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Articles should be 5000-8000 words (though longer articles will be considered).

Notes summarising and commenting on case law and legislative developments should be around 2000 words (though may be longer if the case or legislation merits this). Articles and Notes will be subject to a blind double-peer review process.

Articles and Notes should comply with the current version of the New Zealand Law Style Guide and use headings as set out in this edition of the NZCLR. They should be submitted as Word documents.

Letters to the editor that contribute to debate will be welcomed. In addition, book reviews will feature.

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Editorial

Welcome to the first edition of Te Wharenga - The New Zealand Criminal Law Review.

Te Wharenga translates as “the breaking wave”: an auspicious name, reflecting our hope that its contents will provide new ideas and energy to make a positive contribution to the criminal justice sector of Aotearoa New Zealand. It is planned that there will be three further editions this year, and that a roughly quarterly publication schedule will be followed into the future.

The journal is a collaboration between the various law schools of the universities of New Zealand, which have provided members to the editorial team; the judiciary, several judges being on our editorial advisory board; and the New Zealand Criminal Bar Association, which is supporting the venture as a whole and also providing additional members to the advisory board.

Our aim is to provide a regular outlet for informed discussion of matters of New Zealand criminal law, evidence and procedure and also of wider matters of criminal justice and policy. To that end, we will publish case notes and legislation notes relating to important developments from the courts and in the legislative framework, which summarise and comment on those developments; and articles that consider wider matters of law and policy.

We hope that both practicing and academic lawyers will consider the NZCLR as the first-choice location for their research, whether in the form of a note or an article. The reason for doing this is obvious: research can have a practical effect only if it is read by the audience most likely to be influenced by it.

This first issue includes an article on the important question of the extent of the right to suicide in New Zealand. There are also notes on amendments to the Crimes Act 1961 made in late 2015, and legislation enacted in response to concerns about New Zealand citizens being removed from Australia at the end of a criminal sentence imposed there. It also includes case notes dealing with a number of important criminal cases from the New Zealand Supreme Court. Future issues will also contain notes relating to cases from overseas jurisdictions that might have an impact on New Zealand jurisprudence.

We hope that you will enjoy reading this first issue.

Kris Gledhill
AUT Law School
(for the Editorial Board and the Editorial Advisory Board)

STOPPING SUICIDE AFTER *SEALES*

COLIN GAVAGHAN*

Suicide occupies an anomalous position in New Zealand law. Although it is not a crime to attempt suicide, the provision of assistance in such an attempt remains an offence. Furthermore, s 41 of the Crimes Act allows for the use of force to prevent another's suicide.

The case brought by Lecretia Seales in 2015 focused on the legal status of assisting suicide. During the course of those proceedings, however, attention turned to the defence under s 41. In this article, I consider the approach taken in Seales towards that provision. I will argue that the wide scope accorded to that defence by Collins J is not the only manner in which that section could be interpreted, and argue in favour of an alternative, more restricted, interpretation.

I. INTRODUCTION

The law around end of life decisions in New Zealand comprises a complex and uneven tapestry of legislative provisions and court decisions, involving both civil and criminal law. The ad hoc development of these provisions often makes it difficult to find consistency between them, and courts charged with ruling on one of those aspects must keep one wary eye on the potential impact on others.

It was against this trying background that, in May of last year, the High Court was charged with ruling on certain criminal provisions relating to 'aid in dying'.¹ The litigation brought by Lecretia Seales constituted the first challenge to the legal status of 'aid in dying' in New Zealand.² The decision by Collins J to reject all of the plaintiff's legal submissions (he did recognise certain factual contentions; see Part 1) has been well documented. The future of the legality of assisted dying is now firmly back with the legislature.³

The main points of that decision have been discussed in detail elsewhere.⁴ In this article, I want to concentrate on a somewhat tangential issue that arose in the course of oral arguments. The status – and indeed, the definition – of 'suicide' in

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¹ I use the terminology adopted by the plaintiff, rather than the more question-begging 'assisted suicide'.

² *Seales v Attorney-General* [2015] NZHC 1239, [2015] 3 NZLR 556.

³ The Health Select Committee is currently considering submissions on the topic of medically-assisted dying, in response to a petition initiated by former MP Maryan Street: <http://www.parliament.nz/en-nz/pb/sc/make-submission/OSCHE_SCF_51DBHOH_PET63268_1/petition-of-hon-maryan-street-and-8974-others>. ACT MP David Seymour has also introduced an End of Life Choice Bill into the members' ballot.

⁴ Andrew Geddis and Colin Gavaghan "Aid in dying in New Zealand: recent legal developments" *Journal of Law and Medicine*, forthcoming 2016.

New Zealand law was an important strand to Ms Seales' case, but the approach Collins J adopted to that question seems likely to have important implications for situations other than those in which Ms Seales found herself. In particular, his broad interpretation of s 41 of the Crimes Act 1961 – which allows for the use of force to prevent suicide - could also have implications for those who attempt to end their own lives *without* assistance.

In the Part II of this article, I will outline the main claims advanced by the plaintiff in *Seales*, and show how the definitional question around 'suicide' came to play an important role in the judgment. In Part III, I will explain the approach taken to that question by the judge, Collins J, and argue that the approach he adopted has potentially problematic implications for a range of circumstances not limited to those in the case before him.

In the final section, I will offer an alternative interpretation of s 41. I will propose that, contra Collins J, the decision-making competence of the person attempting suicide should be of considerable significance in this area. In so doing, however, I will argue that a wide margin of protection should be afforded for those who intervene in circumstances when they cannot be certain whether the attempter is in fact competent.

II. *SEALES V ATTORNEY-GENERAL*

In 2011, Lecretia Seales – a lawyer working for the Law Commission – was diagnosed with an advanced form of brain cancer. While treatment extended her life several years beyond her initial gloomy prognosis, by late 2014 it had become evident that anything other than palliative treatment was futile, and her death was imminent. Her attention, then, turned to the timing and manner of that death. The precise manner in which Ms Seales' tumour would progress was impossible to predict with certainty, but some of the possible outcomes were unacceptable to her. 'For me,' she explained, 'a slow and undignified death that does not reflect the life that I have led would be a terrible way for my good life to have to end.'⁵

In the hope of securing herself against the possibility of such a fate, and faced with the prospect of increasingly severe physical disability, Ms Seales sought to be permitted to receive assistance in taking her own life, should her circumstances worsen to the extent that she no longer considered life to be tolerable. Her general practitioner had provisionally agreed to provide her with the means of taking her own life should the need arise, but only on the condition that s/he had an assurance that she would not face criminal charges for so doing.

To that effect, Ms Seales sought two declaratory orders from the High Court. The first asked the Court to declare that, in the circumstances of Ms Seales' condition,⁶

⁵ *Seales v Attorney-General* at [29].

⁶ These circumstances were specified as being that Ms Seales was "a competent adult who: (i) clearly consents ...; and (ii) has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness..." At [8].

it would not be a breach of either s 160 (“culpable homicide”) or s 179 (“assisting suicide”) of the Crimes Act for a doctor to provide her with ‘aid in dying’. In the event that the Court felt unable to grant this declaration, Ms Seales sought an alternative declaration, to the effect that those provisions are, in the circumstances of Ms Seales’ condition, inconsistent with her rights under the New Zealand Bill of Rights Act 1990 (NZBORA).

As is widely known, Collins J declined to issue either declaration. Although this outcome was inevitably disappointing to supporters of reform, whose hopes had been raised by bolder rulings in Canada⁷ and South Africa,⁸ Collins J’s reluctance to make such a radical change in such a contentious area is perhaps not entirely surprising. As he explained,⁹

The changes to the law sought by Ms Seales can only be made by Parliament. I would be trespassing on the role of Parliament and departing from the constitutional role of Judges in New Zealand if I were to issue the criminal law declarations sought by Ms Seales.

On the other hand, it has been argued that avenues were available to him that would have led to a bolder outcome.¹⁰ For the purposes of this article, however, I want to focus on a particular aspect of the ruling. The issue of preventing suicide arose only tangentially to Ms Seales case. No-one had proposed to prevent her taking her own life, should she choose to do so, and she was not asking the Court to prevent any such future intervention. Rather, the issue arose in the context of discussion as to whether the sort of death that she sought to be allowed was properly to be regarded as ‘suicide’ at all. If it was not, then it seemed to follow that anyone assisting her with that death could not be said to be ‘assisting suicide’ for the purposes of s 179. With the Crimes Act offering no definitional assistance, the issue of what precisely counts as ‘suicide’ for those purposes was one for the Court to determine. In particular, it required Collins J to address the vexing question of whether some self-chosen deaths could be regarded as non-suicidal.

Collins J began his evaluation of this area by noting that, historically, the common law had long treated both successful and unsuccessful suicidal attempts as criminal offences. In the thirteenth century, the English jurist Henry de Bracton wrote that ‘[j]ust as a man may commit felony by slaying another so may he do so by slaying himself’,¹¹ and writing some 400 years later, Sir William Blackstone noted that the law regarded suicide as ‘among the highest crimes’.¹²

⁷ *Carter v Canada* [2015] SCC 5, [2015] 1 SCR 331.

⁸ *Stranham-Ford v Minister of Justice and Correctional Services and Others* (27401/15) [2015] ZAGPPHC 230.

⁹ *Seales v Attorney-General*, above note 2, at [13].

¹⁰ Geddis and Gavaghan, above note 4.

¹¹ Bracton on Laws and Customs of England, 423 (f. 150).

¹² Sir William Blackstone, “Of Homicide,” in *Commentaries on the Laws of England* (18th ed, Sweet, Phoney, Maxwell, Stevens & Sons, London, 1829), at 188.

Penalties for those who attempted suicide were often harsh; according to Glanville Williams, it was once a capital offence.¹³ Various imaginative means were derived to punish even successful suicides, including the confiscation of the deceased's estate and the denial of Christian burial; indeed, funeral rites for suicides were often accompanied by grotesque ritual, including 'throwing lime over the body and driving a stake through it'.¹⁴ The Methodist John Wesley had argued for even more public displays of disapproval, suggesting that the bodies of suicides be gibbeted and left to rot in full public view.¹⁵

A movement for a more humane approach to suicide appears to have grown throughout the eighteenth and nineteenth centuries, possibly driven in part by the perception that, while ordinary people were subject to the full wrath of law and the Church, the suicides of wealthy and educated people more commonly avoided stigma or legal sanctions by classifying the deceased as insane.¹⁶

By the late Victorian and Edwardian eras, suicide seems to have come to be viewed more as a social stigma rather than a sin, while particular examples of self-sacrificing conduct seem to have been heralded as heroic, e.g. Captain Lawrence Oates, who is thought to have sacrificed his life in an (ultimately futile) attempt to save fellow Antarctic explorers (see Part III of this article).

Probably as a result of this changing of attitude, coupled with a growing recognition that such penalties did not actually offer much of a deterrent, and perhaps informed by the large numbers of traumatised and 'shell-shocked' men returning to Britain during the First World War, a more lenient approach came to be adopted in England:¹⁷

As long ago as 1916 the Metropolitan Police adopted, with the approval of the then Secretary of State, the practice of preferring a charge of attempted suicide only where there is no responsible person able or willing to take charge of the individual concerned, or where special circumstances, such as threats of renewed attempts of suicide or positive indications of insanity suggest that the individual should be kept in custody for his own protection. In 1921 the Metropolitan practice was brought to the notice of provincial forces. In the great majority of cases no proceedings are taken ...

Nonetheless, suicide remained technically a crime – both in England and Wales and in New Zealand – until 1961, when the Suicide Act (England and Wales) and

¹³ Glanville Williams explained the rationale behind such a punishment thus: "If, as is sometimes supposed, suicide is a form of self-murder, then, but for the accident that the culprit is beyond the jurisdiction, he might be punished for his wicked self-destruction by being destroyed." *The Sanctity of Life and the Criminal Law* (Faber and Faber Ltd, London, 1958) at 246.

¹⁴ Barbara Gates *Victorian Suicide: Mad Crimes and Sad Histories* (Princeton University Press, Princeton, New Jersey, 1988).

¹⁵ Michael MacDonald and Terence R Murphy *Sleepless Souls: Suicide in Early Modern England* (Clarendon Press, Oxford, 1990).

¹⁶ Donna T Andrew "The Secularisation of Suicide in England 1660-1800" *Past and Present*, No 119 (May 1988), 158-165.

¹⁷ Gwilym Lloyd George, Secretary of State for Home Department. HC Deb 20 December 1956 vol 562 cc1432-3.

the Crimes Act (New Zealand) respectively formally abolished the offence. This is not, however, to say that the law recognized any sort of 'right to suicide.' For one thing, both pieces of legislation contained specific offences of assisting suicide (s 2 of the Suicide Act, s 179 of the Crimes Act), punishable by up to 14 years imprisonment. Furthermore, the Crimes Act made specific provision for those who use force to prevent suicide. Section 41 of the Crimes Act provides that:

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

This provision was based on s 72 of the Crimes Act 1908, which provided for 'using such force as may be reasonably necessary in order to prevent the commission of an offence ... the commission of which would be likely to cause immediate and serious injury to the person or property of any one...' The interesting difference is that the defence was expanded to encompass the prevention of an act – suicide – which was no longer criminal. Section 41, then, placed suicide in a unique position; a non-criminal act which anyone could use force to prevent.

III. JUSTICE COLLINS' APPROACH

The manner in which this section became relevant to the Seales case perhaps merits some further explanation. Central to Ms Seales' case was the contention that the offence of assisting suicide would not be committed by someone who assisted her, for example, by providing her with a lethal prescription. There is, she contended, 'a distinction between suicide which ... is "irrational and a product of impaired thinking" and a "rational decision to die" by a mentally competent adult who is not depressed but is enduring a terminal illness.'¹⁸ Some support for this approach could be found in United States case law,¹⁹ though Collins J was quick to discount that authority as "provid[ing] little assistance".²⁰

In evaluating this claim, Collins J looked to the origins and context of the various statutory provisions around suicide, and investigation that led him to discern no basis for any such distinction:²¹

Section 41 of the Crimes Act does not distinguish between the vulnerable and those who might commit a "rational suicide". If s 41 is to have any effect, it must apply to all suicides.

It may seem, then, that Collins J simply followed the well-trodden path of refusing to depart from the plain meaning of s 41. Whether this would be sufficient to reflect legislative intention, or to pay sufficient heed to the New Zealand Bill of Rights Act, are both arguable propositions. Nonetheless, faced with such a socially divisive area of law, there is much that could be said for such judicial humility.

¹⁸ *Seales v Attorney-General*, above note 2, at [135].

¹⁹ *Baxter v Montana* 2009 MT 449 (Mont 2009) at [71].

²⁰ *Seales v Attorney-General*, above note 2, at [142].

²¹ At [128].

In reality, however, Collins J went some way beyond that approach, in two respects. First, while declining to distinguish 'rational' from 'irrational' acts of self-killing, he did recognise several other distinctions which required a somewhat imaginative approach to the bare text of the section. Secondly, he offered an opinion to the effect that s 41 could not practically function were it to be interpreted in the manner proposed by Ms Seales. It is with both of these claims that I take issue in this section.

The Crimes Act offers no definition of 'suicide.' In *Seales*, Collins J referred to '[o]rdinary dictionary definitions of suicide [which] say that suicide is "the intentional killing of oneself"'.²² In reality, both he and other judges have sought to distinguish 'truly' suicidal acts from other decisions and actions that are either intentionally or knowingly oriented towards the death of the individual.

In *Chief Executive of the Department of Corrections v All Means All* – which concerned a prisoner undertaking a hunger strike – Panckhurst J had taken the view that '[s]uicide is an intentional killing of oneself. Death is the desired and intended end result.'²³ The supplementing of 'intent' with 'desire' may be seen as somewhat surprising in this regard, especially given attempted suicide's history as a criminal offence. If attempting suicide had remained a crime, it is interesting to speculate whether a desire requirement would have remained an element of that offence, given the general reluctance of New Zealand courts to conflate intention with purpose or motive.²⁴

Moreover, it may be seen to add a complicating element for the purposes of s 41, which sits awkwardly with Collins J's apparent desire for simplicity from the perspective of the intervener.²⁵

In *Seales*, Collins J also sought to distinguish different categories of self-killing behaviour. He referred, for example, to:²⁶

...the soldier who sacrifices his or her own life on a battlefield by falling onto a grenade to save his or her comrades is generally regarded as a hero rather than a person who has committed suicide. In that case, the soldier's death is not branded as an act of suicide because he or she has acted altruistically, in the greater good to save others.

As with the requirement that the death be 'desired', a definition of 'suicide' that excludes 'altruistic' self-killing certainly involves going some way beyond the wording of the Crimes Act, and also beyond common dictionary definitions. Furthermore, it is presumably possible for someone to intend to kill them self for

²² At [134].

²³ *Chief Executive of the Department of Corrections v All Means All* [2014] NZHC 1433, [2014] 3 NZLR 404 at [44].

²⁴ In *Police v K*, the Court referred to 'the principle that the law has law recognized the need to define criminal intent in a way which does not oblige the prosecution to prove that the prohibited outcome represented the defendant's purpose or motive.' [2011] NZCA 533 at [28].

²⁵ See next section.

²⁶ *Seales v Attorney-General*, above note 2, at [137].

an altruistic motive, in a manner that would commonly be regarded as suicide – as in the case where someone takes their life so that their family may benefit from the insurance pay out. That death may not be their *ultimate* objective is generally not relevant as to whether it is an intended result. Where X is an indispensable means to the accomplishment of Y, it is common to regard both X and Y as intended.

The hand grenade example could, however, at least arguably be distinguished on grounds of intent without entering into the murky terrain of ultimate and instrumental objectives. It is plausible, after all, that the soldier falling on the grenade anticipates that his objective – saving his comrades – might be accomplished without his actually dying. It is not unknown for those who dive onto grenades to survive the experience, albeit that severe injury is almost inevitable. The extent to which ‘intent’ should encompass foreseen side effects is a matter of considerable jurisprudential debate, but on at least some approaches, the soldier’s death could be deemed unintended. Applying the so-called ‘test of failure’²⁷ would allow us to conclude that the heroic soldier did not intend to die at all (even though he recognised that he might well die, his purpose could well have been satisfied had he survived), and hence, could be said not to have intended suicide.

More difficult, from this perspective, is the example of the insurance suicide. Or perhaps the well-known case of Captain Oates, referred to earlier in this article. While it is certainly true that neither of those parties sought death *for its own sake*, both pursued an objective in which death was not only a virtually certain outcome, but an indispensable step toward their desired goal. To regard those deaths as other than intended is to proceed some way down the road towards conflating intention and motive. It would also sit awkwardly with the approach of the New Zealand courts in other contexts. In an oft-cited passage, Fisher J described the position of “oblique” intent in New Zealand law:²⁸

In a legal context ‘intention’ is normally taken to embrace both ultimate (desired) consequences and incidental (undesired but foreseen) consequences so long as the latter are foreseen with sufficient certainty when the course of action is deliberately embarked upon... If it is clear that the intended course of action will result in both, both are said to be intended.

Furthermore, it would seem to restrict very substantially the class of deaths that could be deemed ‘truly’ suicidal. Lecretia Seales, after all, did not seek death for its own sake, but as a means to escape a quality of life that she might deem intolerable. Had she characterised her death as being intended to spare her family the ordeal of watching her further decline, would that have elevated the choice into the realm of altruistic self-sacrifice, rather than suicide properly so called?²⁹

²⁷ Suzanne Uniacke “The Doctrine of Double Effect” in Ashcroft, Dawson, Draper, McMillan (eds) *Principles of Health Care Ethics* (2nd ed, Wiley, 2007) 1052 at 1053. Colin Gavaghan and Mike King “Can facilitated aid in dying be permitted by ‘double effect’? Some reflections from a recent New Zealand case” (2016) 42(6) *Journal of Medical Ethics* 361-366.

²⁸ *R v Wentworth* [1993] 2 NZLR 450 (HC) at 453.

²⁹ It is also, perhaps, interesting to reflect on the extent to which ‘altruistic’ suicides are truly autonomous. In the context of the wider debate around assisted dying, the prospect of elderly or

The claim that 'altruistic' self-sacrifice should not be regarded as 'suicide', then, is controversial in several senses: first, in that it involves going beyond the stated meaning of the text, and indeed, of the standard definitions of 'suicide' to which Collins J alluded; second, because it did so on the basis of considerations of motive or desire, considerations which generally have a very limited role in New Zealand criminal law; and third, because it may be seen to rest on unarticulated normative assumptions about the moral status of these acts.

The second of Collins J's contentious distinctions at least has more of an established pedigree in case law.³⁰

In my assessment, there is an important distinction between those who end their lives by taking a lethal drug and those who decline medical services and die from natural causes.

This approach, as Collins J pointed out, is consistent with the approach adopted by the English courts, most significantly, by the House of Lords in *Bland*.³¹ Perhaps more importantly for New Zealand purposes, it may have been intended to allow the defence in s 41 to be reconciled with s 11 of the New Zealand Bill of Rights Act, which provides that 'Everyone has the right to refuse to undergo any medical treatment.' Yet it is not an approach without problems. In particular, it seems to place very considerable significance on the precise means chosen by the individual to end their life, a significance that seems detached from the practical and ethical concerns that surround end of life choices.

Before exploring those, I should acknowledge that there are certainly cases where a refusal of life-prolonging treatment may be seen as non-suicidal. One such may be the hunger-striking prisoner in *All Means All*. As with the heroic soldier diving onto the grenade, the more plausible reason for deeming the prisoner's conduct to be non-suicidal may lie with his intent, rather than the means adopted. As Panckhurst J explained in that case:³²

Mr All Means All is undertaking a protest. Whether his cause is sensible or not is beside the point. His intention is to bring pressure to bear on the person who he believes is guilty of misconduct. Death is an unwanted end result of the means Mr All Means All has adopted, but it is certainly not his desire, nor his intention.

For All Means All, then, his objective could have been achieved without his death resulting. It was neither his ultimate nor his instrumental objective, but rather, at

disabled people opting for such deaths out of a sense of duty to 'not be a burden' is often advanced as a reason to be cautious of reform. The concern, presumably, is that their autonomous will risks being overborne by the sense of obligation to others. Yet from other philosophical perspectives, actions derived from a sense of duty are the only truly autonomous actions.

³⁰ *Seales v Attorney-General*, above note 2, at [143].

³¹ 'I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.': *Airedale NHS Trust v Bland* [1993] AC 789 per Lord Goff at 864.

³² *Chief Executive of the Department of Corrections v All Means All*, above note 23, at [44].

most, a foreseen possibility that he was willing to risk but hoped to avert. It is at least plausible to conclude that death was not his intent, and therefore, that his hunger strike was not an attempt at suicide.

More problematic would be deaths like those of Auckland woman Margaret Paige, whose refusal of food and hydration seems to have been adopted entirely as means to end her life.³³ If death was not her intent, then it is difficult to see what was. Even more clearly than in the earlier examples of Captain Oates and the insurance suicide, death was precisely what she desired – not only as a means, but as an end in itself. It is difficult to think of any plausible approach to intent that would deem this death to have been unintended, but some imaginative attempts have been made. Margaret Ottlowski has been dismissive of some such attempts:³⁴

There has been a tendency to rationalize this conclusion on the basis that a patient who refuses life-saving treatment would really prefer to live, free of his or her afflictions. This is a patent absurdity which, if followed through to its logical conclusion, would mean that a person deliberately taking his or her life would not be committing suicide if he or she wished it were not necessary.

Yet to interpret s 41 so as to allow her to be forcibly fed would have very fundamentally weakened the effect of s 11 NZBORA. Indeed, it would have required that section to be read as saying something like ‘Everyone has the right to refuse to undergo any medical treatment, provided their intent in so doing is not to die.’ It is presumably in order to avoid this weakening of s 11 that New Zealand courts have followed their English counterparts in declaring that such refusals will not be regarded as suicidal, apparently regardless of the patients’ intent or desire.

Most problematic of all would seem to be those cases where someone survives an initial attempt at suicide, but in an injured state that requires treatment if their subsequent death is to be avoided. This was precisely the situation faced by the English Court of Protection in a recent relatively high profile case.³⁵ Following an overdose, the patient was told that she required a period of dialysis. Her prognosis with this treatment was good, without it her death almost certain. The patient declined the treatment, making it entirely clear that her reason for doing so was a desire to die. As the Court heard from one independent expert witness, she had stated:³⁶

I know that I could get better; I know that I could live without a health problem, but I don't want it; I've lost my home; I've lost everything I'd worked for; I've had a good innings; it's what I have achieved.

³³ “Margaret Paige dies in rest home after 16 days”, *Dominion Post*, 31 March 2010. It should perhaps be noted that Ms Paige's death is the subject of an ongoing Coroner's inquest, though the legality of respecting her refusal of feeding and hydration does not seem to be in doubt.

³⁴ Margaret Ottlowski *Voluntary Euthanasia and the Common Law* (Oxford University Press, Oxford, 1997), at 70.

³⁵ *Kings College Hospital NHS Foundation Trust v C and Another* [2015] EWCOP 80.

³⁶ At [79].

Were such a case to arise in New Zealand, a question might arise as to whether treatment might be forcibly administered to such a patient. Would s 41 provide a defence for those who forcibly treat? Or would s 11 allow the patient to decline that treatment? Peter Skegg has argued that s 11 does not necessarily preclude intervention in such cases:³⁷

Viewed in its entirety, the NZBORA provides no warrant for this aspect of s 41 ... being restricted entirely to interventions in advance of the apparent attempt.

This would seem to place New Zealand law out of line with that in England. It would also arguably draw a fairly arbitrary distinction between those who – like Margaret Paige – choose from the outset to die by omission, and those who – like the patient in the Kings College Hospital case – make the mistake of first attempting by active means. Given that the stated desire of both patients is for their life to be over, it is difficult to see what public interest or ethical value would justify forcibly keeping the latter alive, while allowing the former to starve herself to death.

Margaret Ottlowski has argued that treatment refusals can be distinguished from 'active' suicides on the following basis:³⁸

In the medical context, the refusal of treatment by a patient is usually a considered and rational decision, based on their medical condition and the circumstances of their continued existence. The State's legitimate interest in the prevention of irrational self-destruction clearly does not arise in these circumstances.

On that basis, she concludes that:³⁹

Because of the special features of the refusal of treatment cases, upholding a patient's right to refuse treatment (even though that refusal may be tantamount to suicide), does not necessarily imply a *general* right to commit suicide free of State intervention.

While this may be true as an empirical observation, it seems to provide a more questionable basis for maintaining a clear distinction on this basis. For one thing, the courts have been clear that patients may decline life-saving treatment even if their reason is irrational,⁴⁰ unreasonable or foolish.⁴¹ That being so, it is difficult to accept rationality as the basis for the distinction. Even if it were to be accepted, however, there seems no reason why an exception could not be made for 'considered and rational' suicides by active means – as may well have been the case for Lecretia Seales, had she elected to follow that path.

³⁷ Peter Skegg and Ron Paterson, eds. *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015), at 297.

³⁸ Ottlowski, above note 34, at 75.

³⁹ *Ibid.*

⁴⁰ *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, at 102.

⁴¹ "An individual patient must, in my view, always retain the right to decline operative investigation or treatment however unreasonable or foolish this may appear in the eyes of his medical advisers." *Smith v Auckland Hospital Board* [1965] NZLR 191 (CA) at 219.

Kay Wheat has suggested that such a distinction may be justified on the basis of the differing forms of intervention required:⁴²

We might say that in both cases there is a suicide attempt, but in the case of a refusal of food or medical treatment, the indignity of enforced treatment is too much of an infringement of bodily integrity to be justified.

It is not entirely clear, however, that prior attempts will always be less undignified or intrusive than subsequent attempts. Would physically restraining Ms C, or perhaps forcing the pills from her mouth before she could swallow them, necessarily be less intrusive than forced 'medical treatment'? Were an intervener to force their fingers down her throat to induce vomiting before the pills could be ingested, would that fall under s 41, or s 11? Would seizing the wrist of a knife-wielding suicidal person, or twisting the knife from their grasp, be inherently less dignified or intrusive than forcibly seizing or binding their wrist to staunch the blood flow once the incision was made?

What, then, if s 41 were read as applying only to interventions in advance of the attempt? That too would give rise to some anomalous positions. Patient C could be forcibly restrained from taking the overdose. But were she to succeed in swallowing the pills, any intervener would have to desist in the life-saving attempt and watch her die. The wrist-cutting example perhaps looks even more anomalous; the attempter could be physically restrained when attempting to cut, but the intervener must desist the moment the cut is made.

IV. AN ALTERNATIVE APPROACH TO SECTION 41

My argument, then, is that the attempts to plot a course between s 41 and s 11 have brought the law to an uneasy and unclear compromise position. Competent adults may choose to die, and no-one may intervene to save them, unless their actions are classified as suicidal, whereupon anyone may use such force as is necessary to stay their hand. In the absence of a statutory definition of what makes a chosen death 'suicide', the courts have been left to draw a series of ad hoc and seemingly arbitrary distinctions that seem to reflect nothing of ethical or practical importance.

I wish to propose an alternative reading of s 41, one that I think better reconciles it with s 11 while avoiding the perverse and anomalous outcomes detailed in the previous section. In proposing this, I do not mean to beg the question as to whether it was really open to Collins J to interpret the section in this manner. Much in this regard may depend on how bold we wish our judges to be in interpreting legislative provisions, and this is not an article about that.

⁴² Kay Wheat, "The Law's Treatment Of The Suicidal" (2000) 8(2) Med Law Rev 182. My thanks to Jonathan Herring, who raised a similar point for my consideration.

I do, however, feel on more solid ground in taking issue with Collins J's apparent conclusion that s 41 can only work on an all-or-nothing basis:⁴³

It is difficult to see how a person who intervenes to prevent a suicide can assess whether or not he or she is intervening in a case of "rational" suicide.

My argument is that s 41 could be interpreted in a manner that affords a wide protective scope for those who act without being sure of the rationality of the attempt. In so doing, I will assume that – in the great majority of cases of attempted suicide - it is highly desirable for would-be interveners not to be deterred by the prospect of later criminal charges.

The rationale for such a wide protective scope may be thought to derive from the strong societal interest in preserving life. While there is a certain appeal to this approach, it remains somewhat difficult to reconcile with the presumption of competence that allows individuals to decline life-saving treatment unless shown to be incompetent.⁴⁴

A more plausible basis for the presumption in favour of intervention might derive from an empirical assumption – that as a matter of fact, those attempting suicide are not typically rational, or perhaps even competent.⁴⁵ If that assumption is reliable, then it seems that there is considerable justification to allow intervention on the basis that the attempter is not rational.

This presumption forms the basis for an approach proposed by Margaret Ottlowski:⁴⁶

where a person is found attempting to commit suicide, and nothing is known about his or her state of mind, it would be reasonable to assume that the attempt is evidence of mental disorder and it would be quite justifiable for concerned persons or members of the medical profession to take whatever steps were necessary to prevent the death of that person.

Such an approach would also see the defence available when the intervener is subsequently shown to have been mistaken about the mental state of the attempter. Indeed, that very possibility of a mistaken intervention is explicitly acknowledged in s 41, which provides the defence where the intervener "believes, on reasonable grounds" that the act being undertaken would amount to suicide. In that respect, as the Court of Appeal has noted, "a reasonable mistake may still attract the protection of s 41."⁴⁷

⁴³ *Seales v Attorney-General*, above note 2, at [140].

⁴⁴ HDC Code of Health and Disability Services Consumers' Rights Regulation 1996, Right 7(2).

⁴⁵ I have adopted the language of "rational suicide" from *Seales*. However, it should be noted that, in common law, the relationship between rationality and competence is not straightforward. It has been held, for example, that an irrational refusal of life-saving treatment may nonetheless be competent. See *In Re T* [1992] 3 WLR 782; *Re MB* [1997] 2 FLR 426. Were rationality to be required of attempted suicides, then, it should be noted that this would be to set a considerably higher bar than for those seeking to end their lives by omission. That being so, it may be worth considering whether "competent suicide" may in fact be the preferable term.

⁴⁶ Ottlowski, above note 34, at 85.

⁴⁷ *Russo v R* [2011] NZCA 79, [2011] NZAR 123 at [12].

Admittedly, the error being discussed in that case was as to whether suicide was being attempted at all, and not to the state of mind of the individual making the attempt. Nonetheless, it is not clear why the same scope for reasonable error could not apply to both issues. A passer-by who witnesses what appears to be an attempt at suicide, and who uses force to prevent that apparent attempt, may avail them self of the defence, even if it subsequently transpires either that no attempt was being made, or that the attempt was being made by a competent and rational adult.

Like most presumptions, though, this one would be open to rebuttal. Let us imagine, for instance, that Lecretia Seales had made it known that, having been denied the right to legal assisted dying should she become more profoundly incapacitated, she intended to consume a quantity of drugs that she had been stock-piling, with the intent of ending her own life while she retained the ability. On Collins J's reading, it seems that any passing stranger could forcibly restrain her from so doing – notwithstanding that the High Court had just deemed her to be 'not vulnerable', and her request for aid in dying to be 'a rational and intellectually rigorous response to her circumstances.'⁴⁸

My proposed alternative approach would mean that, in rare circumstances such as this, where the attempter is known to be competent and rational, the defence under s 41 would cease to be available. There would be no more justification for forcibly retraining such a person than for forcibly feeding a competent patient who is declining medical treatment, or feeding and hydration. Just as in those cases – and contra Collins J's conclusion regarding Parliament's intent – the principle of individual autonomy would indeed prevail over the sanctity of life, just as it does in the context of treatment refusal.

This would bring such cases into closer alignment with cases such as that of Margaret Paige, and Ms C in the recent English case discussed above. In all cases where individuals adopt courses of conduct oriented towards ending their own lives, the primary question for any prospective intervener would be whether the individual has the capacity to make such a decision, rather than on arbitrary and spurious distinctions based on the precise form of the conduct. Determining capacity for decisions of such magnitude can be far from straightforward, even for courts. Those intervening in acute situations will have even less scope for considered decisions. This, however, is equally true regardless of whether the decision is to tackle someone attempting suicide, to treat someone who has attempted suicide, or indeed to treat someone who has succumbed to some other injury. In all of those cases, an argument can be made for a wide – though not infinitely wide – margin for error. In none of those cases can a persuasive argument be made for overcoming the will of someone known to be a competent adult.⁴⁹

⁴⁸ *Seales v Attorney-General*, above note 2, at [81].

⁴⁹ Kay Wheat has also sought to distinguish treatment refusals from (other) cases of suicide on the basis of the opportunity for reflection afforded in the former. 'In the context of suicide, it can be argued that, in contrast with the person who refuses treatment because of a wish to die, the person who takes steps to end his own life immediately will have no opportunity to reflect upon what he

V. CONCLUDING REMARKS

Whether it was open to Collins J – or remains open for any future court – to read s 41 in that manner is, I concede, arguable. It is easy to have a measure of sympathy with judicial reluctance to read more into the defence than Parliament explicitly provided. It is also important to consider what my proposed, slightly restricted reading of s 41 would mean for the context in which it arose in *Seales*. Could a rational life-ending action by a competent adult be regarded as ‘not suicide’ for the purposes of s 41, but still ‘suicide’ for the purposes of the assisting offence in s 179? A court adopting my suggested approach to preventing suicidal actions could, if it did not proceed very carefully, end up effectively decriminalising many cases of what might currently be assisting suicide. Unpicking one part of the patchwork of end-of-life laws will at very least tug on threads leading to others.

If, however, courts feel able to supplement the notion of suicide by requiring that death be desired, or by excluding deaths caused by refusing treatment, or deaths motivated by altruism, then my contention is that the door is already some way open to the sort of reading I propose here.

With regard to the implications for s 179, it may be that the New Zealand courts have already conceded rather a lot in this regard. If altruistic acts of self-sacrifice are not to count as ‘suicide’, then it seems to follow that someone who incites, counsels, procures, aids or abets such acts is not guilty under s 179. It may be difficult to imagine such a case arising in the context of the heroic grenade-diving soldier, but if altruistic motives can be expanded to, for example, the insurance case I discussed earlier, then the possible difficulty becomes more apparent. Only a very restrictive, and probably arbitrary, definition of ‘altruistic’ seems likely to keep open the option of prosecution in such cases.

Likewise, if those who starve themselves to death, in the manner of Margaret Paige, are not ‘committing suicide’, then someone inciting them to do so will not be committing an offence. Can it really have been Parliament’s intention to treat different acts of incitement so differently, depending only on the means the incited party chooses to bring about their death? Again, it is hard not to wonder what public interest or ethical value is reflected in that distinction.⁵⁰

is doing and change his mind’. While this may helpfully distinguish some cases of treatment refusal from some cases of suicide, it seems unlikely to function effectively across the board. It is possible, after all, that one person may make their decision to take their own life many weeks or months in advance, while someone refusing treatment after an acute incident will have no opportunity for reflection. There is perhaps something to be said for the argument that a truly autonomous decision to die must involve a ‘cooling off’ period – indeed, several proposals to permit assisted dying have included exactly this. But it is unclear why this should be required of cases of ‘true’ suicide, but not of treatment refusals. Wheat, above note 42, at 182.

⁵⁰ Pamela Ferguson has speculated as to whether the mother of the acutely ill Jehovah’s Witness patient in *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649, who is thought to have impressed on her daughter her obligation to decline a blood transfusion, may have been guilty of an offence under analogous English law provisions. “Killing ‘without getting into trouble’? Assisted Suicide and Scots Criminal Law” (1998) 2(3) *Edinburgh Law Review* 288-314.

It is possible that much of this inconsistency could be rectified should Parliament elect to reform the law around assisted dying. If some provision is made for others to assist in an individual's death, then it seems inevitable that this will require some modification to s 41 as well; it would seem bizarre to allow X to assist with Y's suicide, while at the same time allowing Z to physically prevent it.⁵¹ In the meantime, however, it will fall to the courts to impose whatever logic and consistency is to be found in this area, within the confines of limited and sometimes ambiguous authority. Their task is not enviable.

⁵¹ In this article, I do not address the related issue of whether certain persons or institutions (such as prisons or hospitals) may have *duties* to prevent suicide, but of course, this too would require careful consideration if the law in this area is to be reformed.

LEGISLATION NOTE: THE RETURNING OFFENDERS (MANAGEMENT AND INFORMATION) ACT 2015

KRIS GLEDHILL*

The Returning Offenders (Management and Information) Bill 2015 was introduced to Parliament on 17 November 2015, and became an Act on 18 November 2015. It was passed under urgency, though with a clause requiring a select committee to provide a review on its operation after 18 months (s 37).¹ This note can be seen as an early commentary as to matters that should be examined as part of this review; it also discusses various issues that might be raised in arguments testing the application of the Act.

I. THE STATUTE OUTLINED

Section 3 of the Returning Offenders (Management and Information) Act 2015 states that the Act's purpose "is to obtain information from returning offenders and establish release conditions for offenders returning to New Zealand following a prison sentence of more than 1 year in an overseas jurisdiction". This and other preliminary provisions are set out in Part 1 of the Act. The substantive provisions are contained in the four sub-parts of Part 2. First, sub-part 1 deals with returning offenders; this is a broadly defined group, who are made subject to a regime for collecting information, as is noted below. Secondly, sub-part 2 covers returning prisoners, a sub-group of returning offenders. It subjects those covered to New Zealand parole release conditions. Sub-part 3 is concerned with returning offenders who have been out of custody for more than 6 months but have been monitored in that period by reason of parole conditions or some other regime. Finally, sub-part 4 amends the Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 to provide for the making of extended supervision orders and public protection orders against returning prisoners who meet the criteria set out for those provisions.

The more demanding provisions in sub-parts 2-4 are summarised first. Sections 16 and 17 set out the process for designating someone as a returning prisoner. It is carried out in the name of the Commissioner of Police. In essence, a person the New Zealand police determine to have been sentenced overseas to more than 1 year in prison for conduct that is imprisonable in New Zealand and who is returning within 6 months of release from custody overseas is a returning prisoner. This is given an extended meaning in that, first, the sentence can be a cumulative one comprised of various sentences of less than 1 year and 1 day but adding up to at least the relevant figure; secondly, the release can be at the end of the sentence or from immigration detention that is imposed after release from the prison sentence. Sections 18 to 23 deal with the time-scale for making the determination that a person be designated as a returning prisoner (6 months after return to New Zealand), service of the notice of determination (which can include obtaining a

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¹ The Bill suggested a review after 2 years.

court warrant to enter premises to serve it), the contents of the notice, and a process to seek a review by the police of their determination (which is expressly without prejudice to any right to seek a judicial review of the determination).

Under ss 24 to 30, once the notice has been served, it has various consequences. The returning prisoner is subject to release conditions for at least 6 months (if the underlying sentence was not more than 2 years), rising to 5 years if the sentence was indeterminate (ie life or the equivalent of preventive detention). The conditions are, as a minimum, the standard ones that arise under the Parole Act 2002 in relation to domestic prisoners: this is the statutory consequence of the service of the notice of determination that the person is a returning prisoner. In addition, the person can be made subject to any special conditions of the sort that arise under the 2002 Act. This requires a court order on the application of the Chief Executive of the Department of Corrections rather than the New Zealand Police. Breach of the conditions carries a penalty of up to 1 year in prison: s 31.

Sub-part 3 allows a court to impose release conditions on those who are outside the definition of a returning prisoner because they have been out of custody for more than 6 months. This is possible if the person was subject to parole conditions or ongoing monitoring such as under the overseas equivalent of an extended supervision order or public protection order either immediately before their return to New Zealand or before being detained and then returned to New Zealand. As noted already, sub-part 4 amends domestic legislation to allow these further monitoring or detention orders to be made in respect of a returning prisoner. Both options involve applications by the Department of Corrections to the High Court.

The broader category of returning offender is defined in s 7 as being any person convicted of an offence for conduct that would be an imprisonable offence in New Zealand. All returning prisoners are expressly included in this, but clearly some returning offenders might be outside the definition of a returning prisoner. Returning offenders may be required within 6 months of their return to New Zealand to provide such "identifying particulars" – including photographs and fingerprints – as may be taken from people in police custody in New Zealand, and the person may be detained for that purpose and commits an offence carrying 6 months' imprisonment for failing to comply with any direction to cooperate, including by providing false information (for example, of biographical details).

These provisions allow rather than require the obtaining of information: s 8 states that the police may obtain the information for it to be used "for any lawful purpose". Bodily samples may also be taken if the offence overseas equates to one that would allow samples to be taken under the Criminal Investigations (Bodily Samples) Act 1995.

II. THE BACKGROUND TO THE STATUTE

The Regulatory Impact Statement of 12 October 2015 from the Ministry of Justice² describes as the background to the Bill the “increasing number of New Zealand citizens returning back to New Zealand following criminal offending in another jurisdiction”. This was the predictable outcome of changes to Australian law that were implemented in 2014. As such, it is hard to see why this issue was dealt with in a rushed response.

Under s 501 of the Migration Act 1958 (Cth), the Australian Commonwealth authorities may cancel a visa on grounds of the person not meeting a test of good character. A person fails that test on the basis, inter alia, of having a substantial criminal record, or committing certain offences, or there being reasonable suspicion of involvement in a criminal group. A “substantial criminal record” is defined in s 501(7) as involving a sentence of 12 months or more, including on a cumulative basis. It also includes being found not guilty by reason of insanity and ordered to be detained or being found unfit to stand trial but to have committed the act charged and ordered to be detained. Aspects of this definition were amended by the Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth), which also added s 501(3A) to require the cancellation of a visa if the “substantial criminal record” involved a sentence of 12 months or more.

The consequence of this for New Zealand is traced in the October 2015 Regulatory Impact Statement to the Bill, which records an increase in deportations from Australia from 5 per month previously to 25 per month since June 2015. Placing this in its context, the average of returned offenders in previous years had been 60-100 deportations per year, 80% of whom were from Australia; on the revised figures, it would seem that there would be more than 300 per year, with an even higher percentage from Australia. The Statement also suggests that 70% of offenders returned since 2013 had been convicted of offences of violence or burglary; this might well be different in light of the changed approach in Australia, which will catch less serious offending. It is also recorded that for offenders deported in the period 2000-2002, the reconviction rates in New Zealand were 48% within 2 years.

The stated rationale for the then proposed legislation is that the offenders being returned pose a risk to New Zealand and so need to be placed under supervision in the same way as those released from prison in New Zealand. What is not commented upon in the text of the Regulatory Impact Statement is information which may appear to contradict the assumption that such supervision will reduce offending. Mentioned in a footnote is the fact that the reconviction rate for those deported in 2000-2002 is lower than the reconviction rate of those who had been convicted in New Zealand and, accordingly, released on the supervision conditions that apply to domestic detainees.³

² Ministry of Justice *Management of Offenders Returning to New Zealand* (12 October 2015) <<http://www.justice.govt.nz/policy/regulatory-impact-statements>>.

³ At 3, fn 2: the reconviction rate for domestic prisoners released in 2002-2003 was 55.4%.

III. THE PROPRIETY OF THE TERMS OF THE LEGISLATION

Some aspects of the legislation will be noted first, since they may help to inform any question as to the propriety of having the legislation at all.

A. The Incomplete Overlap between the Australian Policy and the New Zealand Legislation

An initial point arising from the description of the position in Australia is the definition of a returning prisoner. The Australian legislation leads to obligatory removal on the basis of a sentence of 12 months or more; but the core provisions of the Returning Offenders Act relate to people sentenced to more than 12 months (ie at least 12 months and 1 day). Since a sentence of 12 months is likely to be much more common than one of 12 months and a day, it seems likely that some mandatory deportees from Australia will not be returning prisoners and so cannot be subject to release conditions. They will be subject only to the Part 2, sub-part 1 regime as to the provision of information on the basis of being a returning offender. It is not clear whether this was a deliberate choice rather than simply an error in drafting: if the former, the rationale for the different treatment of those who are deported on the basis of the minimum term that produces that outcome under the Australian regime is not clear. The Parole Act 2002 refers to sentences of "more than" 12 and 24 months (see definition of "long-term sentence" in s 4): it may be that this was assumed to be the formula used in Australia.

B. The Definition of a Returning Offender

Turning to the returning offender definition in s 7: there are numerous issues as to its coverage. Before mentioning those, there is the question of how any challenges might be brought.

1. The process of challenge

Since there is an imprisonable offence of failing to comply with the directions of a police officer who is taking information on the basis that someone is a returning offender (s 13, carrying up to 6 months' imprisonment), it may be that some of these issues will have to be resolved if a defendant argues that the police were not exercising powers that existed on a proper understanding of the statute.

In addition, given that, as noted above, the provisions give the police a power to obtain information rather than mandating it, this confers a public law discretion that might be open to challenge via judicial review in relation to the outcome of the determination made pursuant to the statute or the process followed in considering its application. The fact that the language does not direct the police to obtain the relevant information suggests that there are circumstances in which it might not be proper to obtain the information. In this context, the obvious starting point is that a general discretion should have the limit imposed on it that the discretion should be used for the purpose for which it has been conferred.

Section 8 provides that the purpose of the information-obtaining powers – which may involve detention whilst the police exercise them, which in turn should bring into play the rights accorded by the New Zealand Bill of Rights Act 1990 in relation to detention – is to enable the police to obtain that information for any “lawful” police purpose. In relation to the bodily samples provisions, the purposes applicable to that legislation govern. This structure should allow arguments to be raised as to the limits of the police collating information merely for the sake of doing so. In other words, the fact that the person happens to be within the statute is a necessary but not necessarily sufficient precondition for its exercise. One can perhaps expect that policies should be formulated as to when it is disproportionate to obtain the information; certainly, such policies should exist to guide the exercise of the discretion by possibly junior officers involved in the process.

One can only hope that the legal aid funding agencies will take a view that the potential problems with this legislation are such as to merit funding the relevant arguments when they arise.

2. The basic definition

The definition covers a person convicted overseas on the basis of conduct that is an imprisonable offence in New Zealand and has led to the deportation or removal of the person. It does not require that there has been a custodial sentence imposed abroad; indeed, it could cover conduct that is not in fact imprisonable in the overseas country, so long as it is imprisonable in New Zealand.

3. Removal and visa cancellation

One question arising is whether “removal” covers people whose visas have been cancelled following a conviction of any such offence in the overseas country, leaving them with no option but to leave. If the aim of the statute is public protection, the propriety of such wide coverage is an obvious question to ask.

4. Challenging the propriety of the conviction

A second question arising in relation to this definition of a returning offender is whether doubts as to the safety of the conviction can be raised. Does the New Zealand government simply accept the propriety of the conviction, or can the returning offender argue that he or she should not have been convicted and so should be outside the definition of a returning offender? This may involve questions of substantive law, evidence or procedure. For an example of the former, what is the situation if the provisions for self-defence in the overseas country are stricter than those set out in s 48 of the Crimes Act 1961 and self-defence might well have been accepted here? Can that be raised and, if so, how can it be evaluated whether the conviction would be merited in New Zealand? The conduct of assault may be the same, but if there would not have been a conviction in New Zealand owing to the width of the domestic provisions for self-defence, there is no dual criminality.

The problem of evaluating the evidence leads to the more general question of the ability to challenge the original conviction. Transnational enforcement of overseas criminal law also arises in the context of extradition law; obviously, this is a distinct area of law, but there may be some analogous value in light of the subjection of someone in New Zealand to consequences arising from overseas criminal processes. In an extradition situation, the New Zealand courts will investigate the adequacy of the evidence in some situations when the person is accused of an offence (s 24 of the Extradition Act 1999). Will they do so if a returning person suggests the evidence simply was not enough for the conviction recorded against them?

Clearly, there is no equivalent statutory language to that appearing in the extradition context, but if the underlying purpose of the Returning Offenders Act is to deal with the risks of overseas criminals, this purpose is not met by action against those who should not have been convicted. Since the right to justice exists as a fundamental right by virtue of its inclusion in s 27 of the New Zealand Bill of Rights Act 1990, the question could be rephrased as whether public authorities in New Zealand are not able to look beyond the fact of an overseas conviction. Take what will no doubt be seen as an extreme example and suppose that the conviction related to a conviction in a country that is notorious for the corruption of its police officers or the inadequacy of its court system, that the trial was attended by observers or a New Zealand diplomat and that the information provided by them is that the conviction was simply not justified by the evidence. Although an extreme example, it helps to illuminate the existence of a principle that a person subject to compulsion in New Zealand on the basis of an overseas conviction that is not sufficiently based on evidence should be able to raise that point.

If, however, it is not possible to read in a right to challenge the propriety of an overseas conviction on the terms of the legislation as it stands, that may be a matter that should be considered when the legislation is reviewed.

Similar arguments would arise in relation to whether there is scope for challenging a conviction that arose through a trial process that does not meet the standards of the NZBORA? For example, what if the procedural rights include adverse inferences from silence, or inadequate legal aid or representation, or the defendant faced a difficult practical decision that led to a guilty plea (for example, to avoid the risks of overcharging or the delays of a contested trial)? Would the actions of the police in giving respect to such a conviction and providing for consequences arising from it be the act of a public body that is a reasonable restriction on the right under s 5 of NZBORA? If not, could the statute be interpreted so as to include an implied condition that only convictions that respect human rights standards are to be respected?⁴

⁴ If the analogy with extradition is valid, it should be noted that procedural matters may be raised in that context, including where there has been a conviction, such as significant problems of bias in relation to the prosecution or the conduct of the trial (s 7 of the 1999 Act) and possible restrictions on surrender if it would be unjust or oppressive to extradite in light of such matters as the trivial nature of the offence of the time since it occurred. The policy reasons that justify these limitations

5. Mental disorder

Other questions might arise in other circumstances. For example if the person has a mental disorder and would not have been convicted in New Zealand but the overseas system has a more stringent insanity or unfitness to stand trial procedure: is such a person covered by the definition of a returning offender? At first sight, the requirement is an overseas conviction and conduct that would amount to an imprisonable offence avoids the question of whether the person would be convicted in New Zealand: but the conduct would not constitute a criminal offence in New Zealand if the defence to a conviction of insanity as understood in New Zealand was present. A similar argument could be raised that the conduct does not amount to an imprisonable offence if the defendant cannot be convicted because he or she is unfit to stand trial by New Zealand standards.

6. Children and youth

Equally, as the definition of a returning offender applies to any "person", it appears to cover those in the youth court jurisdiction. A question may therefore arise as to those under 14 if the overseas jurisdiction does not use the presumption of *doli incapax*, as found in s 22 of the Crimes Act 1961. The argument would be that the conduct is not criminal in New Zealand unless that additional element has also been proved. Similarly, in relation to a child under the age of criminal responsibility in New Zealand but convicted abroad in a country that has a lower age of responsibility, the argument would be that they have a defence based on their age and so do not meet the dual criminality requirement. The contrary argument in all these situations, however, is that the focus is on the conduct being criminal (which perhaps focusses on *actus reus* elements) and the conviction abroad, rather than any defence based on a personal characteristic such as age or mental disorder.

C. The Returning Prisoner Provisions

1. The definition of a returning prisoner

A returning prisoner is someone who has been convicted of conduct amounting to an imprisonable offence in New Zealand; in addition, there must have been a sentence of more than 1 year (and so at least 12 months and 1 day); and the person is returning to New Zealand within 6 months of release from custody abroad. This has some similarities to, but also differences from, the definition of a returning offender. Note that the definition of a returning offender expressly includes all returning prisoners, and so irrespective of whether there is a complete overlap, the provisions relating to the taking of information apply to returning prisoners. The overlapping element of the definition is that it involves a conviction abroad in relation to conduct that would be an offence in New Zealand: as such, all the arguments noted above in relation to this aspect of the definition of a

on enforcing overseas criminal law are also valid in the situation of the offender returning to New Zealand rather than being sent overseas.

returning offender apply. The supplemental element is the need for a sentence of more than 1 year in prison, which has been discussed above as it does not match completely the Australian position. (It should also be recalled that the Australian statute allows but does not mandate return if the sentence led to a hospital disposal.)

The definition is, however, wider than that of a returning offender in one respect: there is no requirement that the person be deported or removed from the overseas country. Rather, it is simply indicated that the person is returning to New Zealand within 6 months of release from custody, whether from the sentence or from immigration detention imposed after release from the criminal custody. In short, there is no need for any compulsion in relation to the return to New Zealand. This, of course, means that if the person involved is at liberty, he or she merely needs to remain away for 6 months and one day. There is an exception to this in the case of a person who is under monitoring after release: sub-part 3 allows an application to be made to a court for the imposition of conditions in such a case (or for an extended supervision order or public protection order if the criteria for those orders are made out).

2. What is the process?

The provisions relating to returning prisoners are not in discretionary terms. The police must make a determination that someone is a returning prisoner on being satisfied that the person is within the definition. The determination turns on whether "the Commissioner is satisfied" as to the criteria (s 17(1)), with a provision to allow the person to seek a review by the Commissioner of that conclusion (s 22). As has been noted above, the consequence of the determination is that someone is subject to parole release conditions (and possibly to imprisonment for breach of them) and might be subject to the provisions of an extended supervision order or public protection order. As such, the determination is important. That in turn means that any uncertainty about the process to be followed may need to be clarified, and routes to challenge the conclusion may have to be considered.

No doubt the determination made can be challenged in various processes: (i) by judicial review if it is argued that the police have erred in their determination; (ii) through the court process if special parole conditions or the use of an extended supervision order or public protection order are sought, if it is argued that there is no jurisdiction to make an order because the person is not a returning prisoner; or (iii) if an allegation is made of breach of the conditions, the offence under s 31, and it is argued that the person should never have been subject to them.

An obvious question is whether the determination is an investigative judgement to which the concept of a burden and standard of proof is inapplicable? Or, if there is a question raised as to the criteria being met, is it a matter that has to be proved a suitable legal standard? And to the civil standard or to the criminal standard, given that the consequence of the determination is that the person is subject to a regime equivalent to a released prisoner?

It is suggested that there are two separate matters. First, there are questions of law as to the meaning of the definition and hence who is included within it in light of that meaning. These are matters of legal judgment on which the Commissioner has to reach a conclusion. Secondly, there are questions of fact as to whether someone is within the meaning as interpreted. If there are denials of the facts – such as the length of the sentence imposed or the time limits for return after release from custody – those matters have to be resolved and are suitable for a standard of proof.

Having set out this position, it must be noted that there are conflicting approaches in other contexts where bodies have to be satisfied of something. First, in relation to the extended supervision order regime that arises under the Parole Act 2002: this requires that the court making the order on the application of the Department of Corrections has to be satisfied as to risks of further offending (s 1071(2)). In determining what was meant by being “satisfied” in the context of this section, the Court of Appeal in *McDonnell v Department of Corrections*⁵ concluded that this involved a judicial judgment rather than something which had to be proved.⁶ The Court expressly rejected the view of the High Court that it was necessary to be satisfied to the criminal standard that the relevant risk pertained.⁷ There is also the context of detention in the mental health system, which is based on satisfaction as to whether a person is mentally disordered and whether compulsion is needed, which in turn depends on the level of risk to the patient or others. Whilst it has been determined that the process is inquisitorial and does not involve a burden of proof on those calling for detention,⁸ it has been determined that the relevant tribunal – the District Court or the Mental Health Review Tribunal – should reach its conclusion that the disorder in question exists and is such as to justify detention by applying the balance of probabilities.⁹

There are good arguments for the latter approach: in the context of the right to liberty, the risks of error in making an assessment of danger can be reduced by ensuring that the risk should not be borne by the person whose liberty is lost. Indeed, a burden of proof may also be important here. In English case law, the Court of Appeal found incompatible with the right to liberty a provision in its Mental Health Act 1983 which contained an indication that discharge should only follow if the patient demonstrated that the criteria for detention were not made out: *R (H)*

⁵ *McDonnell v Department of Corrections* [2009] NZCA 352.

⁶ The Court applied the conclusion previously reached in relation to whether the court was “satisfied that it is expedient” for public protection that a sentence of preventive detention should be imposed under the then applicable s 75 of the Criminal Justice Act 1985: see *R v Leitch* [1998] 1 NZLR 420 (CA).

⁷ *McDonnell v Department of Corrections* at [71]-[75].

⁸ See *In the matter of C* [1993] NZFLR 877 (DC) at 889-890 and *In the matter of D* [1995] NZFLR 28 (DC) at 32. There had been alternative case law previously. See further K Gledhill “Risk and Compulsion” in J Dawson and K Gledhill (eds) *New Zealand’s Mental Health Act in Practice* (Victoria University Press, Wellington, 2013) at 62-76.

⁹ *Re GM (mental health)* [2001] NZFLR 665 (DC) at 670-671; *In the matter of T* [1994] NZFLR 946 (MHRT) at 955.

v Mental Health Review Tribunal.¹⁰ The conclusion was that the detaining authority should show the need to detain. As to the standard of proof to be applied in England and Wales, it was determined in *R (AN) v Mental Health Review Tribunal*¹¹ that a standard of proof usefully expressed the degree of certainty necessary in relation to the evaluative judgments involved in the test for detention. It was also held that the normal civil standard was appropriate. In the US, it has been determined that a higher standard is appropriate to protect the right to liberty in the mental health context: see *Addington v Texas*,¹² which sets a test of “clear and convincing” evidence of the criteria for detention being met, an intermediate standard between the civil and criminal approach.¹³

In addition to this conflicting case law as to what to do when matters of judgment are involved, it is arguable that there is a clear difference between the *McDonnell* situation and the current one in that the test for an extended supervision order relates to the existence of a risk, which is essentially a matter of judgement. As such, it differs from a finding of fact of the sort that has to be made in the context of the 2015 Act, namely whether the criteria for someone being a returning prisoner are established. After all, the test for a jury in a criminal case is whether it is satisfied as to the facts that reveal that a defendant is guilty of an offence. Accordingly, it is suggested that the police should attach a standard of proof as to whether they are satisfied as to whether the criteria are met.

It is further suggested that the criminal standard is appropriate to the finding that someone is a returning prisoner because the consequence of the finding is that the returning prisoner is subject to conditions that apply to a prisoner who has been convicted in a criminal context in New Zealand and is being released on parole. In other words, as the determination amounts to the imposition of such a regime, it should be seen as a further penalty. This approach is consistent with case law as to extended supervision orders, which involve further supervision at the end of a sentence and have been classified as an additional penalty: *Belcher v Chief Executive of the Department of Corrections*.¹⁴

IV. THE PROPRIETY OF INTRODUCING THE LEGISLATION

The 2015 Act sets up a monitoring system.¹⁵ However, in relation to those who are within the definition of a returning prisoner, the elements of this monitoring

¹⁰ *R (H) v Mental Health Review Tribunal* [2001] EWCA Civ 415, [2002] QB 1, [2001] Mental Health Law Reports 48.

¹¹ *R (AN) v Mental Health Review Tribunal* [2005] EWCA Civ 1605, [2006] 2 WLR 850, [2006] Mental Health Law Reports 59.

¹² *Addington v Texas* (1979) 441 US 418.

¹³ The criminal standard was rejected as impractical.

¹⁴ *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA), (2006) 22 CRNZ 787 at [47]-[56]. Obviously, note the case of *McDonnell*, discussed above, in which it was concluded that there was no standard of proof and that the classification of a matter as a penalty did not mean that a criminal standard was applicable.

¹⁵ In the debate on the Bill before Parliament, there was discussion about the adequacy of service provision for those who have been returned to New Zealand, often despite having much closer links to Australia and having limited family or whanau in New Zealand. Hansard, vol 710, p15 (17

system – breach of the conditions of which are criminal – amount to a penalty; see the analogy with an extended supervision order, noted above. As such, the question of retrospectivity arises. In *Belcher v Chief Executive of the Department of Corrections*,¹⁶ it was determined that the applicability of the ESO regime in a retrospective fashion was a breach of the prohibition on retrospective penalties set out in s 25(g) and 26(2) NZBORA, albeit not one that could be rescued by the interpretive obligation under s 6 of the statute.¹⁷

It is worth noting that there was no report from the Attorney-General under s 7 of the NZBORA to indicate that there a problem of compatibility; nor was there a report from Crown Law to indicate that there was no such problem.¹⁸ Nevertheless the retrospectivity is fairly clear in two ways. First, the possibility of such an order being made in New Zealand was not in place at the time of the original offending which led to the overseas conviction. Moreover, the order under the New Zealand statute may arise even if the overseas sentence has completely expired. For example, if someone received a fifteen-month sentence in Australia, served half of that and was then held in immigration detention for 8 months and then returned to New Zealand, he or she would still be a returning prisoner and subject to a further six-month period of supervision in New Zealand: this amounts to an extension of the penalty imposed in Australia on a retrospective basis (as it was not available at the time of the offending). An alternative analysis might be that it amounts to the imposition of a further penalty in New Zealand for the same conduct and so is problematic on double jeopardy grounds.

There is also a wider question of whether it is appropriate for New Zealand legislation to give support to a problematic Australian policy. The approach by the Australian authorities clearly results in disproportionate breaches of the right to family life of those deported and, more importantly, of their family members who remain in Australia. One argument against the policy is that it results in released persons not being supervised: but this problem has now been filled by New Zealand.

Naturally, the counter-argument is that the New Zealand government is responding to the real-life problem caused by the new Australian policy rather than endorsing it. However, the question arises as to whether the blanket imposition of a retrospective penalty on anyone within the definition of a returning prisoner is a justified approach, particularly as there are alternatives such as crafting a statute that allows an application to court in a case of urgent need. It is not suggested, however, that the use of a court order would rescue the legislation from any human rights complaint. It should be noted that at the international level, the prohibition

November 2015). The sensible point arising is that those left without adequate support may be more likely to reoffend.

¹⁶ [2007] 1 NZLR 507 (CA), (2006) 22 CRNZ 787.

¹⁷ The Court of Appeal subsequently declined to issue a declaration of inconsistency: *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174.

¹⁸ No report relating to the Bill appears on the relevant website that collates both the s 7 reports and the advice that there is no problem: <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>>.

on the retrospective increase in penalties which arises under Article 15 of the International Covenant on Civil and Political Rights 1966¹⁹ is a right that cannot be derogated from even in the context of a national emergency: see Article 4(2). This makes it difficult to suggest that the breach is proportionate for the purposes of s 5 of the NZBORA. The focus should rather have been on providing support mechanisms than on the imposition of a regime that amounts to a further criminal penalty.

¹⁹ 16 December 1966, 999 UNTS 171, entered into force 23 March 1976.

LEGISLATION NOTE: THE CRIMES AMENDMENT ACT 2015

KRIS GLEDHILL*

I. INTRODUCTION

Legislation is often introduced in response to international treaty obligations, reflecting that much government policy is developed in the context of international arrangements. The Crimes Amendment Act 2015 is an example of this. It introduces a number of extensions to Part 10 of the Crimes Act 1961 (crimes against rights of property). It adds new offences and rewords existing offences. It also rewrites the people trafficking and bribery offences found in Parts 5 and 6 of the 1961 Act. These changes illustrate the role of international obligations.

The Amendment Act enacts provisions taken from the Organised Crime and Anti-Corruption Legislation Bill 2014. This wider proposal was designed to implement a policy document from August 2011 entitled "Strengthening New Zealand's Resistance to Organised Crime".¹ An important contextual factor to this is international treaty obligations, in particular those arising under the UN Convention Against Transnational Organised Crime 2000² and its Protocols;³ and the UN Convention against Corruption 2003.⁴ Both of these fall under the purview of the Vienna-based UN Office on Drugs and Crime, the UN agency that exists to support international collaboration in relation to criminal matters.⁵

The international treaty background is important for a number of reasons. First, the purposive interpretation required by s 5 of the Interpretation Act 1999 puts the

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¹ Ministry of Justice, ISBN 978-0-478-32404-4. It also has proposals to amend various statutes, including the Misuse of Drugs Act 1975, the Customs and Excise Act 1996 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

² United Nations Convention Against Transnational Organised Crime 2225 UNTS 209 (opened for signature 12 December 2000, entered into force 29 September 2003); New Zealand signed this on 14 December 2000 and ratified it on 19 July 2002, and so was an early adopter.

³ There were two Protocols at the outset: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2237 UNTS 319 (opened for signature 12 December 2000, entered into force 25 December 2003); and the Protocol against the Smuggling of Migrants by Land, Sea and Air 2241 UNTS 507 (opened for signature 12 December 2000, entered into force 28 January 2004). New Zealand signed both on 14 December 2000 and ratified them on 19 July 2002.

⁴ United Nations Convention Against Corruption 2349 UNTS 41 (opened for signature 9 December 2003, entered into force 14 December 2005).

⁵ "Organized Crime" UNODC <<https://www.unodc.org/unodc/en/organized-crime/index.html>>. Other transnational aspects of the Bill, set out in the Explanatory Note to it, include that it "enables implementation of the Agreement between the Government of the United States of America and the Government of New Zealand on Enhancing Cooperation in Preventing and Combating Crime". This can be found at <http://www.justice.govt.nz/publications/global-publications/e/enhancing-cooperation-in-preventing-and-combating-crime>. It allows the sharing of information, particularly in relation to suspected terrorism. The wider Bill is also said to support improved compliance with such other international conventions as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, available at <http://www.oecd.org/corruption/>; New Zealand ratified this on 25 June 2001.

international obligation to the centre if that is the reason for the legislation. Secondly, this is supported by the general proposition that New Zealand statutes should be construed so as to meet international obligations where that is possible.⁶ This may involve exploring material that is produced around the treaty, from the discussions of drafting groups to the views of any working parties on its implementation. Further, it may allow consideration of comparative material, including the legislation of other countries and its interpretation by their courts. The more general point is that the legislative language cannot be construed in a vacuum and advocates must be willing to look broadly to assist interpretation.⁷ Criminal lawyers in these areas have to be international lawyers as well.

II. THE REVISED PEOPLE TRAFFICKING PROVISION

A. Background

Section 98 of the Crimes Act 1961 reflects the long-prohibited action of dealing in slaves. For some reason, it is classified as an offence against public order and so included in Part 5 rather than being a Part 8 crime against the person. Various supplemental offences have been added this century, all of which are more obviously crimes against the person than against public order. For example, the Crimes Amendment Act 2005 added as s 98AA to the 1961 Act the offence of dealing in people under 18 for sexual exploitation, and also for the removal of body parts or engagement in forced labour: these may be viewed as examples of modern-day slavery. An obvious question arising is why the offending in question is only made out in relation to those under 18. The Explanatory Note to the Crimes Amendment Bill (No 2), which provides the origin of the provision, suggests that the offence was designed to ensure compliance with an Optional Protocol to the UN Convention on the Rights of the Child 1989 which deals with the exploitation of children.⁸ Of course, an international requirement to protect those under 18 does not prevent a national legislature deciding to protect those 18 or over.

The Crimes Amendment Act 2002 also added a number of offences relating transnational movement of people, in the form of ss 98B-F, under the heading "Smuggling and trafficking in people". In between s 98AA and ss 98B and following is the offence of participating in a criminal gang, contrary to s 98A. This is a deliberate choice by the legislature, grounded in its view that there is a link between organised crime and these other offences. Section 98A was amended by the 2002 Act. This amendment and the introduction of the further offences started with the Transnational Organised Crime Bill 2002. The origin of this was the implementation by New Zealand of obligations arising by virtue of the ratification of the UN Convention Against Transnational Organised Crime 2000 and two of its Protocols. The Convention requires the criminalisation of organised gangs (Article

⁶ See, for example, *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90].

⁷ In *R v Chechelnitski* CA160/04, 1 September 2004, an appeal against sentence in a migrant smuggling case, contrary to s 98C Crimes Act 1961, the Court of Appeal gave lengthy consideration to the international background in construing the seriousness of the offence; reference was also made to sentencing under the equivalent provisions in Australia.

⁸ Crimes Amendment Bill (No 2), Explanatory Note at 5.

5), action against money laundering, including its criminalisation (Articles 6-7), action against corruption, including its criminalisation (Articles 8-9), and regimes for confiscation (Article 12); there are numerous provisions for international cooperation. The Protocols relate to trafficking and smuggling of people.⁹ Article 32 of the Convention requires ongoing meetings as to implementation, which has led to significant material, all of which is compiled by the United Nations Office on Drugs and Crime.

Of this group of trafficking offences, s 98D as originally inserted was "Trafficking in people by means of coercion or deception", and carried up to 20 years' imprisonment. Its elements were either (i) arranging the entry of a person into a state (whether New Zealand or another state, and whether or not the entry occurred): ss 98D(1)(a) and (3)(a); and (ii) using coercion or deception as part of that transfer: s 98D(1)(a). Alternatively, (i) arranging, organising or procuring the reception or concealment or harbouring in a state (whether New Zealand or another state, and whether or not it actually happened): ss 98D(1)(b) and (3)(b); and (ii) knowing that coercion or deception had been used: s 98D(1)(b). As such, the essence of the offence was the making of the arrangements for the trans-border movement of the victim; and different forms of participation were criminalised as principal offending. Section 98E includes various aggravations to be taken into account at sentencing, primarily any maltreatment if the trafficking was carried out.

B. The Amended Section 98D

Section 98D has been renamed and redrafted, though it has the same maximum penalty. The offence is now named simply "Trafficking in persons", although coercion or deception remain necessary. There has to be an arranging, organising or procuring of some activity towards the victim. The essence of the offence is the making of the prohibited arrangements; they do not need to have been put into effect (ss 98D(1) and 98D(3)(b)), though the aggravations in s 98E remain as they were.

The activity that is arranged, organised or procured can be either of

- (i) some transnational movement, whether involving New Zealand or some other state (s 98D(1)(a)); or
- (ii) the facilitation of such movement, in the form of "reception, recruitment, transport, transfer, concealment, or harbouring" (s 98D(1)(b)).

As well as alternative activities, there are alternative mens rea states:

- (i) the arrangement has to be for the purpose of exploiting or facilitating the exploitation of the person (ss 98D(1)(a)(i) and 98D(1)(b)(i)); or

⁹ A Third Protocol exists, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition 2326 UNTS 208 (opened for signature 2 July 2001, entered into force 3 July 2005). New Zealand has not even signed this Protocol.

(ii) there has to be knowledge that the person has been subject to coercion or deception, even if not all of the process involved such conduct) (ss 98D(1)(a)(ii), 98D(1)(b)(ii) and 98D(3)(a)).

It can also involve both. In the first alternative, exploitation is defined in s 98D(4) as involvement in sexual services, forced labour and the like, or organ removal (similar to offending that is caught by s 98AA in relation to those under 18). Further, that involvement has to be secured through deception or coercion. As such, deception or coercion remains an element of the offence, despite being removed from the name.¹⁰ It is not necessary that the entire process involve such exploitation: s 98D(3)(a).

As can be seen, there are several methods of committing the offence; and the drafting is not the simplest. But it will be necessary to try to reduce it to questions that a jury can follow. If one takes the version involving arranging entry into New Zealand for prostitution, the question trail for the jury might look something like the following:

1. Did the defendant make an arrangement?¹¹

2. Did that arrangement involve the entry of a person into New Zealand (irrespective of whether the entry occurred)?¹²

EITHER

3(a). Was the purpose of the defendant's exploitation of the person subject to the arrangement,¹³ by which is meant involvement in prostitution,¹⁴ and was the person deceived or coerced into that by the defendant (even if not every aspect of the arrangement involved deception or coercion)?¹⁵

OR¹⁶

3(b). Did the defendant know that the entry of the person into New Zealand involved coercion or deception?

A question arising is whether the purposive element envisages only a direct intent or whether it also covers an oblique intention, namely knowing full-well that it will happen. In *Police v K*, the Court of Appeal indicated that drafters of legislative language would work on the basis of a "traditional approach" that both direct and oblique intention would suffice when intention was in issue.¹⁷ This statute refers to the "purpose". That is also the language of s 66(1)(b) of the Crimes Act 1961 in relation to party liability through aiding, and was held to cover oblique intention as

¹⁰ In addition, s 98D(3)(b), which makes clear that the person involved does not have to have been moved or subject to any relevant arrangements, refers to "the person exploited, coerced or deceived", which also makes plain that this remains an element.

¹¹ Alternatively, it might involve the defendant organising or procuring: s 98D(1), opening words.

¹² It might also involve the person leaving New Zealand; it could also involve entry into or exit from any other state: s 98(1)(a) and (3)(b)(i).

¹³ Alternatively, facilitating exploitation: s 98(1)(a).

¹⁴ Other sexual services, or forced labour or forced services, or organ removal are alternatives: s 98D(4).

¹⁵ Sections 98D(1)(a)(i) and (4).

¹⁶ Note that both may be made out.

¹⁷ *Police v K* [2011] NZCA 533, (2011) 28 FRNZ 835 at [33].

well in *R v Wentworth*.¹⁸ It seems unlikely that language arising in the context of protecting vulnerable people will be construed so as to allow a person who knows full well that exploitation will occur to avoid conviction on the basis that he or she did not actually want that outcome.

The wider drafting problem of the complexity of the language arises from two decisions: first, to include distinct methods of participating in the offending as part of one sub-section, and, secondly, to define a key aspect (exploitation) in another sub-paragraph. Given that the charging document will have to give proper particulars that indicate what the allegation is, there is no good reason for this. Rather, the drafting of the offence should set out in separate subsections the different elements of the different forms of involvement in trafficking that the legislature has decided to criminalise. That might produce a longer statutory section but it would also provide more clarity.

It should be noted that in the Explanatory Note to the Organised Crime and Anti-Corruption Legislation Bill 2014, it was said that the newly-defined offence “augments” the previous offence.¹⁹ The difficulty with this contention is that the previous language did not make any reference to exploitation, rather referring only to the coercion or deception. Accordingly, the supplemental language – arranging the entry for the purpose of exploitation – relates to a narrow set of circumstances. In light of the definition of exploitation, it must involve some deception or coercion. Previously, the section criminalised arranging the entry by deception or coercion with no need to identify the purpose as being exploitation. That seems to have been a wider offence.

Article 3 of the Trafficking Protocol to the UN Convention Against Transnational Organised Crime 2000, it should be noted, defines trafficking as involving the use of deception or coercion and as being for the purpose of exploitation. It indicates that the latter includes “at a minimum” the elements that are included in the statute. The modified version of the offence against s 98D might be explained by a desire to conform more closely with the Protocol. However, in the first place, the Protocol does not limit a country to such situations of exploitation; and exploitation is not a feature of every way of committing the offence.

III. THE REVISED BRIBERY OFFENCES

A. *The UN Convention Against Corruption*

The UN Convention Against Corruption 2003 (UNCAC) was signed by New Zealand on 10 December 2003. However, ratification by New Zealand was a slow process and did not occur until 1 December 2015. For a contrast, Australia ratified it in

¹⁸ *R v Wentworth* [1993] 2 NZLR 450. Note that in *R v Murphy* [1969] NZLR 959, it was held that attempted murder – ie conduct for the “purpose of” accomplishing the crime they intend – requires an “actual intent to kill”, which seems inconsistent with *Wentworth* but may be explicable by the specific context of murder having a separate mens rea of recklessness as to death and hence no need for oblique intention.

¹⁹ Organised Crime and Anti-Corruption Legislation Bill 2014, Explanatory Note at 5.

December 2005, and the UK in February 2006; the USA ratified it in October 2006 and Canada did so in October 2007. New Zealand has therefore been a very slow follower. In accordance with constitutional practice, ratification follows the making of necessary legislative amendments to ensure that domestic law complies with what the treaty requires.²⁰ This process seems to have been tied in to a more general response to organised crime, including the development of the 2011 policy document "Strengthening New Zealand's Resistance to Organised Crime". Having said that, the UNCAC received only a passing comment in this policy document, with reference being made to progressing its ratification (at page 29).

The UNCAC includes requirements as to the prevention of corruption, both in relation to the public and private sectors; ensuring that there is a wide range of criminal offending, including in relation to trading in influence and the laundering of the proceeds of bribery and embezzlement; ensuring that there are processes for recovering the assets that are the product of corrupt activities; and providing for international cooperation in relation to these matters.

Naturally, various aspects of corruption have long been criminal offences in New Zealand. Part 6 of the Crimes Act 1961 relates to "Crimes affecting the administration of law and justice" and contains long-standing offences relating to the bribery of judges, parliamentarians and law enforcement officials. Section 105 makes it an offence for an official to accept or solicit a bribe in relation to their public duties or for a person to offer one; s 99 defines "official" to include those working for central or local government in New Zealand.

The importance of international trade led to the past amendment of Part 6. Under the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001, ss 105C to 105E were added, to criminalise actions in relation to foreign government officials of the sort that would be covered by s 99, though with significant gaps. Section 105E provided a defence if the conduct in question was not criminal in the overseas state, so creating a dual criminality requirement. In addition, s 105C(3) provides an exemption for small payments designed to speed up routine activities.

According to the Explanatory Note to the Organised Crime and Anti-Corruption Legislation Bill 2014, the further amendments to these provisions in 2015 were designed to "enhance" the legislative provisions and "bring New Zealand into line with international best practice", which is identified as arising from the UNCAC and other bodies such as the OECD.²¹ The existing offences contrary to ss 105C and 105D are amended or clarified and new offences of "corruption of foreign public officials" and "trading in influence", contrary to ss 105E and 105F, are added.

²⁰ Ministry of Foreign Affairs and Trade "International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements" (September 2014) at 6.

²¹ Organised Crime and Anti-Corruption Legislation Bill 2014, Explanatory Note at 3.

B. Revised Section 105C – Bribery of Foreign Public Official

Section 105C(2) provides for an offence with the following elements: (i) corruptly, (ii) giving/offering/agreeing to give, (iii) a bribe, (iv) with intent to influence, (v) a foreign public official, (vi) in relation to an official act/omission (irrespective of whether it is within their authority), (vii) in order to either obtain or retain business or obtain an improper advantage in the conduct of business. There is an exception in s 105C(3), namely that small benefits to ensure that routine government action is ensured or expedited are outside the section. Section 105C has to be read together with s 105D, which indicates that New Zealand citizens, permanent residents or corporations involved in similar offending outside New Zealand are liable to conviction and the same penalty. Prosecution of these offences, and the others noted below, requires the consent of the Attorney-General: see s 106.

The offence against s 105C (and so by extension s 105D) is in substance as it was before the 2015 amendment statute. However, there have been some definitional changes. Taking in turn the elements that require further consideration, first “corruptly”: it is not defined but appears in other sections and was considered in the context of a politician (and hence s 103) in *R v Field*.²² In this case, the Supreme Court held that it covered gratuities offered for work done in an official capacity (except very minor ones that represent the usual courtesies of life) if it was known to be considered corrupt to accept such benefits. The basis for this was that knowingly accepting substantial benefits for action done in an official capacity is simply wrong. This is clearly to be read with the exception provided for in s 105C(3), namely small benefits for routine government actions. The latter phrase is now subject to an extended definition of what does not qualify. Section 105C(1) previously excluded a decision in relation to business or anything that is outside the scope of the ordinary duties of the official. The 2015 amendment has added to the exclusion any action that leads to “an undue material benefit” to the payor or “an undue material disadvantage” to any other person.

There is a statutory definition of a “bribe” for the purposes of Part 6 of the statute, found in s 99: it covers any benefit. There is also a definition of a “foreign public official”, found in s 105C(1). It covers the legislative, executive and judicial branches of government, at national, regional or local level, and also any body that carries out a public function and any foreign equivalent of a state-owned enterprise. Also covered is someone who is employed by or acts for a “public international organisation”, which covers any organisation of which 2 or more governments are members or send representatives.

The key is the involvement of “business”, whether obtaining, retaining or securing a benefit in relation to it. This is not defined save that the 2015 statute has added that it “includes the provision of international aid”. If philanthropic activity is covered, then clearly all aspects of trade and commerce are covered, no doubt to be understood as any field of endeavour that involves payments or benefits. There might be difficult questions at the margins. For example, if an investigative

²² *R v Field* [2011] NZSC 129, [2012] 3 NZLR 1, (2011) 25 CRNZ 693.

journalist pays for information from a government official, and thereby gains an advantage in the development of a story, is that an advantage in the conduct of business within s 105C(2)? That turns on whether the essence of the offence is viewed narrowly as business that flows from or is open to influence by the foreign government; or involves the defendant benefitting somehow as a result of the intervention of the foreign official. On this latter, wider view, benefit to a business that is many steps removed from the government could be important. Indeed, whilst a journalist's story might be one example, another might be information from government sources that has commercially sensitive information. Governments no doubt compile such macro-economic statistics. It would be surprising if that was not covered, so favouring the wider understanding of business. The argument in relation to the investigative journalist scenario might turn on whether an "improper" advantage was obtained. Alternatively, non-prosecution will turn on prosecutorial discretion.

The major change to this offence is that the former defence in s 105E, namely that s 105C (or 105D) does not criminalise something that is legal – or, rather, not a criminal offence - in the foreign country, has been removed. In other words, people are to be judged by the standards set out in the New Zealand context without any requirement for dual criminality.

In addition, added as s 105C(2A) is a wide provision for corporate liability. This is no doubt aimed at ensuring that corporations take appropriate steps to prevent improper conduct. This provides that if an employee commits an offence against subsection (2), then the corporation also commits the offence if the employee has acted within the scope of their employment and was intending to benefit the company. Added to s 105C(1) is a definition of employee that includes any agent. Section 105C(2B) and (2C) together provide that there is no offence if the company has taken reasonable steps to prevent it; but that it is presumed that no reasonable steps were taken.

The precise language here is worth noting, because the question may arise as to whether the corporation has to prove this exception (ie meeting a reverse burden of proof to establish that it has not committed a crime). Section 105C(2C) indicates that the presumption of a lack of reasonable steps arises "unless the body corporate or corporation sole puts the matter at issue". This language can be contrasted to "unless the contrary is proved" terminology such as was considered in *R v Hansen*²³ and held to amount to a legal burden on the defendant to prove that they did not commit an offence even though that breaches the presumption of innocence. It is suggested that this statutory language is entirely consistent with an evidential burden of proof only (ie sufficient evidence to raise a doubt), particularly as s 105C(2B) indicates not that there is a defence of reasonable steps but that the offence is not committed if it has taken reasonable steps. Whilst the prosecution will argue that the entire purpose of the section is best secured by having a legal burden on the corporation, especially as the liability of the

²³ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

corporation is predicated on an offence having been committed by the employee, this cannot be justified in light of the statutory language.

Of course, if the employee is the embodiment of the corporation, it may commit the offence under s 105C(2) in any event. It might be thought that the wide coverage of s 105C(2A) means that there is no need to take an expansive view of the ambit of corporate liability in the context of s 105C(2).

The addition of the corporate liability section has led to a change in the sentencing provision: it carries up to 7 years' imprisonment, as it did previously, but there is also now a provision for a fine of up to \$5 million or 3 times the value of any commercial gain. (See ss 105C(2D) and (2E).)

C. Section 105E – Corruption of Foreign Public Officials

The first of the two new offences is that under s 105E. This mirrors the offence under s 105C in that it criminalises the taking of a bribe, with a sentence of up to 7 years' imprisonment. Its coverage is of foreign public officials who carry out the relevant conduct in New Zealand; and also of New Zealand citizens, permanent residents and corporations who are acting as foreign public officials and commit the offence outside New Zealand. In the latter category, the person or corporation does not have to be acting in a role linked to New Zealand. The wide definition of "foreign public official" noted above is applicable.

The elements are (i) corruptly, (ii) accepting, obtaining, agreeing, offering to accept or attempting to obtain, (iii) a bribe, (iv) for the person or another, (v) relating to the act or omission of the foreign public official in that capacity (even if outside their authority). These terms are all discussed above or arise elsewhere (such as the concept of an attempt). There may be an issue in relation to whether obtaining includes retaining, as it does in relation to property offences, in light of the definition set out in s 217. There could no doubt be a situation in which funds are due to be repaid and are retained, and the question of whether that amounts to an obtaining may arise. Section 2 defines "obtain a material benefit" as including an indirect obtaining, and one suspects that a purposive interpretation of s 105E will encourage a wider rather than narrow understanding on the basis that a retention amounts to a benefit to which there is no entitlement.

D. Trading in Influence

In addition, there is an offence of seeking to be a "middle-man", namely "Trading in influence", contrary to s 105F; this also carries up to 7 years' imprisonment. It consists of the first four elements noted above in relation to s 105E, and an intent to influence an official in their actions or omissions as an official (even if beyond their authority). This, it should be noted, relates to an official. This word is defined in s 99 as a New Zealand official; the non-inclusion of trading in influence with foreign public officials is difficult to understand.

IV. CHANGES TO PART 10 OF THE CRIMES ACT

Also included in the 2015 Act are various amendments to the property offences in the Crimes Act 1961, creating several new offences and expanding significantly the money laundering provisions. These also started life in the Organised Crime and Anti-Corruption Legislation Bill 2014, no doubt on the basis that the extended coverage will capture activities that are sometimes carried out by the limited group of people who treat crime as their occupation.

A. Passing on Documents that are Illegally Obtained

Section 228 of the 1961 Act criminalises the conduct of (i) taking, obtaining (including retaining, by reason of s 217), using or attempting to use, (ii) a document (which is also widely defined in s 217, and includes items such as credit cards). The fault elements are (iii) dishonesty, (iv) lack of a claim of right and (v) intention to obtain property or a service, pecuniary advantage or valuable consideration. This carries up to 7 years' imprisonment. In some ways similar is s 240(1)(c), which covers the obtaining by deception of a document or other thing capable of being used to derive a pecuniary advantage. This carries up to 7 years if the value of the document or thing is more than \$1000. In addition, s 256 criminalises the making of a false document, with separate offences depending on whether there is an intent to obtain some form of benefit (s 256(1), which carries up to 10 years) or that it be used as a genuine document (s 256(2), which carries up to 3 years). Section 258(1) mirrors s 256(1) but involving altering, concealing, destroying or reproducing a document.

The offence against s 228 is now contained in s 228(1). Added as s 228(2) is the offence of passing on or offering to do so ("sells, transfers, or otherwise makes available") a document that has been the object of an offence contrary to s 228(1). The defendant must know its criminal history and be acting without a reasonable excuse. This seems most obviously to cover someone who has made use of a document for a dishonest purpose and then passes it on for further use or someone who acts in the middle of such a transaction. In the latter situation, it could include a person who comes into possession of the document without any relevant guilty knowledge, then obtains that knowledge and passes the document on.

Also added as s 240(1A) is a similar offence with a similar maximum sentence in relation to a document (or other thing capable of being used to secure a pecuniary advantage) that has been obtained in circumstances that would amount to obtaining by deception under s 240(1)(c). This is also subject to a reasonable excuse exception. In addition, there is a new s 258(3), which covers the passing on without a reasonable excuse of a document with knowledge that it has been reproduced, altered or so on in circumstances that would breach s 256(1); it carries up to 3 years' imprisonment.

Section 256(5) has also been added. It imposes up to 3 years' imprisonment for making available a false document knowing that it is false and was made as a

forgery in circumstances that would be in breach of s 256(2).²⁴ This will cover someone who has discovered after its acquisition that a document is a forgery and passes it on. For example, if someone has been the victim of a forgery (such as by buying something that turned out to be a forgery) there would be an offence in passing that on. This might be made out even if the item was sold expressly as a forgery. This arguable over-reach will be avoided by construing a reasonable excuse to include a sale that was accompanied by clarity as to status.

B. Preparatory Offences Relating to Theft or Other Offences of Dishonesty

Section 227 of the Crimes Act 1961 makes it an offence to have an instrument for conversion with intent to use it, and s 233 contains a similar offence in relation to burglary and a more general offence of being disguised with intent to commit an imprisonable offence. These are examples of specific offences that criminalise conduct that is a precursor to another offence but may well not amount to an attempt because of a lack of proximity.²⁵ There was a gap in coverage in relation to other offences: for example, there was no offence covering possession of an item to be used for theft. As such, the person could only be apprehended for a criminal offence once he or she had taken steps that were sufficiently proximate to the theft. Accordingly, a shoplifter equipped with a bag lined with material designed to fool store alarms - clearly equipped for theft - would be arrestable only they had passed the proximity threshold. This gap has been filled by the Crimes Amendment Act 2015, which has added ss 228A-C to the Crimes Act 1961. These criminalise designing, manufacturing, adapting, dealing in or possessing items that are to be involved in offences of dishonesty. The fault element is the intention to facilitate or commit an offence of dishonesty. The various offences carry a maximum of 3 years' imprisonment.

Note that an "offence involving dishonesty" is defined in s 2 to include not just property offences (except criminal damage offences) but also the various corruption offences in ss 100-105F, and those in the Secret Commissions Act 1910. The latter statute was also amended last year, by the Secret Commissions Amendment Act 2015, which increased the maximum sentence from 2 years' imprisonment to 7 years (and no doubt provided a reminder as to its existence). It sets out various offences by agents involving the giving and taking of gifts and benefits, failing to disclose pecuniary interests, using false invoices and receipts and so on. In many ways, it reflects the offences set out in ss 105C-F noted above but in the context of private business.

²⁴ Most situations that are in breach of s 256(1) would also be in breach of s 256(2), but not all, since there is no requirement that the document be thought of as genuine: see *R v Li* [2008] NZSC 114, [2009] 1 NZLR 754, in which the Supreme Court determined that a person who made to order a document that was ordered as a false document had committed the offence against subs (1) by reason of the payment for the services.

²⁵ See also s 264 re instruments for forgery. These offences provide an argument against the approach identified in *R v Harpur* [2010] NZCA 319, 24 CRNZ 909. See *Ah Chong v R* [2015] NZSC 83 at [72] and [121] for commentary that the *Harpur* decision may be thought overly broad. Its propriety will no doubt be a focus when *R v Johnston* [2015] NZCA 162 is heard on appeal by the Supreme Court; see the leave judgment [2015] NZSC 143.

C. The Extended Money Laundering Offences

The final change to note in the Crimes Amendment Act 2015 may well be the most important one in practice. Section 243 of the Crimes Act 1961 contains the offence of money laundering. It originates with the Crimes Amendment Act 1995 and carries 7 years' imprisonment. Its elements as it stood prior to amendment, set out in s 243(2), were: (i) entering into a money laundering transaction, (ii) involving property that (iii) is the proceeds of a serious offence, (iv) with knowledge or recklessness as to the origin of the property as proceeds of a serious offence. Conduct that amounted to laundering was further defined in ss 243(1) and (4): essentially dealing with property in order to conceal it by converting or otherwise disguising it. A serious offence was one carrying 5 years or more. That could be made out by conduct outside New Zealand that would be an offence here – but subject to s 245, which excluded conduct that is not an offence abroad. A separate offence of possession of the property with intent to launder also exists: s 243(3). It carries up to 5 years.

There are various amendments. According to the Explanatory Note to the 2014 Bill, the purpose of the changes is to ensure the effectiveness of the offences and that they are compliant with international obligations.²⁶ The need for a serious offence has now been removed: as such, any offence is covered. In addition, the extra-territoriality provision is changed. Section 245, which covers conduct that occurs outside New Zealand, provides that the ambit of s 243 applies to an act that is an offence where committed, is an offence in New Zealand even if committed abroad, or is sufficiently linked to New Zealand as to give jurisdiction.

These changes extend the scope of money laundering by a significant degree. Section 243A, which was added by the Crimes Amendment Act (No 4) 2011, indicates that the person who committed the underlying offence, does not need to have been charged or convicted. This has been reworded, but the change seems only to be semantic. It remains necessary to show that an offence was committed: as that is an element of the offence, it will have to be proved beyond a reasonable doubt. The fact that there is no need for a conviction raises the question of what should happen if there has been an acquittal of the person alleged to have committed the offence. It is suggested that the language of the offence will preclude money laundering being made out because there is a model for the contrasting situation: the Civil Proceeds Recovery Act 2009 expressly allows recovery even if someone has been acquitted: s 6(2). That model could have been followed in s 243A but was not.

In addition, there has been a change to definition of what amounts to laundering. There is no need for it to be shown that the defendant acted in order to conceal the property. Rather, it is sufficient that the property be concealed in the sense of being converted or otherwise disguised. This conclusion arises from the changed language of s 243(4) and the addition of s 243(4A) to make clear that the

²⁶ Organised Crime and Anti-Corruption Legislation Bill 2014, Explanatory Note at 2.

prosecution do not have to prove any such intent. Article 6(1)(a)(i) of the UN Convention Against Organised Crime 2000 requires the criminalisation of the conversion of proceeds “for the purpose of concealing or disguising” or to help the person who committed the underlying crime to escape the consequences. However, Article 6(1)(a)(ii) requires that concealment also be a criminal matter. Moreover, Article 6(2) requires that “the widest range of predicate offences” be covered: as such, it is arguable that the provisions have been non-compliant with international obligations hitherto.

One additional and welcome piece of tidying up has occurred. There was a separate offence in relation to drugs offending in s 12B of the Misuse of Drugs Act 1975, but it has been repealed by the Misuse of Drugs Amendment Act 2015, thereby leaving just the general provision in the Crimes Act. Section 243(7) has been added to the latter to make clear that offending against the 1975 Act is covered.

CASE NOTE: *R V WILSON* [2015] NZSC 189; *R V KUMAR* [2015] NZSC 124.

DEBRA WILSON*

I. INTRODUCTION

In 2015 the Supreme Court heard three cases involving legal issues relating to undercover police operations. Two will be discussed below; the decision in the third has not been released at the time of writing.

II. *R v WILSON* [2015] NZSC 189

A. The facts

This case involved a police investigation ('Operation Explorer') into the Red Devils Motorcycle Club in 2009, following concerns that the Red Devils were growing in prominence and were intending to become a chapter of the Hells Angels Motorcycle Club. Part of the investigation involved a separate Operation, known as 'Operation Holy', in which two undercover police officers (a male and a female) were used to gather information. When it became apparent that the Red Devils were becoming increasingly suspicious of the male undercover officer, the Police undertook an elaborate scheme in an effort to enhance the officer's credibility. This involved the Police seeking and obtaining a search warrant using fabricated information, and the consequential bringing of charges against the male officer. The officer in fact subsequently appeared in the District Court on several occasions under a fictitious name.

B. The Decisions of the Courts

Operation Explorer resulted in 21 defendants, including Wilson, facing 151 counts under the Crimes Act 1961 and the Arms Act 1983. These defendants subsequently applied for a stay of prosecution on the basis that the undercover operation had undermined the integrity of the judicial system. When the stay application was partially heard, and following a sentencing indication, Wilson decided to plead guilty to 5 counts relating to the possession and supply of drugs. Subsequently, Simon France J ordered a stay for the remaining defendants. Wilson then appealed to the Court of Appeal to vacate his guilty plea. Before this appeal could be heard, the Court of Appeal quashed the order for the stay of the remaining defendants.¹ Wilson abandoned his appeal against conviction but was successful in reducing his sentence from 2½ years' imprisonment to 9 months' Home Detention. He subsequently appealed to the Supreme Court on the basis that the Court of Appeal's decision to quash the stay of the remaining defendants was incorrect.²

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¹ *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806.

² Wilson's aim in bringing this particular appeal was to convince the Supreme Court that the High Court decision granting the stay in relation to the other defendants based on the impact of the undercover operation was the appropriate decision. As he had similarly been affected by the undercover operation,

The Supreme Court considered that there were three elements of Operation Holy which were “troubling”. Firstly, the fabrication and use of a false search warrant was seen as undermining the importance of there being independent scrutiny of a warrant application by a judicial officer to protect against state abuse, and was “a false document for the purpose of s256 Crimes Act”. Secondly, the male undercover officer appeared in court (on several occasions) and swore an oath that both he and his superiors knew to be untrue. This displayed “an unacceptable attitude to documents and processes which are important components of the criminal justice system”. Finally, was the involvement of the Chief District Court Judge. The Supreme Court commented that the “independence of judges from the executive, both in appearance and in reality, is critical to both the proper operation of the rule of law and New Zealand’s constitutional arrangements, and to the maintenance of public confidence in the operation.” It concluded that “it is quite wrong that judges should be asked to play an active part in investigative techniques... such involvement is not consistent with the judicial oath.”

In relation to the discretion to grant a stay, the Supreme Court considered that this discretion might be appropriately exercised if the actions of the police had prejudiced the fairness of the defendant’s trial, or if allowing the trial to proceed would have undermined the public confidence in the integrity of the judicial process. The Court referred to authority in both the United Kingdom³ and in Canada⁴ which supported an integrity-based rationale for granting a stay. This required the application of a balancing exercise⁵ which weighed the importance of prosecuting those charged with grave crimes against the importance of not conveying the impression that a court will consider that the end will justify any means. Relevant, but not determinative, was the existence of a causative connection between the unlawfully obtained evidence and the prosecution or conviction.

In the present case, the Supreme Court considered that a causative connection could be established. The actions of the Police, while not effective in completely eliminating the suspicions of the male undercover officer, nevertheless assisted with allowing the undercover operation to continue. Also relevant in the balancing exercise was the “powerful” consideration of public confidence in the police, the moderately serious nature of the appellant’s offending, the fact that the police actions did not cause the appellant to offend, and the one-off nature of the police’s actions (as opposed to it being part of an established pattern). On balance, the Court agreed with the Court of Appeal that a stay was not appropriate in this case.

he would then reinstate his appeal to have his guilty plea vacated (on the basis of incorrect legal advice) and then argue that the stay should similarly apply to him.

³ *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 (HL); *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060; *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837; and *Warren v AG of Jersey* [2011] UKPC 10, [2011] 3 WLR 464.

⁴ *R v Mack* [1988] 2 SCR 903.

⁵ *R v Latif* [1996] 1 WLR 104, [1996] UKHL 16. Adopted in *Warren v AG of Jersey*, above n 3.

III. *R v Kumar* [2015] NZSC 124

A. *The Facts*

Kumar was a suspect in a murder investigation, and was arrested following an interview with the police. He subsequently spoke to a lawyer by telephone. On receiving assurance from the Police that Kumar would not be interviewed again that night, the lawyer made arrangements to meet with Kumar the following morning. That evening, two undercover officers were placed in the same cell as Kumar. They struck up a conversation with him which lasted 80 minutes, and during this time asked first general, then more specific, questions in relation to the murder. Kumar subsequently argued that evidence obtained during this conversation was inadmissible.

B. *The Decisions of the Courts*

In the High Court,⁶ Venning J held that this evidence was admissible. Kumar sought leave to appeal this decision directly to the Supreme Court,⁷ but this application was dismissed.⁸ Kumar then appealed to the Court of Appeal,⁹ which allowed the appeal, finding that the evidence was improperly obtained.

In the Supreme Court, the majority decision of William Young, Glazebrook, Arnold and O'Regan JJ dismissed the appeal, agreeing with the Court of Appeal that the accused was deprived of his right to silence through depriving him of his choice whether to speak to police. This was particularly the case following assurances made to Kumar's lawyer that he would not be interviewed again that evening. The majority considered and adopted the "active elicitation" test developed in the Supreme Court of Canada¹⁰ and subsequently applied in New Zealand¹¹ and Australia.¹² Under this test, the accused's right to silence is not automatically breached through the use of undercover police officers to gather information. It will, however, be breached where the information has been actively elicited in situations where the "relevant parts of the conversation were the functional equivalent of an interrogation".

In considering the transcripts of the conversations recorded by both undercover officers, the majority disagreed with the High Court's comment that the same conversations would have occurred between Kumar and a genuine prisoner, considering that this was not a relevant consideration. In the majority's opinion, applying the active elicitation test required a consideration of both the nature of the exchange and the nature of the relationship between the undercover officer and the

⁶ *R v Kumar* [2013] NZHC 3487.

⁷ Section 14 of the Supreme Court Act 2003 permits such an application where the court is satisfied that there are exceptional circumstances which justify this.

⁸ *Kumar v R* [2014] NZSC 3.

⁹ *Kumar v R* [2014] NZCA 489.

¹⁰ *R v Hebert* [1990] 2 SCR 151; *R v Broyles* [1991] 3 SCR 595; *R v Liew* [1999] 3 SCR 227.

¹¹ *R v Barlow* (1995) 14 CRNZ 9 (CA); *R v Hartley* CA6/02, 9 May 2002; *R v Szeto* CA240/98, 30 September 1998; *R v Ross* [2007] 2 NZLR 467 (CA).

¹² *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159.

accused. The issue in relation to the first factor was whether the undercover officers “prompted, coaxed or cajoled” Kumar to respond. The majority considered that the officers had directed the conversation in a systematic and comprehensive manner, and therefore ‘prompted’ the response and actively elicited the information. Kumar’s rights had therefore been breached and the entire conversation should therefore be excluded.

Chief Justice Elias provided a concurring decision. While agreeing with the application of the active elicitation test, her Honour preferred a broader interpretation of the requirements than that they ‘prompted, coaxed or cajoled’ the response of the accused. In her Honour’s opinion, the satisfaction of such a specific test could be strategically avoided by the police. Instead, active elicitation should be understood as being in contradistinction to passive observation. This standard would have been met in the present case.

IV. COMMENTARY

It is interesting to note that the Supreme Court heard three appeals in relation to undercover police operations in 2015.¹³ This provides an indication of the importance being placed on the rights of the accused during criminal investigations. The cases focus on the necessity of balancing the need to maintain the public confidence that those involved in the commission of crime will be punished, with the importance of ensuring that the integrity of the criminal justice system is maintained through appropriate protection of the rights of those individuals being investigated or charged with offending.

In both of the cases discussed above, the Supreme Court considered overseas authorities in detail (particularly Canadian decisions) and decided consistently with these authorities. Overall, the decisions demonstrate a commitment to ensuring that the rights of those under investigation are complied with. Where rights have been breached, attention can turn to identifying an appropriate remedy. It is clear that a breach of rights will not automatically result in a stay being granted or a sentence being reduced. Instead, identifying the appropriate remedy will require the consideration of multiple factors, including any resulting prejudice to the accused, any evidence that the actions of the police indicate an established pattern of practice which might require addressing, and any impact on the public confidence in the judicial system.

¹³ The third being *R v Wichman* [2015] NZSC 198, which had not been fully determined at the time of writing this article.

CASE NOTE: COUNTER-INTUITIVE SEXUAL ABUSE EVIDENCE, EMOTIVE LANGUAGE AND INADVERTENTLY-ELICITED POTENTIALLY PREJUDICIAL EVIDENCE: *KOHAI V R* [2015] NZSC 36 AND *DH V R* [2015] NZSC 35.

ROBIN PALMER*

I. INTRODUCTION

The two Supreme Court appeals, *Kohai v R*¹ and *DH v R*,² focused primarily on various aspects of so-called 'counter-intuitive' expert sexual abuse evidence.³ The overall objective of expert counter-intuitive sexual abuse evidence is to provide the fact-finder with a comprehensive conceptual framework in terms of which evidence of sexual abuse must be understood. This purpose was explained in the 1999 Law Commission report on the Reform of the Law of Evidence:⁴

Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively. That is why such evidence is sometimes called "counter-intuitive evidence": it is offered to show that behaviour a jury might think is inconsistent with claims of sexual abuse is not or may not be so; that children who have been sexually abused have behaved in ways similar to that described of the complainant; and that therefore the complainant's behaviour neither proves nor disproves that he or she has been sexually abused. The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women.

The aspects considered by the Court included admissibility, expert credentials, types of evidence, evaluation, sufficiency and the scope of evidence. In addition, in the *DH v R* case the court considered the effect on the jury of the use of emotive language by the court, and jury directions about good character evidence and memory. In *Kohai v R*, the Supreme Court also commented on the use of emotive language by the trial court prosecutor, and the correct approach to dealing with inadvertently-elicited potentially prejudicial evidence.

II. BACKGROUND

The appellant in *Kohai v R*, Mr Abraham Eparaima Kohai, an adult male in his thirties, was convicted in a jury trial on nine counts of committing sexual offences on three female complainants, who were from six to nine years' old at the time the offences were committed (from 2001 to 2003). On appeal to the Court of Appeal against these convictions, the two grounds of appeal were, first, trial counsel incompetence,⁵ and second, the alleged excessive scope and inadmissibility of certain parts of the evidence of the expert witness, Dr Suzanne Blackwell, who testified on "counter-intuitive" sexual

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¹ *Kohai v R* [2015] NZSC 36; [2015] 1 NZLR 833.

² *DH v R* [2015] NZSC 35; [2015] 1 NZLR 625.

³ For a comprehensive overview of this type of evidence, see Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21(4) *Psychiatry, Psychology and Law* 511.

⁴ Law Commission *Evidence* (NZLC R55, 1999) at [C111].

⁵ This ground appears not to have been pursued in the appeal.

abuse evidence at the trial. The Court of Appeal dismissed the appeal,⁶ and the Supreme Court thereafter granted leave to appeal on the approved question whether the Court of Appeal had correctly dismissed the conviction appeal.⁷

The *Kohai* case was heard by the Supreme Court at the same time as another appeal on similar issues, *DH v R*. DH had been convicted in a jury trial⁸ on 16 counts of sexually abusing his daughter over a period of five years, starting from 2002 when his daughter was 11 years old. On appeal to the Court of Appeal, the convictions were confirmed,⁹ after which DH was granted leave to appeal to the Supreme Court.¹⁰

In *DH v R*, the admissibility of Dr Blackwell's 'counter-intuitive' sexual abuse expert evidence was not in issue. The appellant's main contention was that there had been a miscarriage of justice due to the excessive scope of Dr Blackwell's testimony, combined with an ancillary argument that she had addressed matters specific to the complainant's allegations, thereby potentially influencing the jury and prejudicing the appellant.¹¹

In both the *Kohai* and *DH* cases, the appellants submitted that the Court of Appeal should have found that a miscarriage of justice in terms of s 385(1)(c) of the Crimes Act 1961 had occurred.

III. THE SUPREME COURT'S APPROACH TO EXPERT COUNTER-INTUITIVE SEXUAL ABUSE EVIDENCE

Dr Suzanne Blackwell testified as an expert witness on the nature and purpose of counter-intuitive expert sexual abuse evidence in both trials. In both appeals,¹² the Supreme Court accepted the justification for counter-intuitive expert sexual abuse evidence. Applying s 25(1) of the Evidence Act 2006, the court in *Kohai* specifically stated that counter-intuitive evidence of this nature would only be admissible if, "... the fact-finder was likely to obtain 'substantial help' from it in understanding other evidence or ascertaining a fact in issue." The court further held that the expert evidence had to be "... relevant to a live issue in the case ...".¹³

This holding in the Supreme Court *Kohai* case was preceded by its summary in the *DH* case of the approach to counter-intuitive evidence applied in two Court of Appeal cases,¹⁴ which reads as follows:¹⁵

⁶ *Kohai v R* [2014] NZCA 83.

⁷ *Kohai v R* [2014] NZCA 91.

⁸ In a second trial, following a first trial in which the jury had been unable to agree. Dr Suzanne Blackwell testified as an expert witness on counter-intuitive sexual abuse evidence in the second trial.

⁹ *DH v R* [2013] NZCA 670.

¹⁰ *DH v R* [2014] NZSC 50.

¹¹ *DH v R* [2015] NZSC 35 at [28].

¹² *Kohai v R*, above n 1, at [20]; *DH v R*, above n 2, at [135].

¹³ *Kohai v R*, above n 1, at [20].

¹⁴ *M v R* [2011] NZCA 191, confirmed by the Supreme Court in *M v R* [2011] NZSC 134; *OY v Complaints Hearing Committee* [2013] NZCA 107.

¹⁵ *DH v R* [2015] NZSC 35 at [30] (footnotes omitted).

(a) In many cases involving allegations of sexual abuse, the jury's verdict will depend critically on their assessment of the complainant's credibility. In such cases, there is a risk that unjustified behaviour assumptions may influence the jury's assessment, and expert evidence as to those assumptions may be admissible. The evidence should be directed at correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse. The objective is to allow the jury to consider the complainant's credibility on a neutral basis.

(b) The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it clear that the witness is not commenting on the facts of the particular case.

(c) The evidence must be relevant to a live issue in the case. Evidence about features in other cases of sexual abuse that are not raised in the particular case will not be relevant or substantially helpful in terms of s 25 of the Evidence Act. Having said that, it must be acknowledged that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.¹⁶

(d) The witness should make it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which evidence is being given. The witness should also make it clear to the fact finder that the purpose of the evidence is limited to neutralizing misconceptions which may be held by the fact finder.

(e) Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

It appears that some of the difficulties that arose in the assessment of counter-intuitive evidence in both the *Kohai* and *DH* cases¹⁷ can be traced back to the contents of paragraph (c) in the summary above, which acknowledges that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.¹⁸

In the *Kohai* and *DH* cases this situation resulted, in a number of instances, for the court to address defence arguments alleging that the expert counter-intuitive evidence given at the trial was directly or impliedly diagnostically used to support the complainants' versions, thereby resulting in consequent prejudice to the appellants.¹⁹

It therefore appears that it is good practice for the expert's brief to have a relatively wide scope. This is to ensure that not only all issues that the expert considers to be

¹⁶ In terms of s 23 of the Criminal Disclosure Act 2008, the defendant may deliver an expert witness brief in response to the prosecution's expert witness brief at least 10 working days before the commencement of the trial. Should this route be followed, it does provide scope for the narrowing of the number of "live" issues for trial, by the seeking of pre-trial rulings if necessary. However, as stated in paragraph (c), there may be matters involving counter-intuitive reasoning that were not foreseen and were therefore not included in the experts' briefs, or the defence may choose to leave the point at large in order not to have to disclose their defence.

¹⁷ *Kohai v R*, above n 1, at [19] to [41]; *DH v R*, above n 2, at [28]-[103].

¹⁸ See the discussion in *DH v R*, above n 2, at [110].

¹⁹ For example, see the discussion and findings on "delay in sexual abuse disclosure" in *DH v R*, above n 2, at [42]-[49].

relevant are covered in the brief of evidence, but that issues that the expert thinks the prosecution, defence or court *may* consider relevant are also covered.

This broad approach may result in the inclusion of counter-intuitive expert evidence on some topics that may prove to be only tangentially relevant to the “live” issues in a particular case. This is to be expected, as the expert’s role is to provide an overall framework in terms of which evidence of sexual abuse should be understood, and not every item of relevant research used to inform the framework will necessarily be applicable in every case.

However, the evidence included in its ambit should be limited to evidence that is clearly counter-intuitive, and not be expanded to include evidence which is logically inferable - for example, the obvious inference that a young child has been sexually abused due to she or he having contracted a sexually-transmitted disease.²⁰

As emphasized above, the purpose of the expert’s brief is to provide a general assessment of the current state of knowledge relating to sexual abuse evidence (i.e. a general conceptual framework), in order to ensure that fact finders assess the evidence led at trial unburdened by unjustified assumptions and prejudices.²¹ This evidence is not intended to be minutely dissected on an issue-by-issue basis for admissibility and weight - it merely provides an overall basis for understanding sexual abuse evidence.²²

IV. THE LEGAL BASIS FOR ADMITTING EXPERT COUNTER-INTUITIVE EVIDENCE

It is trite law that for expert evidence to be admissible in criminal trials, the evidence concerned must be both relevant, as required by s 7 of the Evidence Act 2006, and comply with the “substantial help” test in s 25(1) of this Act. Section 7(3) of the Evidence Act 2006 reads:

Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

The “anything that is of consequence” requirement is, *in casu*, narrowly confined to one issue: the need to disabuse the fact finder of unjustified assumptions and prejudices when assessing sexual abuse evidence. Having established the relevance of the counter-intuitive evidence, the next question is whether the expert evidence proffered satisfies the “substantial help” test in s 25 of the Evidence Act 2006. Section 25(1) reads:

²⁰ See, for example, the discussion on the evidence of children with gonorrhoea (*Kohai v R*, above n 1, at [34], and the issue of continued contact with the abuser (*Kohai v R*, above n 1, at [41]).

²¹ Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012), makes the valid point that excessive jury deference to the expert’s opinion must be guarded against (at 299). This argument was made in *DH v R* (above, n 2), at [99].

²² Of course, given the nature of the evidence and the preparation of the brief of evidence, all obviously relevant live issues will inevitably be incorporated in the expert’s brief, and led at trial. (See *DH v R*, above n 2, at [21]-[26]). See also, in general, Fred Seymour and others “Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand”, above n 3. See also *Tomo v R* [2015] NZCA 392.

An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding, or in ascertaining any fact that is of consequence in the determination of the proceeding.

The evidence given by Dr Blackwell, the expert in *Kohai* and *DH*, thus had the narrowly confined purpose of offering, “substantial help ... in understanding other evidence in the proceeding, ...” namely, substantial help in understanding the nature and risk of unjustified behaviour assumptions that may influence the fact-finder’s assessment of sexual abuse evidence.²³

The Supreme Court in *Kohai* endorsed this approach by quoting with approval the trial judge’s jury directions on dealing with counter-intuitive expert evidence. The trial court directed the jury that this evidence was general evidence designed to assist the jury, and that it said, “... nothing about this case directly.” The trial court emphasized that the purpose of the expert’s evidence was solely to educate the jury on various misconceptions as to how children react when they have been abused.²⁴

It is submitted, therefore, that the correct approach (as inferred from the Supreme Court’s approach in the *Kohai* and *DH* cases) to the admissibility and scope of counter-intuitive evidence, is whether the expert evidence concerned provides an accurate and non-prejudicial overall conceptual framework in terms of which the sexual abuse evidence to be led at trial can be properly understood.²⁵ This is to ensure that the jury considers the evidence led at trial on a neutral basis (as set out in of the Supreme Court’s summary of the correct approach to counter-intuitive evidence –see paragraph (a) above).

The identification of disputed “live” issues relating to counter-intuitive evidence (following the tentative pre-trial issue identification in the expert’s brief of evidence) is effectively determined by the defence’s choices on how to counter the expert counter-intuitive evidence led, presented or admitted at trial.²⁶ This may be done through the defence calling its own experts on counter-intuitive evidence, or cross-

²³ See, in general, Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014), 105 – 115; *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138 at [28].

²⁴ *Kohai v R*, above n 1, at [26] and [27].

²⁵ Scott Optican *Evidence* [2015] 3 NZ L Rev 473, referring to various sources, suggests that much of so-called ‘counter-intuitive’ evidence is already general knowledge, and the time may come when courts refuse to admit this type of evidence as ‘substantially helpful.’ (at 499). However, as previously noted, certain kinds of evidence currently given under the counter-intuitive evidence label are clearly *not* counter intuitive: for example, the inference of sexual abuse where victims contract sexually transmitted diseases.

²⁶ For example, see *Kohai v R*, above n 2, at [31]-[33], where the Supreme Court found that Dr Blackwell’s evidence why abused children may not disclose sexual abuse to significant adults was ‘substantially helpful,’ and therefore admissible, despite the same evidence having been found to be inadmissible in prior the Court of Appeal case.

examining the expert witnesses called by the Crown.²⁷ In addition, the court itself may question the expert on issues it considers pertinent.²⁸

V. METHODS OF PRESENTATION OF EXPERT COUNTER-INTUITIVE EVIDENCE

In *Kohai*²⁹ and *DH*³⁰ the Supreme Court supported the general approach that counter-intuitive evidence be given as briefly and clearly as possible.³¹ However, although brevity and clarity are desirable, the applicable legal principle is set out in *DH v R*:³²

We do not think it is appropriate to be prescriptive about how erroneous beliefs or assumptions are best to be countered in criminal trials. Judicial directions, s 9 statements and expert evidence are all possibilities. We do, however, consider that a cautious approach needs to be taken to the ambit of expert evidence given at trials of this kind to ensure that such evidence is confined to what would be substantially helpful, there is focus on live issues and that the evidence is not unduly lengthy or repetitive and is expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial.

In articulating the above legal test, the Supreme Court clearly indicates that there is no “one size fits all” solution, and that the appropriate method of presentation chosen will largely be determined by the aspects of the expert counter-intuitive evidence the defence decides to dispute.³³ In the context of the current cases, the five aspects of Dr Blackwell’s expert evidence that may be disputed are, first, her qualifications as an expert; second, the factual basis on which her proposed evidence rests; third, the scope, ambit and relevance of the issues identified by her; fourth, the sources and supporting material she relies upon, and fifth, the validity of the conclusions and opinions drawn by her, based on the facts, issues and source materials.³⁴

The Supreme Court in *DH v R*,³⁵ suggests the following general approach for the presentation counter-intuitive expert evidence (bullet-points inserted):

- We consider that, in cases where evidence of this nature is to be adduced, the trial judge and counsel should address any potential issues before trial, with a view to ensuring that the evidence is given as briefly and clearly as possible. This could be a matter that is routinely addressed at call-overs.
- For example, there could be a discussion about whether the expert’s credentials will be challenged. If not, a short formulation of the expert’s credentials could be agreed.

²⁷ The identification of “live” issues in both the *Kohai* and *DH* cases were often the subject of dispute—see, for example, *DH v R*, above n 6, at [47] and [65], and *Kohai v R*, above n 1, at [31]-[41].

²⁸ Section 100 of the Evidence Act 2006.

²⁹ *Kohai v R*, above n 1, at [18].

³⁰ *DH v R*, above n 2, at [103].

³¹ See Optican’s summary of the two courts’ discussion on this issue in Scott Optican *Evidence* [2015] 3 NZ L Rev 473 at 498-499.

³² *DH v R*, above n 2, at [110]. And see the discussion on various presentation options at [111]-[117].

³³ The expert evidence may be disputed in numerous ways: challenging expert credentials; admissibility of issues and proposed evidence; accuracy and sufficiency of the facts relied upon; reliability and applicability of sources and materials referred to; and the logical validity of conclusions drawn and opinions given by the expert witness.

³⁴ See *DH v R*, above n 2, [21]-[41].

³⁵ *DH v R*, above n 2, at [103].

- If no cross-examination is anticipated, it may be that there could be agreement that the expert will read a brief, which could omit references to academic commentaries.
- There could also be a discussion about alternative methods of dealing with intuitive assumptions (a topic to which we now turn).
- Of course, none of this is intended to restrict the options of defence counsel to challenge such evidence and/or the expertise of the witness.
- We envisage that the practice of providing a brief of evidence setting out the expert's qualifications and giving references to all sources (as Dr Blackwell did in this case) would continue. That ensures defence counsel is provided with full information so he or she can cross-examine the witness and/or brief potential witnesses for the defence.

VI. THE SUPREME COURT'S COMMENTS ON THE USE OF EMOTIVE LANGUAGE

In *DH* the Supreme Court considered the evidential effect of the use of the word "grooming"³⁶ by expert witness Dr Blackwell, and the use by the trial judge of the words "criminals" and "dirty laundry" when giving jury directions. In *Kohai* the court considered the allegedly emotive language used by the prosecutor in referring to the appellant's "taste for young girls." In none of the above instances was it held that a miscarriage of justice had occurred.

In *DH*, after considering the use of the terms "grooming" and "normalisation of abuse" by the expert witness, the Supreme Court concluded that the term "grooming" was linked to the term "normalisation," as the expert evidence was directed at explaining how the abused child is conditioned over time (i.e. "groomed") to see the sexual abuse as "normal." The court points out that whilst "normalisation" is a relatively unfamiliar term, the use of the term "grooming" in this context should be avoided.³⁷ The essence of the objection to the expert's use of this word is that it is a term in everyday use with negative connotations, and may result in unwarranted prejudicial inferences by the jury (it also being a specific heading in the Crimes Act 1961,³⁸ as pointed out by counsel for the appellant).³⁹

With regard to the use of the words in the *DH* case of "criminal"⁴⁰ and "dirty laundry"⁴¹ by the trial judge in giving jury directions, the Supreme Court agreed with the Court of Appeal that it would have been preferable for the trial judge not to have used these words.⁴² The message is that trial judges have to be very careful with their choices of words when giving jury directions, as even seemingly innocuous words or statements have the potential to influence the jury.

³⁶ At [56]-[61].

³⁷ At [63].

³⁸ Crimes Act 1961, s 131B.

³⁹ At [57].

⁴⁰ *DH v R*, above n 2. at [118]-[120].

⁴¹ At [129]-[133].

⁴² At [120] and [133].

The reference in *Kohai* by the prosecutor to the appellant's alleged "taste for young girls" is more problematic.⁴³ In her closing address, the prosecutor said:

The first thing is that you know about the accused's taste in girls. At the time he offended against [S2] and [S1] he was publicly in a relationship with a girl who was teenager, 15 or 16 years old [Ms AP]. You have heard he was well over double in his age [*sic*]. In fact he was a day older than her [Ms AP's] mother. It is a matter entirely for you but you may conclude that much younger girls is what he had a taste for.

Later, in wrapping up her closing argument, the prosecutor repeats this phrase, linking it to other evidence in a way in a way that creates the superficial impression that it has been independently verified:

So that's four matters that perhaps might lay a foundation for your deliberations. Firstly, you have heard he has had a taste for young girls; secondly, you have heard ...⁴⁴

The Supreme Court agreed with the counsel for the Crown's concession that the trial prosecutor was wrong to use the "taste for young girls" phrase, and to refer to the appellant's relationship with Ms AP in this regard. The court said these remarks were, "unjustified and inflammatory," and that the consensual relationship between the appellant and Ms AP (who was 15 or 16 years old at the time) had no relevance to the sexual abuse allegations.⁴⁵

The Supreme Court recognized that the words used went beyond the mere use of emotive language, and was effectively an attempt by the trial prosecutor to imply that Ms AP's age and relationship with the appellant increased the likelihood that that the appellant had a general propensity to target young girls. The Court held, however, the trial did not miscarry as a result of the prosecutor's use of these words, especially as the trial judge had cautioned the jury, in general terms, not to be influenced by prejudice, or by sympathy for the complainants.⁴⁶

Referring to *R v Stewart (Eric)*,⁴⁷ the Supreme Court reiterated the duty of prosecutors in this context:⁴⁸

... prosecuting counsel is entitled to be firm – even forceful - in what is after all an adversary process. But a prosecutor must present the Crown case in a way that is dispassionate and analytical and may not make intemperate, inflammatory or emotive remarks about an accused.

This warning should perhaps be amplified to caution prosecutors not to attempt to create or entrench jury prejudices against accused persons by using emotive labels to suggest negative character traits that may be erroneously diagnostically linked to the issues the jury has to decide.

⁴³ At [42]-[44].

⁴⁴ At [42].

⁴⁵ At [44].

⁴⁶ At [50]. The counsel for the appellant argued that the judge's jury caution should have been couched in more specific language, addressing this attempted diagnostic link directly.

⁴⁷ *R v Stewart (Eric)* [2009] NZSC 53; [2009] 3 NZLR 425.

⁴⁸ At [51].

In such cases, it would also be appropriate for trial judges to direct the jury to guard against the *specific* potential prejudice of such emotive language- in this case, the fallacious inference that because the appellant, in his thirties, is in a relationship with a 15 or 16 year old girl (“a young girl”), he has a “taste” for young girls, and is therefore likely to have sexually abused the three complainants (who are even younger girls).

The final issue that will be considered, arising from *Kohai’s* case, is the Supreme Court’s approach to inadvertently-elicited potentially prejudicial evidence.⁴⁹

VII. INADVERTENTLY-ELICITED POTENTIALLY PREJUDICIAL EVIDENCE

In *Kohai v R*, the counsel for the appellant pointed out that one of the trial Crown witnesses had referred to the appellant “coming up on charges” and possibly having been in prison.⁵⁰ He argued that this evidence was irrelevant and prejudicial to the appellant.⁵¹ According to counsel for the appellant, this information “popped out”⁵² while the witness concerned was giving evidence, leading to the suggestion that it was inadvertently elicited by the prosecutor.⁵³ At trial the judge ignored this testimony in instructing the jury, and it was also not raised by defence counsel at any stage.

The Supreme Court held that the correct approach by the trial judge, in dealing with potentially prejudicial evidence mentioned in passing by a witness, is to make an assessment of the degree of potential prejudice the evidence concerned is likely to cause.⁵⁴ If the likelihood of potential prejudice is low, the judge may choose to merely ignore it. The alternative is to instruct the jury to ignore it, if the likelihood is that the jury could be influenced by the evidence to the detriment of the accused.⁵⁵ In this case, the Supreme Court found that the testimony concerned was “fleeting and non-specific and would have had little or no impact.”⁵⁶ The court held that ignoring this evidence had been “the sensible course.”⁵⁷ The Supreme Court therefore effectively found that, in the circumstances, the inadvertent admission of this testimony did not justify a finding that a miscarriage of justice could have occurred.⁵⁸

The correct approach by an appeal court in assessing the likelihood of a miscarriage of justice having occurred at trial through the inadvertent disclosure of potentially prejudicial evidence is set out in *Edmonds v R*.⁵⁹ In *Edmonds*, the Court endorsed a

⁴⁹ *Kohai v R*, above n 1, at [47]-[49].

⁵⁰ A more detailed extract of the trial evidence is not referred to in the judgment.

⁵¹ At [43].

⁵² It is not uncommon for the term “popped out” to be used in court judgments when describing testimony assessed to have been inadvertently given.

⁵³ At [48].

⁵⁴ The applicable legal test is elaborated in *Thompson v R* [2006] 2 NZSC 3, [2006] 2 NZLR 577 at [16].

⁵⁵ Although the Supreme Court pointed out that this may itself be prejudicial, as it would draw attention to the evidence, thereby possibly giving it unwarranted prominence in the minds of jurors: *Kohai v R*, above, n 1, at [49].

⁵⁶ At [49].

⁵⁷ At [49].

⁵⁸ At [49] and [52].

⁵⁹ *Edmonds v R* [2015] NZCA 152. See also Scott Optican *Evidence*, above n 31, at 486 to 488.

contextual approach, whereby the nature and manner of the of the inadvertent disclosure is considered; whether the evidence was elicited as part as a natural response to a question; to what extent the defence case hinges on the credibility of witnesses, and measures taken after the evidence is given. The Court stated that the absence of jury directions in such cases “is not determinative,” and that the Court will regard as “significant” the fact that an experienced trial judge chose not to intervene or see a need to direct the jury on the evidence concerned.⁶⁰

While the Supreme Court’s legal approach on this issue in *Kohai* is consistent with the legal methodology to assess the prejudicial effect of inadvertently admitted evidence set out in the *Edmonds* case, the Court’s assessment of the applicable facts relating to the disclosure of the inadvertently elicited evidence in *Kohai* requires comment.

The actual trial transcript extract is not referred to in the judgment, but it is clear that the evidence of the witness concerned contained two items of information potentially prejudicial to the appellant. These items are that the appellant was “coming up on charges” and that he had possibly been in prison.⁶¹ With reference to these two items of evidence, the Court concluded that, “... all concerned seem to have ignored it,”⁶² and that that this evidence was somehow “lost in the noise of the trial.”⁶³

Whether this testimony “popped out” or was perceived to have been “mentioned in passing,”⁶⁴ the evidence was nevertheless given, and in the absence of evidence to the contrary, must be assumed to have been heard by some or all the members of the jury. While the defence counsel, prosecutor and trial judge may well have ignored the evidence that “popped out” as having been inadvertent, this conclusion cannot be attributed to the members of the jury, as their reactions to this evidence are not reflected on the court record. Any perceived danger that a judicial direction instructing jurors to ignore this potentially prejudicial evidence would unduly emphasise it must surely be outweighed by the even greater probability that the jury would consider itself entitled (and arguably even obliged) to take the inadvertently-elicited evidence into account in deciding the guilt or lack of guilt of the accused. Thus, from the jury’s perspective, the lack of any challenges to the admissibility of this evidence by defence counsel,⁶⁵ and the later lack of directions from the judge on its content and admissibility, would most likely result in the jury treating this evidence like any other evidence before it.

In the circumstances of this case, it is therefore submitted that a more detailed contextual approach⁶⁶ by the appeal court to the inadvertently admitted evidence concerned should have been followed. It is submitted that a preferable approach would have been as follows:

⁶⁰ At [24].

⁶¹ At [43] and [48].

⁶² At [48].

⁶³ At [49].

⁶⁴ At [48] and [49].

⁶⁵ This may be one indication why defence counsel competence initially appeared to be a ground of appeal- see n 5 above.

⁶⁶ As required by *Edmonds v R*, above n 60.

(1) There is nothing on record to indicate that the jury did not actually *hear* the evidence concerned (the reference to “lost in the noise of the trial”). It must therefore be assumed that this evidence was heard by some or all the members of the jury.

(2) In the absence of a defence challenge during the trial, or any jury instruction by the trial judge to this effect, it must be assumed that the jury considered the evidence admissible.

(3) There is nothing on record to indicate that the jury understood the evidence concerned to be of such little potential weight that it needed not to have been considered at all. Therefore, it must be assumed that the evidence was discussed, evaluated and considered by the members of the jury in the same way as all the other evidence given at trial.

(4) Given the assumptions in (1) to (3) above, the inadvertently-elicited evidence must then be considered, in the context of the witness’s assessed credibility and other supporting or contradictory evidence, to determine whether any reliance on this evidence by the jury prejudiced the accused to the extent that a miscarriage of justice could have occurred.⁶⁷

In *Kohai*, on the available information, the Supreme Court’s conclusion that the inadvertently-elicited evidence concerned did not result in a miscarriage of justice appears to be correct. However, it is submitted that the basis on which the inadvertently-elicited evidence is assessed to determine whether a miscarriage of justice occurred should be set out in more detail, as suggested above.

⁶⁷ See *Thompson v R* above n 54, at [16].