore, it is clear that if the significant gap between Indigenous and non-Indigenous experiences and involvement in the criminal justice system in countries such as Australia and Canada is going to be bridged, Indigenous communities need to be able to assert their self-determination and be empowered to take control of their peoples' futures. Central to this is the assertion of Indigenous notions of justice through appropriate, community-based justice processes such as sentencing circles, as well as in crime prevention programs. Without

[54] Ibid.
[55] Ibid.

such involvement, Indigenous people will continue to suffer misunderstanding, isolation and overrepresentation in the criminal justice system, and the gap will remain unbridged.

Appendix 1

Section 718.2(e) Canadian Criminal Code:

"A court that imposes a sentence shall also take into consideration the following principles: - all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

IS PRESIDENT AL-BASHIR IMMUNE FROM ARREST?

DANIEL JACKSON*

Introduction

This paper considers whether states parties to the Rome Statute of the International Criminal Court[1] are required to arrest Omar al-Bashir, President of the Republic of the Sudan, if he enters their territory. It concludes that the better view is that they have no obligation to do so. In fact, doing so would violate customary international law, since he possesses immunity *ratione personae*.

Background

The conflict in Darfur started in February 2003. The Sudan Liberation Movement/Army and the Justice and Equality Movement began an armed struggle, accusing the Sudanese government of oppressing black Africans, who form the majority of the population in Darfur and other regions in the south of the Sudan. Arabs, who predominate further north, are the majority of the national population and dominate the Sudanese government. The Sudanese government has been accused of involvement or complicity in atrocities (as have rebel groups).

On 31 March 2005 the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1593, referring the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (in accordance with Article 13(2) of the Statute).[2] On 4 March 2008 Pre-Trial Chamber I of the Court issued an arrest warrant for President al-Bashir on charges of war crimes and crimes against humanity but, by a majority, refused to

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[1] Rome Statute of the International Criminal Court (opened for ratification 17 July 1998, entered into force 1 July 2002).

[2] *Resolution 1593* SC Res 1593, S/Res/1593 (2005).

include a charge of genocide.[3] On an appeal by the Prosecutor, the Appeals Chamber overturned the decision regarding the genocide charge and remanded the case to Pre-Trial Chamber I,[4] which issued another arrest warrant in respect of genocide.[5]

President al-Bashir has subsequently travelled to Chad and Kenya, which are both parties to the Rome Statute, without being arrested. This followed the adoption by the Assembly of the African Union of a resolution calling on members not to arrest him. The failure to arrest President al-Bashir caused considerable controversy. Several European Union states summoned Kenyan Ambassadors to explain the failure to arrest President al-Bashir.[6] Pre-Trial Chamber I reported the visits to the Assembly of States Parties and the Security Council "in order for them to take any measure they may deem appropriate."[7]

Analysis

International law accords a serving head of state immunity *ratione personae*: that is, personal immunity for all acts, whether or not done in an official capacity. This is to be distinguished from immunity *ratione materiae*, or functional immunity, which protects only acts that a person does in an official capacity.[8] The arrest of a head of state by another

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[3] *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (*Prosecutor v Al Bashir)* ICC-02/05-01/09-3, 4 March 2009.

[4] *Prosecutor v Al Bashir* ICC-02/05-01/09-T-1, 3 February 2010.

[5] *Second Decision on the Prosecution's Application for a Warrant of Arrest (Prosecutor v Al Bashir)* ICC-02/05-01/09-94, 12 July 2010.

[6] "Kenyan ambassadors summoned over Omar al-Bashir's visit" (2010) "BBC News" <http://www.bbc.co.uk/news/world-africa-11156184>

[7] *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya (Prosecutor v Al Bashir*) ICC-02/05-01/09-107, 27 August 2010 at 4; *Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad (Prosecutor v Al Bashir)* ICC-02/05-01/09-109, 27 August 2010 at 4.

[8] Robert Cryer and others *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007) at 423.

state would violate this immunity. Since President al-Bashir is a head of state, he would appear to be protected by this immunity.

The prohibition of genocide is a *jus cogens* norm.[9] The prohibitions on war crimes and crimes against humanity are probably also *jus cogens* norms.[10] It has been contended that immunity is displaced in cases involving international crimes that involve the violation of a *jus cogens* norm, since such norms prevail over all other international law norms. The minority of the Grand Chamber of the European Court of Human Rights in *Al-Adsani v United Kingdom* put it this way in a case about torture:[11]

> The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.

In *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* Lord Hoffmann exposed the fallacy in this reasoning:[12]

> The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not.

Similarly, Hazel Fox QC notes:[13]

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[9] *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ Rep 6 at 28.

[10] See M Cherif Bassiouni "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 LCP 63 at 68.

[11] *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 at 298-299 (Grand Chamber).

[12] *Jones v Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26, [2006] 1 AC 270 at [44].

[13] Hazel Fox *The Law of State Immunity* (Oxford University Press, Oxford, 2002) at 525.

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement.

Lord Hoffmann observed:[14]

> To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged.

The view that there was such a rule was rejected by the International Court of Justice in the *Arrest Warrant* case.[15] That case related to immunity *ratione personae* of a minister of foreign affairs, but the immunity of ministers of foreign affairs can hardly be supposed to be more extensive than that of heads of state. It was also rejected in the context of state immunity by the Grant Chamber of the European Court of Human Rights in *Al-Adsani*.[16]

A rule of customary international law requires two elements. The first is state practice, which must be extensive, representative and virtually uniform.[17] The second is *opinio juris*, which means that states must have considered themselves legally bound to act in the way that they did.[18] Since the general principle, which pre-dates the development of *jus cogens* norms, is that heads of state have immunity, the burden is on those claiming there is an exception for alleged breaches of such norms to meet the requirements for a rule of customary international law. It is not necessary for the claimed rule to meet the more stringent

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[14] *Jones v Ministry of Interior for the Kingdom of Saudi Arabia*, above n 12, at [45].
[15] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 at 21.
[16] *Al-Adsani v United Kingdom*, above n 11.
[17] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3 at 72.
[18] Ibid, at 73-74.

criteria for a *jus cogens* norm, since it is simply an exception to an ordinary rule of customary international law.

There is hardly any state practice supporting the view that there is an exception to immunity *ratione personae* for breaches of *jus cogens* norms. Suits against various head of state and foreign ministers were brought under Belgium's universal jurisdiction law, but this led to Belgium's loss at the International Court of Justice in the *Arrest Warrant* case. The logic of the reasoning of the Italian Court of Cassasion in *Ferrini v Federal Republic of Germany*[19] would suggest the recognition of such an exception, but the case itself related to state immunity, so its value as state practice in this context is doubtful.

Immunity *ratione personae* has been upheld by the French Court of Cassation in a case against Muammar Qadaffi,[20] the Spanish *Audienco Nacional* in a case against Fidel Castro,[21] the United States District Court for the Southern District of New York in a case against Robert Mugabe,[22] and the Bow Street Magistrates Court in England in cases against President Mugabe[23] and Shaul Mofez, at that time the Israeli Minister of Defence.[24] The Danish government refused to arrest the Israeli Ambassador, Carmi Gillon, who was accused of responsibility for torture, on the basis of immunity *ratione personae.*[25] In the *Pinochet* case none of their Lordships contended that immunity *ratione personae* would be inapplicable. Lord Millett, while concluding that immunity *ratione materiae* did not apply, made clear that the position would be different in relation to immunity *ratione personae*, emphasising its absolute character.[26] The immunity has been upheld in cases of espionage, drug smuggling, murder and plots against the head of state.[27] It has been held that a foreign diplomat cannot be arrested

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[19] *Ferrini v Federal Republic of Germany* [2004] 128 ILR 658.
[20] *Qadaffi* (2001) 125 ILR 456.
[21] *Castro* (1999) 32 ILM 596.
[22] *Tachiona v Mugabe* 169 F. Supp. 2d 259 (S.D.N.Y. 2001)
[23] Colin Wardrick "Immunity and International Crimes in English Law" (2004) 53 ICLQ 769 at 770.
[24] Ibid, at 771-773.
[25] Jacques Hartmann "The Gillon Affair" (2005) 45 ICLQ 745.
[26] *R v Bartle, ex parte Pinochet* [1999] UKHL 17, [2000] 1 AC 147 at 171, 179.
[27] Cryer and others, above n 8, at 434.

even if he threatens the security of the state.[28] The state practice is overwhelming against the suggested norm, and accordingly it must be rejected.

Does the Rome Statute place an obligation on states parties to arrest President al-Bashir if he enters their territory? Two provisions of the Statute relate to immunity. Article 27(2) provides:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over a person.

Article 98(1) provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the co-operation of that third State for the waiver of the immunity.

These two provisions may seem contradictory at first glance. But they relate to different situations: Article 27(2) to invoking immunity before the Court and Article 98(1) to immunity from arrest.[29] There has been uncertainty over whether the term "third state" refers to all states other than the "requested State" or only to states not party to the Statute. The context supports the wider reading. This phrasing occurs nowhere else in the Statute, while the phrase "State not party to this Statute" is used on several occasions. It would appear that the term is used in contradistinction to the term "requested State", which is used earlier in

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[28] *Rose v R* [1947] 3 DLR 618 (Que KB).

[29] Michiel Blommestijn and Cedric Ryngaert "Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity" (Working Paper No 48, Leuven Centre for Global Governance Studies, 2010) at 26.

the provision.[30] This forecloses the argument that Article 98(1) is not applicable because Sudan is to be treated, in relation to his case, as a party to the Statute. So Article 98(1) means that, if President al-Bashir possesses immunity, the Court's act in requesting his arrest was ultra vires and states do not have to comply with it.[31]

It has been contended that the Security Council's referral of the situation in Darfur to the Court must be taken as removing President al-Bashir's immunity.[32] The Security Council has the power under Chapter VII of the Charter to abrogate immunity when it considers this to be necessary for the maintenance of international peace and security. The Charter prevails over other norms of international law, except *jus cogens* norms.[33] Paragraph 2 of the Resolution reads:

> *Decides* that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully..."

The Council did not expressly remove immunity. Can it remove it by implication? There is an analogy to waiver of immunity. A state can waive its immunity or that of its officials. It is well established that this waiver may be either express or by submission to the jurisdiction of the court. But the state practice and authorities do not support the notion that a state may impliedly waive immunity by treaty.[34] In *Argentine Republic v. Amerada Hess Shipping Corporation* the Supreme

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[30] Ibid, at 26 n 77.
[31] Ibid, at 29.

[32] See Dapo Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" (2009) 7 JICJ 333.
[33] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Further Request for the Indication of Provisional Measures)* [1993] ICJ Rep 325 at 339-440
[34] Campbell McLachlan "Pinochet Revisited" (2002) 51 ICLQ 959 at 961 n 20.

Court of the United States rejected a submission that Argentina had impliedly waived immunity by certain treaties. Rehnquist CJ, delivering the judgment of the Court, said: "Nor do we see how a foreign state can waive its immunity ... by signing an international agreement that contains no mention of a waiver of immunity..."[35]

Oppenheim's International Law states:[36]

> A state, although in principle entitled to immunity, may waive its immunity. It may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or an international agreement ... A state may also be considered to have waived its immunity by implication, as by instituting or intervening in proceedings, or taking any steps in the proceedings relating to the merits of the case...

Implied waiver of immunity is only referred to in relation to participation in proceedings, which is regarded as constituting submission to the jurisdiction of the court. The International Law Commission's Draft Articles on the Jurisdictional Immunities of States and their Property[37] also support this view. Waiver by treaty is dealt with in Article 7(1), which provides:[38]

> 1. A state cannot invoke immunity from jurisdiction in a proceeding before a court of another state with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
> (a) by international agreement;

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[35] *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 109 US 683 at 693.

[36] Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Longman, London, 1992) 351-355.

[37] *Yearbook of the International Law Commission, 1991* (United Nations, New York and Geneva, 1994) at Vol II, Part 2, at 13.

[38] Ibid, at Vol II, Part 2, 25.

> (b) in a written contract; or
> (c) by a declaration before the court or by a written communication in a specific proceeding.

The commentary states, in relation to Article 7(1):[39]

> ...there appear to be several recognisable methods of expressing or signifying consent...the consent should not be taken for granted, nor readily implied. Any theory of 'implied consent' as a possible exception to the general principles of state immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognised exception. There is therefore no room for implying the consent of an unwilling state which has not expressed its consent in a clear and recognisable manner, including by the means provided in Article 8 [which relate to submission to the jurisdiction of a court].

It is unsurprising that states would reject the notion of implied waiver of immunity by treaty. States understandably attach great importance to immunity *ratione personae*, since it protects their most senior officials from interference by other states and is an expression of the sovereign equality of states. Further, as Lord Goff of Chieveley said in his dissenting opinion in *Pinochet (No 3)*, "what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio."[40] Some of their Lordships disagreed with his Lordship's conclusion on this point,[41] but they were unable to cite previous instances of states impliedly waiving immunity by treaty or statements recognising implied waiver by treaty. It seems that states are only prepared to recognise implied waiver of immunity in the context of an affirmative act clearly consistent with the assertion of immunity, viz

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[39] Ibid, at Vol II, Part 2, 27.

[40] *R v Bartle, ex parte Pinochet*, above n 26, at 223.

[41] Ibid, at 114-15 per Lord Browne-Wilkinson, 169 per Lord Saville of Newdigate, 190 per Lord Phillips of Worth Matravers.

submission to the jurisdiction of the court. Since, as noted above, the rejection of implied waiver of immunity appears to be based upon the importance attached to immunity, the principle is also applicable in the context of a Security Council resolution.

Even if immunity can be removed by implication, it would have to be a necessary implication. This standard is not met here. Security Council resolutions are product of negotiation. It is entirely possible that some members of the Council were prepared to allow the situation to be referred to the Court but not to remove President al-Bashir's immunity. China, for instance, is on friendly terms with him. The Resolution is not deprived of effect by recognising his immunity. There are many other people who do not have immunity who could be charged. In addition, the obligation on Sudan to cooperate with the Court probably includes a requirement to deliver him up to it. What the Resolution does not contain is a clear statement that other states can ignore the fundamental principle of head of state immunity.

Dapo Akande has suggested that President's al-Bashir's immunity is removed by the Genocide Convention.[42] Article VI thereof provides: "Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[43] But again immunity is not removed expressly. Its removal is not even a necessary implication of the provision. As the International Court of Justice noted in the *Arrest Warrant Case*, immunity does not entail impunity. Sudan can try President al-Bashir without violating his immunity. If he is guilty of genocide, then Sudan is violating its obligation to punish him. Article IV is therefore not deprived of effect by declining to read it as removing his immunity *ratione personae*.

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[42] Dapo Akande "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?" in *Debating International Justice in Africa: OTJR Collected Essays 2008-2010* (2010) University of Oxford Centre of Socio-Legal Studies.

[43] Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force 12 January 1951), art IV.

Thus Article 98(1) is applicable. The Court's request for assistance is ultra vires and states do not have to comply with it.

Conclusion

It is important to note the limited nature of the thesis that has been advanced in this paper. It has not been contended that President al-Bashir would possess immunity before the Court. Nor it is denied that Sudan has an obligation to procure him to the Court. The claim is simply that states parties to the Rome Statute (and other states) have no obligation to arrest him and would violate customary international law if they did so.

States place great importance on immunity *ratione personae*. It protects a serving head of state almost absolutely. States have not embraced any customary exception for international crimes breaching *jus cogens* norms. Article 98(1) of the Rome Statute precludes the Court from requesting states to arrest a person when that would conflict with their international obligations. The Security Council has not expressly President al-Bashir's immunity and it cannot impliedly do so. Article 98(1) therefore applies. Since the request for assistance was ultra vires the Court, states are under no obligation to comply with it. Doing so would violate their customary international law obligation to Sudan to respect the immunity *ratione personae* of its head of state.

It may be thought this state of affairs is unsatisfactory. Frankly, the author agrees. Sudan is most unlikely to transfer President al-Bashir to the Court. The Security Council has the power, acting under Chapter VII of the Charter, to expressly remove his immunity in the interests of international peace and security. It should exercise that power. It should also expressly require Sudan to transfer him to the Court and sanction non-compliance. The trial of President al-Bashir by the International Criminal Court would send a salutary message to other political leaders who might be inclined to use their control of the state to commit international crimes. In light of recent events in the Middle East and North Africa, including atrocities against protesters and other civilians, the trial of a local leader for crimes against his own people would be particularly timely.